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The Workmen's compensation
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The Workmen's Compensation Law Journal

Reports of All Decisions Rendered in Workmen's Compensation Cases in the Federal and Appellate Courts, and in Addition All Admiralty and Federal Employers' Decisions wherein the Jurisdiction, in such Cases, is determined.

William Otis Badger, Jr., Editor
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Volume IX *January, 1922* *No. 1*

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PAYNE, DIRECTOR GENERAL OF RAILROADS, v. COHLMEYER.
(No. 2858.)

(United States Circuit Court of Appeals, Seventh Circuit. April 2 1921.)

275 Federal Reporter, 803.

1. MASTER AND SERVANT—EMPLOYEE MAY REJECT FEDERAL COMPENSATION ACT.

While an employee of the federal government may elect to take under the federal Employees' Compensation Act (Comp. St. §§ 8932a-8932uu), he is not required to do so.

(For other cases, see Master and Servant, Dec. Dig. § 351.)

In Error to the District Court of the United States for the Eastern District of Illinois.

Action by August H. Cohlmeyer against John Barton Payne, Director General of Railroads. Judgment for plaintiff, and defendant brings error. Reversed, and new trial ordered.

Defendant in error, herein called plaintiff, a deputy marshal of the United States in the performance of his official duties was riding in a passenger car of the Wabash Railroad Company operated at the time by plaintiff in error. herein called defendant, when he received injuries fixed by the jury at $15,000. The various acts of negligence complained of dealt with the car's leaving the track. A further statement of facts will be found in the opinion.

Edward C. Kramer, of East St. Louis, Ill., for plaintiff in error.
C. B. Thomas, of East St. Louis, Ill., for defendant in error.

Before Baker, Alschuler, and Evans, Circuit Judges.

EVANS, C. J. [1] Because plaintiff was a deputy marshal of the United States, it is claimed his right to recover is fixed and determined by the federal Compensation Act (Comp. St. §§ 8932a-8932uu). This contention was not pressed on the oral argument, yet not specifically withdrawn. We conclude, however, that he was in a position to maintain this action. While an employee may elect to take under this Compensation Act, he is not required so to do. Dahn v. McAdoo (D. C.) 256 Fed. 549; Hines v. Dahn (C. C. A.) 267 Fed. 105, 114. It is not necessary to determine whether he was an "employee" of the United States at the time he was injured.

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Further assignments of error deal with the admission and rejection of evidence, a consideration of which requires a more detailed statement of the pleadings and the evidence.

Defendant was charged with negligence (a) in running the train at a great speed over a portion of the track recently repaired. (b) in failing to provide the cars with proper and safe equipment and running at an excessive speed; (c) in running the train at an excessive speed over a defective switch; (d) in using cars with defective attachments and in failing to repair its roadbed and in running at a great speed under these conditions.

It appeared that the roadbed had been recently repaired, new ties having replaced old ones at a split switch not far from Sangamon; that the train was traveling some 45 or 50 miles an hour at the point when one car left the track. Other cars followed, some were turned over, and the train broke in two. Plaintiff was in a rear car, one that did not turn over. He was. however, injured by the sudden release of the air and by the train's derailment.

[2] From this brief statement of the pleadings and the evidence it is apparent that the condition of the cars. as well as their attachment and equipment and the state of the roadbed, were legitimate matters of inquiry. Defendant sought and was refused permission to show the disclosures of an inspection of the cars in the train, part of them shortly after the accident. and the balance the next day.

This was error. Plaintiff having charged. among other acts, defective equipment of the cars, and having relied upon the rule of res ipsa loquitur, so far as this rule may apply. it was incumbent upon the defendant to meet and disprove each of the alleged acts of negligence which would give application to the rule. The lapse of time between the accident and the inspection. at most only a few hours as to some of the cars, and less than a day as to the others. affected the weight, but not the admissibility. of this evidence.

[3] The court. against defendant's objection. permitted a witness to answer a hypothetical question. and say that a section foreman replacing ties should protect his work by flags. It appeared that the section men had repaired the track by taking out 30 old ties and replacing them with new ones in a distance of approximately 100 to 125 feet. Defendant called the court's attention to the absence of an alleged material fact from the hypothetical question, namely. that the ties removed were not adjacent to. but separate from, one another. The significance of this omitted fact was disclosed by the same witness, who stated on cross-examination that, where single ties were replaced here and there by new ones, no flag was used. While this statement may in part have overcome the effect of the previous answer, the jury was left in doubt as to whether a flag should or should not have been p ced at the point of repair.

[4, 5] In charging the jury the court said, among other things:

"The carrier of passengers for hire must omit nothing that he can do to preserve the safety of his passengers. The failure to exercise every degree of care that he may. renders him responsible should any damages occur because of the failure to exercise that high degree of care. In regard to the selection and adoption of the implements or machinery suitable for the transportation of passengers for hire, a common carrier is expected under the law to use the best means at hand—the best machinery at hand—and with regard to the individuals whom the common carrier selects to operate their machinery or keep it intact or keep it in repair, the law says it must select such persons as do and will, and that they must use all the care necessary to prevent the happening or the occurrence of an accident; otherwise, should damages arise.

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the defendant would be responsible and would have to respond in money damages.

* * * * * * * * *

"If the railroad company has done everything it was required to do under the law, if it has done everything that it could do to prevent the accident, and it can explain that the accident occurred in some way whereby it itself—it cannot be explained that the railroad company is responsible in some way—then in that case the railroad company should not be held responsible."

This was error. The carrier was not an insurer. 10 Corpus Juris, 858; 4 R. C. L. § 582, p. 1137; Louisville & Nashville Railroad Co. v. Fisher, 155 Fed. 68, 83 C. C. A. 584, 11 L. R. A. (N. S.) 926. Yet no other impression could have been gathered from the above quoted instruction. True, at other places in the charge a rule announcing a more limited liability was set forth. But the jury must have concluded from the entire charge that the defendant was required to "use all the care necessary to prevent the happening or the occurrence of an accident; otherwise, should damages arise, the defendant would be responsible and would have to respond in money damages." If this was not the effect of the entire charge, then the best that can be said is that a state of doubt and confusion existed.

The judgment is reversed, and a new trial ordered.

FEDERAL MUT. LIABILITY INS. CO. v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA ET AL. (S. F. 9753.)

(Supreme Court of California. Nov. 4, 1921.)

201 Pacific Reporter, 920.

MASTER AND SERVANT — INJURY BY COEMPLOYEE ENGAGED IN PLAY HELD NOT ONE ARISING "OUT OF AND IN COURSE OF EMPLOYMENT."

Where employee of packing plant engaged in putting grapes into a machine threw grapes at other employee, which hit and injured the eye of a third employee engaged in sweeping the floor, the injury to such third employee was not an injury arising "out of and in the course of the employment" within the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

In Bank.

Proceedings under Workmen's Compensation Act (St. 1917, p. 831) by Gus Farsais for compensation for injuries. Opposed by the San Joaquin Packing Company, employer, and the Federal Mutual Liability Insurance Company, insurer. Award for employee by Industrial Accident Commission, and insurer brings certiorari. Award annulled.

Cooley, Crowley & Lachmund, of San Francisco, for petitioner.

A. E. Graupner, of San Francisco (Warren H. Pillsbury, of San Francisco, of counsel), for respondents.

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PER CURIAM. This is a petition in certiorari to annul an award made by the Industrial Accident Commission in favor of Gus Farsais and against the petitioner, who was the insurance carrier for the San Joaquin Packing Company, the employer of said Farsais.

At the time of the injury Farsais was working for the packing company, engaged in sweeping the floor of a part of the premises where other employees were putting grapes into a machine as a part of their duty. While Farsais was at work an employee threw some grapes at another employee, and, his aim being bad, he missed the other person, and one of the grapes hit Farsais in the eye, thereby causing his injury. Upon the evidence the Commission made a finding that—

The injury occurred "in the course of and arising out of his employment, as follows: One employee threw some grapes at another employee, and one of the grapes struck the defendant Gus Farsais in the left eye, resulting in the permanent disability hereinafter described."

There was nothing in the nature of the employment in which any workmen present were engaged which required any of them to throw grapes at another. The act was either a playful or malicious act of one employee toward another, having no connection whatever with the work in which he was engaged.

The case is not distinguishable from Coronado Beach Co. v. Pillsbury, 172 Cal. 682, 158 Pac. 212, L. R. A. 1916F, 1164, and Fishering v. Pillsbury, 172 Cal. 691, 158 Pac. 215. It comes within the general rule of the cases known as the "skylarking" cases or "horseplay" cases. The court did not issue this writ with any desire to overrule those cases. At the time the alternative writ was issued the court had ordered a writ issued in a case previously filed, entitled General Accident F. & L. A. Co. v. Industrial Accident Commission (S. F. No. 9633) 200 Pac. 419, in which an opinion was rendered on August 15, 1921, and it was desired to consider that case fully prior to a decision upon the present case. The line of demarcation between cases which come within the definition of an injury "arising out of and in the course of the employment" and those which do not is of necessity a narrow one, and it is not always easy to distinguish the exact point of division without careful consideration. In the case last referred to the employer became engaged in a controversy amounting to a quarrel arising immediately out of his business and while so engaged and before the matter was concluded and because of such controversy he fired a shot at one of the men engaged therein, missing him but which glanced and hit one of his own employees, thus causing the injury complained of. It is evident that the act which caused the injury was one which arose directly out of the business in which the injured person was employed. As the court said in the opinion in that case, the injury "was received in the course of a series of incidents which had their initiative in a business transaction of his employer, and while the latter was actively and justifiably engaged in defending his business." This was held to be an injury arising out of his employment. In the present case the throwing of grapes had no connection whatever with the general business carried on in the establishment, nor with the particular work of any employee therein. The respondent concedes that the decision of the Commission is inconsistent with the decisions of this court first above cited. It is contended in its behalf that those cases should be overruled. The argument is that in every establishment where a number of workmen are required to be near to each other in the course of their employment for hours at a time "some frolicking is inevitable. It occurs in every plant. The industry, by bringing workmen together in numbers exposes its workmen to this hazard, which is just as much a hazard incident to the employment and 'arising out of the employment' as the danger of slipping upon floors, colliding with other workmen, falling down stairs," and the like.

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Although this line of reasoning has support in the decisions of some of the other states, it is contrary to our own, and it seems to us to be an unwarranted extension of the meaning of the controlling language of the Constitution and of the statute defining the character of injuries that are to be compensated out of the earnings of the business in which they occur. In the Coronado Beach Co. Case we said:

"The accidents arising out of the employment of the person injured are those in which it is possible to trace the injury to the nature of the employee's work, or to the risks to which the employer's business exposes the employee. The accident must be one resulting from a risk reasonably incident to the employment."

And after a full review of many authorities on the subject it was held that the injury to the claimant caused by the act of a fellow servant in "tickling" him while he was at work did not "arise out of" his employment. Such injuries have no connection whatever with the work the employee is doing at the time, or with the work the mischievous employee was engaged to do, or with any business carried on in the place of employment, or with any peculiar construction or characteristics of the place of employment for which the employer could be held responsible and which creates "a risk reasonably incident to the employment." All this is true of the case at bar. It is therefore to be decided in accordance with the same rule.

The award is annulled.

Shaw, Shurtleff, Wilbur, Sloane, and Lawlor, JJ., concur.

GREAT WESTERN POWER CO. OF CALIFORNIA v. INDUSTRIAL ACCIDENT COMMISSION ET AL. (S. F. 9758.)

(Supreme Court of California. Nov. 5, 1921.)

201 Pacific Reporter, 931.

MASTER AND SERVANT—EMPLOYEE'S INJURY BY FELLOW WORKMEN WRESTLING HELD NOT ONE "ARISING OUT OF EMPLOYMENT" WITHIN COMPENSATION ACT.

Where a workman in the performance of his duties passed over a platform when two fellow workmen engaged in a friendly wrestling match accidentally fell on him and broke his leg, such injury did not arise out of his employment within Workmen's Compensation, Insurance, and Safety Act of 1917; no claim being made that the wrestling was habitual, or that the employer had any knowledge of the horseplay, or that it had any other characteristic which would make it a risk of the employment.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

In Bank.

Proceedings under the Workmen's Compensation Act by E. S. Holbrook against the Great Western Power Company of California, Award allowed by the Industrial Accident Commission, and defendant brings certiorari. Award annulled.

Guy C. Earl, of San Francisco, for petitioner.

A. E. Graupner, of San Francisco, for respondents.

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LAWLOR, J. This is a proceeding in certiorari on a petition by the Great Western Power Company of California, a corporation, to review the action of the respondent Industrial Accident Commission allowing an award against petitioner in favor of respondent E. L. Holbrook for injuries received by him while employed by petitioner.

Respondent Holbrook was employed by petitioner in the capacity of pumpman at Belden, Cal. While in the performance of his duties, he was walking from the toolhouse to a shaft or tunnel in which he was working. On his way to the shaft he passed over a board platform on which two fellow workmen were engaged in a friendly wrestling match. The scuffling was not caused by any dispute or altercation over the work or over anything connected with the employment, and respondent was not participating in it. The wrestlers accidentally fell on him and broke his left leg. He was incapacitated for two months, and applied to the Industrial Accident Commission for compensation under the Workmen's Compensation, Insurance, and Safety Act. A hearing was had by that body, and that it was found the respondent sustained injury occurring in the course of and arising out of his employment, and that he was entitled to a benefit of $160.69. Petitioner applied for a rehearing before the Industrial Accident Commission, which was denied. This petition followed.

Petitioner contends:

That "said Commission in rendering said decision and entering said award acted without and in excess of its powers, and that the order and decision are unreasonable, and that the findings of fact of the said Commission in said proceeding do not support the order, decision, or award here sought to be reviewed."

It insists that—

"In the case at bar there are absolutely no facts or circumstances to take this case out of the general rule uniformly followed both in England and in the United States that injuries resulting from 'horseplay' among employees, whether the injured party is a participant or not, do not 'arise out of the employment.'"

In support of this position are cited Coronado Beach Co. v. Pillsbury, 172 Cal. 682, 158 Pac. 212, L. R. A. 1916F, 1164; Fishering v. Pillsbury, 172 Cal. 690, 158 Pac. 215.

"We frankly concede that the decision of the Commission is inconsistent with the ruling of this court in Coronado Beach Co. v. Pillsbury et al., 172 Cal. 682, 158 Pac. 212, L. R. A. 1916F, 1164, and Fishering v. Industrial Accident Commission, 172 Cal. 690, 158 Pac. 215, both cases being decided the same day. In view of the fact that these cases were early decisions upon the question of horseplay rendered in 1916, and before the doctrine was well established in other states, and that since that time the leading states upon the doctrine have taken the opposite view, so we take the liberty of urging upon the court a reconsideration of the views therein expressed." that, "where an employee is attending properly to his own work without diversion for purposes of horseplay, and is injured by the frolicking act of another employee, such injury, except in exceptional cases, may be said to arise out of the employment for the reason that the danger of ordinary frolicking by employees is a danger incident to every business which brings employees together in numbers;" and that "hazard due to the usual propensities of workmen being brought together in numbers for the purpose of employment should be the hazards insured against both to protect the individual and the community."

In support of this position respondents cite authorities from other jurisdictions decided since the above-mentioned cases. Petitioner, however, asserts that—

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"These last-mentioned cases have been cited with approval in a very large number of decisions from the highest courts of many of the states of the land. In the decisions referred to by respondents herein, which do not follow the foregoing cases, the court has had great labor to create and point out circumstances differentiating the cases from these two leading cases."

The Workmen's Compensation, Insurance, and Safety Act of 1917 (St. 1917, p. 834) provides:

"Liability for the compensation provided by this act, in lieu of any other liability, whatsoever to any person, shall, without regard to negligence, exist against an employer for any injury sustained by his employees arising out of and in the course of the employment. * * *"

Coronado Beach Co. v. Pillsbury, supra, is a case where an employee, who was particularly susceptible to tickling, while in the course of his employment was going downstairs when he was tickled in the ribs by another employee. As a result he fell down the stairs, sustaining injury. The court held he was not entitled to compensation, saying:

"The accidents arising out of the employment of the person injured are those in which it is possible to trace the injury to the nature of the employee's work or to the risks to which the employer's business exposes the employee. The accident must be one resulting from a risk reasonably incident to the employment. * * * In the matter at bar the employment of Flint exposed him to no greater danger from being tickled by a fellow servant than would a guest in the hotel of his employer have been so exposed."

In Fishering v. Pillsbury, supra, an employee, about 17 years of age, pointed a trick camera at another employee and caused a spring to be ejected from it. The spring struck the other in the eye, injuring him. The court held he was not entitled to compensation, on the authority of Coronado Beach Co. v. Pillsbury, supra.

Respondents rely chiefly upon two cases which follow the rule they ask us to adopt. One of these is Leonbruno v. Champlain Silk Mills, 229 N. Y. 470, 128 N. E. 711, 13 A. L. R. 522. In that case an employee, while engaged in the performance of his duties, was struck in the eye by an apple thrown by a fellow servant at another. The court, in upholding the award, said:

"Whatever men and boys will do, when gathered together in such surroundings, at all events, if it is something reasonably to be expected, was one of the perils of his service."

Another authority is Willis v. State Industrial Accident Commission, 78 Okl. 216, 190 Pac. 92, in which case an employee was, with several others warming himself by an open fire during an interval in his work, and was injured because of the explosion of a piece of dynamite which a fellow employee threw into the fire to see if it would explode. It was declared:

"We think the correct rule is, and so hold in these cases, that, if a workman is an active participant in what has been denominated 'horseplay,' he is not entitled to compensation, but if, while going about his duties, he is the victim of another's prank, to which he is not in the least a party, he should not be denied compensation."

An authority similar to these is Verschleiser v. Stern, 229 N. Y. 192, 128 N. E. 126.

The other cases cited by respondents do not fully support the rule contended for by them. While in some of them compensation was awarded for injuries resulting from skylarking, in the cases where such compensation has been awarded special circumstances have appeared which made the skylarking peculiarly one of the risks of the employ-

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ment. In other cases the compensation was awarded for injuries received by employees as the result of altercations or quarrels, but in each of those cases the controversy had its origin in some misunderstanding or incident connected with the work. These cases decide that, while ordinarily compensation will not be allowed where injuries are caused by skylarking or are the result of a dispute between employees, yet an injury may be so caused and still be held to arise out of the employment. Thus, in the case of In re Loper, 64 Ind. App. 571, 116 N. E. 324, an employee, while going about his duties, was injured by another's sportive use of an air compressor. The injured employee was not participating in the horseplay. The evidence showed the compressor was habitually used in this way. The court declared:

"We are not dealing here with a sporadic, occasional, or unanticipated use of the air hose in play. * * * The employer, with knowledge of the facts, permitted such practice to continue. It was within his power to have prohibited it. But failing to do so, it became an element of the conditions under which the employee was required to work."

A similar case was State v. District Court, 140 Minn. 75, 167 N. W. 283, L. R. A. 1918E, 502. There an employee was struck in the eye by a sash pin thrown by a fellow employee at another, not the injured workman. The injured employee was not engaging in the horseplay. It was customary for the employees to throw things at each other, and it was found that the employer knew or should have known of the custom. The court said:

"The rule is well enough settled that, where workmen step aside from their employment and engage in horseplay or practical joking, or so engage while continuing their work, and accidental injury results, and in general where one in sport or mischief does some act resulting in injury to a fellow worker, the injury is not one arising out of the employment within the meaning of compensation acts. [Citing cases.] Here we conceive the situation to be different. Filas was exposed by his employment to the risk of injury from the throwing of sash pins in sport and mischief. He did not himself engage in the sport. His employer did not stop it. The risk continued. The accident was the natural result of the missile throwing proclivities of some of Filas' fellow workers and was a risk of the work as it was conducted."

In Mueller v. Klingman (Ind. App.) 125 N. E. 464, also cited by respondent, the deceased employee and a fellow employee were working together. The fellow worker became angered at a remark made by deceased concerning the doing of the work, and threw a hammer at him, striking him in the head. The injury inflicted caused his death. The court held that the injury arose out of the employment, basing the decision on Pekin Cooperage Co. v. Industrial Commission, 285 Ill. 31, 120 N. E. 530, and quoting from that case as follows:

"Where men are working together at the same work, disagreements may be expected to arise about the work, the manner of doing it, as to the use of tools, interference with one another, and many other details which may be trifling or important. Infirmity of temper, or worse, may be expected, and occasionally blows and fighting. When the disagreement arises out of the employer's work in which two men are engaged, and as a result of it one injuries the other, it may be inferred that the injury arose out of the employment."

Of the other cases cited by respondent Stuart v. Kansas City, 103 Kan. 307, 563, 171 Pac. 913, Marchiatello v. Lynch Realty Co., 94 Conn. 260, 108 Atl. 799, and Colucci v. Edison Portland Cement Company, 93 N. J. Law, 332, 108 Atl. 313, are similar to In re Loper, supra, and State v. District Court, supra. The others resemble Mueller v. Klingman, supra, and were decided on the theory that injury resulted from an al-

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tercation concerning the work. These cases are Heitz v. Ruppert, 218 N. Y. 148, 112 N. E. 750, L. R. A. 1917A, 344, American Steel Foundries v. Melinik (Ind. App.) 126 N. E. 33, Polar Ice & Fuel Co. v. Mulray, 67 Ind. App. 270, 119 N. E. 149, and Pekin Cooperage Co. v. Industrial Commission, supra. Another case, Stasmos v. Industrial Commission, 80 Okl. 221, 195 Pac. 762, although decided on the authority of Leonbruno v. Champlain Silk Mills, supra, was clearly a case where the injury was caused by an altercation concerning the employment, inasmuch as the employee was injured as the result of an altercation with his foreman over which of two lifts he should use in leaving the shaft in which he was working, the mine having been shut down suddenly and the employees ordered to the surface. The English cases of Thom v. Sinclair [1917] App. Cas. 127, and Dennis v. White and Company [1917] App. Cas. 479, contain valuable discussion of the phrase "arising out of the employment," but the facts are dissimilar, and they do not assist in a decision of the case at bar.

While the authorities cited above from New York and Oklahoma lay down the rule contended for by respondents, we are not prepared to concede that they represent the general trend of authority on the subject. We do not think, therefore, that these authorities would justify us in overruling the settled law of this state as laid down in Coronado Beach Co. v. Pillsbury, supra, and Fishering v. Pillsbury, supra, approved in the late case of Federal Mutual Liability Insurance Company v. Industrial Accident Commission, 201 Pac. — on the subject of injuries received by an employee through horseplay. It cannot be held that all injuries so received in the course of the employment arise out of the employment. It may be remarked that the recent case of General Accident, Fire & Life Insurance Corporation v. Industrial Accident Commission, 200 Pac. 419, is in harmony with the rule expressed in Mueller v. Klingman, supra, and the similar cases. In that case the injured employee was repairing a tire in a garage a short distance from where his employer and a stranger became engaged in a quarrel over the purchase of gasoline by the latter. The employer shot at the stranger, and the bullet glanced and struck the injured employee, who had not participated in the quarrel. The question presented in that case was whether the injury arose out of the employment. Mr. Justice Shurtleff, in writing the opinion of the court, said:

"In the present case the injury is largely, if not wholly, traceable to the acts of the employer. The controversy in which it was received arose out of an incident which concerned his business, namely, an application to purchase gasoline. That it ultimately resulted in a personal difference or that the accident was an unusual one, not likely to occur, does not deprive it of its business character or establish that it did not arise out of the employment. * * * What are termed the 'horseplay' cases, and the rule in them announced, have no application here. The injury sustained by Shrout was not due to skylarking or a frolic, but was received in the course of a series of incidents which had their initiative in a business transaction of his employer and while the latter was actively and justifiably engaged in defending his business."

In the case at bar it is not claimed or shown that the scuffling was habitual, that the employer had any knowledge of the horseplay, or that it had any other characteristic which would make it a risk of the employment. The injury was an unfortunate accident which had no connection with the employment, and did not arise out of it. The employer should not be held liable.

The award is annulled.

We concur: Wilbur, J.; Sloane, J.; Shurtleff, J.; Shaw, J.

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BURKE v. INDUSTRIAL COMMISSIIN ET AL. (No. 10136.)

(Supreme Court of Colorado. Nov. 7, 1921.)

201 Pacific Reporter, 891.

MASTER AND SERVANT — DISCHARGED TAXICAB DRIVER HELD NOT AN "EMPLOYEE WITHIN COMPENSATION ACT BY RATIFICATION.

Where driver of taxicab was discharged from his employment and thereafter, without employer's knowledge or consent, took on a trip persons who had the day before requested the employer that he be chosen as driver for the trip, and was killed on the trip, and the passengers thereafter paid the employer for the trip, the relation of master and servant did not exist under the Workmen's Compensation Act at the time he was killed, and his dependents were not entitled to compensation; neither the doctrine of ratification nor estoppel being applicable.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

(For other definitions, see Words and Phrases, First and Second Series, Employee.)

Error to District Court, City and County of Denver; Charles C. Butler, Judge.

Proceeding by Mary D. Chadwick and William Chadwick, the widow and minor child of John B. Chadwick, under the Workmen's Compensation Act, to obtain compensation for his death, opposed by John F. Burke, the employer. There was an award of compensation, which was affirmed in part and reversed in part by the district court, and the employer brings error. Reversed and remanded.

George J. Lemmon and John R. Smith, both of Denver, for plaintiff in error.

Victor E. Keyes, Atty. Gen., and John S. Fine, Asst. Atty. Gen., for Industrial Commission.

John E. Rinker, of Denver, for defendants in error Chadwick.

BAILEY, J. The case is here on error to review a judgment of the district court of the City and County of Denver, affirming in part and reversing in part, an award of the Industrial Commission of Colorado.

Claimants are the widow and minor child of John B. Chadwick, who suffered injuries from which he died, while driving an automobile belonging to John F. Burke, proprietor of a taxicab line, operating in and about the City of Denver.

It appears that Burke, in conducting his business, employed from four to fourteen drivers, and that in the summer season many of his men and machines are engaged in transporting passengers to and from various mountain resorts. Decedent had been so employed by Burke for some considerable time. On the day preceding the accident a party of Texas tourists arranged with Burke for a trip to Estes Park, and requested that Chadwick be sent as driver. Burke replied that he would try to get Chadwick, but could not guarantee to do so. At that time Chadwick had driven a party to Colorado Springs. He returned the same evening, and in consequence of complaints received by Burke of Chadwick's careless and reckless driving on that trip was then and there discharged, and directed to report at the office in the morning for a settlement. The next morning, the day of the accident, Chadwick, instead of reporting at the office as directed, took the car he had been accus-

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tomed to drive, called for the party of tourists who had previously arranged with Burke for the Estes Park trip, and left with them. This was without the knowledge or assent of Burke, and directly against and contrary to his specific orders to the effect that Chadwick should come to the office on that morning for settlement of his accounts, because of his discharge upon the previous evening.

While making the return trip from Estes Park, Chadwick attempted to turn the car out of a rut on a muddy road, when it upset. pinning him underneath, resulting in injuries from which he died a few days later. The passengers were brought to Denver, and later paid Burke the regular fare for the trip.

The Commission failed to directly find that Chadwick had been discharged, but from irresistible inference did so find in that it declared that Burke in accepting payment from the tourists ratified the act of Chadwick in going out for the trip, which acceptance of payment by Burke the Commission held reinstated Chadwick as an employee. The Commission's findings for all practical purposes were findings that Chadwick was not in the employment of Burke at the time of the accident. That he was not in such employment at that time is conclusively established by the proofs; the testimony of four witnesses to the effect that Chadwick was discharged on the evening before the accident being absolutely uncontradicted.

There is no conflict in the testimony upon the fact of Chadwick's discharge, and the question of his reinstatement is strictly one of law and not of fact. The Commission found that he was an employee solely upon an alleged ratification by Burke of his act in taking the car, without authority as above noted. This view was adopted by the district court.

It seems clear to us that the acceptance by Burke of pay for the use of his automobile and equipment could have and did have no effect whatever upon the status of Chadwick. Chadwick was either an employee of Burke at the time of the accident, or he was not. If he was not, then we fail to see how any subsequent act of Burke in dealing with third parties could change Chadwick's relations to him. Whatever the law may be upon the subjects of ratification and estoppel. under the circumstances here shown, as applied to third persons, manifestly, as between Burke and Chadwick, upon the undisputed facts, neither the doctrine of ratification nor estoppel has the slightest application, and both the Commission and the district court were in error in holding to the contrary. If Chadwick was not in the employment of Burke when injured his heirs have no standing under the Workmen's Compensation Act (Laws 1919, p. 700). It conclusively appears that when Chadwick was injured, he had been discharged, and was a mere volunteer, wrongfully engaged in driving the Burke car. The law must leave him where it finds him, for since that situation was brought about by his own wilful and deliberate wrong, upon no possible theory is he or are his dependents in position to ask or receive compensation at the hands of Burke.

Since the case is determined upon this particular point, it becomes unnecessary to either consider or decide any of the many other interesting and important questions argued and submitted.

Judgment reversed and cause remanded.

Teller and Burke, JJ., concur

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HASSELL IRON WORKS CO. ET AL. v. INDUSTRIAL COMMISSION ET AL. (No. 10086.)

(Supreme Court of Colorado. Nov. 7, 1921.)

201 Pacific Reporter, 894.

MASTER AND SERVANT — EVIDENCE HELD TO SUPPORT COMPENSATION AWARD FOR DEATH BY LIGHTNING.

Evidence *held* to support a finding that the death of an oxy-acetylene welder by lightning while working on a steel bridge was caused by an accident arising out of his employment within Workmen's Compensation Act 1915, § 8.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Error to District Court, El Paso County; J. W. Sheafer, Judge.

Proceeding by Elizabeth Hrutkai on behalf of herself and minor children of John Hrutkai, for an award under the Workmen's Compensation Act, opposed by the Hassell Iron Works Company, employer, and the Ocean Accident & Guarantee Corporation, insurer. The employer and insurer brought action in the District Court to set aside the findings and award of the Industrial Commission. Judgment for the defendants, and the plaintiffs bring error. Affirmed.

Fred W. Varney and Chas. W. O'Donnell, both of Denver, for plaintiffs in error.

Victor E. Keyes, Atty. Gen., and John S. Fine, Asst. Atty. Gen., for Industrial Commission.

Martin M. Burns, of Colorado Springs, for defendant in error Elizabeth Hrutkai.

ALLEN, J. This is an action brought in the district court of El Paso county to set aside the findings and award of the Industrial Commission in the matter of a claim presented under the Workmen's Compensation Act. The district court confirmed the findings and award, and plaintiffs bring the cause here for review.

The claim for compensation filed with the Industrial Commission was made by and on behalf of the dependents of a deceased employee, one John Hrutkai. The findings and award were in favor of the claimants. The claim was resisted by the employer and the insurer, plaintiffs in error here and plaintiffs below.

The findings of the Commission, so far as now material, are as follows:

"That John Hrutkai, deceased, was killed by an accident arising out of and in the course of his employment while performing services arising out of and in the course of his employment while working for the * * * employer at Ship Rock, N. M., on September 9, A. D. 1918. That while so employed and while engaged in operating an oxy-acetylene torch and wrecking a steel bridge on an island in the San Juan river, near Ship Rock, N. M., the said John Hrutkai was struck by lightning, death resulting instantly. That his death was the immediate result of the accident above described, and arose out of and in the course of his employment. * * *"

The objection of the plaintiffs in error to the findings and award of the Commission are stated in various ways in the complaint and in the assignment of errors, but they may be summed up in this, namely, that

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there is no evidence to support the finding that the accident arose out of the employment.

The materiality of the objection, as thus stated, results from that provision of section 8, c. 179, Session Laws of 1915, which makes it one of the conditions precedent to the right to compensation that the injury or death of the employee be proximately caused by accident arising out of his employment.

The only question that need be determined upon this review is whether there is evidence to support the finding that the accident arose out of the employment. In Passini v. Industrial Commission, 64 Colo. 350, 171 Pac. 370, this court said:

"This court may consider only the legal question of whether there is evidence to support the findings, and not whether the Commission has misconstrued its probative effect. The award is conclusive upon all matters of fact properly in dispute before the Commission, where supported by evidence, or reasonable inference to be drawn therefrom."

The employee concerned in the instant case was killed by lightning. It is claimed by the plaintiffs in error that, upon the facts appearing in the instant case, the Commission could not find that the accident of being struck by lightning arose out of the employment. It appears to be assumed on both sides that a correct statement of law relevant to this matter is that found in 1 Honnold on Workmen's Compensation, 428, as follows:

"The employer cannot ordinarily be held liable for compensation for disability from sunstroke, freezing and lightning. These are forces of nature which he cannot foresee and prevent, and the employee is ordinarily no more subject to injury from such sources than others. But where the work and the method of doing the work exposes the employee to the forces of nature to a greater extent than he would be if not so engaged, the industry increased the danger from such forces, and the employer is liable."

In the light of the statement just quoted, the contention of the plaintiffs in error may be said to be that there is no evidence that the employee, John Hrutkai, was exposed to the danger of being struck by lightning to a greater extent than he would be if not engaged in his employment. Upon this point there is evidence of the following facts:

At the time of being struck by lightning, Hrutkai was working upon a steel bridge which was partly in water and partly upon a river bank. He was an oxy-acetylene welder. His employment required him to use, and he did use, a platinum lighter, a torch, a small wrench, and a pair of pliers. He had some of these tools on his person when he was struck by lightning. The tools were carried over the spot on his body on which burns were found. At the time of the accident the ground was damp, and an electrical storm was in progress. A witness for the claimants describes the bridge and the surrounding conditions, as follows:

"The bridge washed down the river, * * * a quarter of a mile; it was a steel bridge. * * * That is a pretty swift river; it was 50 feet from the bank to the bridge and it was about 32 feet high from the floor to the highest part of the arch; there was about 47 tons of steel in it. When it went down it seems as though it hung on an abutment and went down end first, and when it struck it doubled up in the center and twisted in a kind of a mass. There was about 20 feet in the water that we had to cross to get out to the bridge and the balance was on the other side; it lay on the island. He [Hrutkai] was at the lower end of the bridge. * * * He was still working the last I seen of him, and had a torch in his hand cutting."

The witness Andrew Reid was experienced upon the subject of lightning protectors for street cars, and was an electrican. He testified

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that he had given special attention and consideration to devices and means for the protection of street cars against lightning, and studied the action of lightning in devising those means of protection. He further testified, in answer to a hypothetical question, to the effect that the deceased would be exposed to a greater hazard from lightning because of the place at which he was working and the conditions of his employment.

The Commission could have found, as a reasonable inference to be drawn from the evidence, that the steel in the bridge and the water underneath caused an attraction for lightning, and was a conductor thereof to an extent much greater than was common to points elsewhere in the vicinity, and could have so found even if the testimony of the witness Reid had not been admitted. As said in Passini v. Industrial Commission, supra, we cannot consider whether the Commission misconstrued the probative effect of the evidence. We cannot say that the Commission ought to have found that the conditions under which Hrutkai was working did not add to his hazard of being struck by lightning. The facts in the instant case are as favorable for claimants as the facts found in State ex rel. Coal & Ice Co. v. Dist. Court, 129 Minn. 502, 153 N. W. 119, L. R. A. 1916A, 344, 9 N. C. C. A. 129. In that case a driver of an ice-route was struck and killed by lightning after having sought shelter under a large elm tree, situated near an iron fence. The court held the evidence "sufficient to sustain a finding that the accident to the decedent resulting in his death was one 'arising out of' of his employment."

The plaintiffs in error cite Hoenig v. Industrial Commission, 159 Wis. 646, 150 N. W. 996, L. R. A. 1916A, 339, 8 N. C. C. A. 192, where compensation was denied to the dependent of an employee who was struck by lightning and killed while employed at work on a dam. In that case, however, the Industrial Commission itself found that the deceased was not exposed to a hazard from lightning stroke peculiar to the industry, or differing substantially from hazard from lightning stroke of an ordinary outdoor work, and the Wisconsin Supreme Court invoked the rule that the findings of the Commission should not be disturbed where there is any substantial basis for them in the evidence. This court has frequently announced the same rule, and under it we cannot disturb the findings of the Commission in the instant case

Other cases on the subject may be found in the cases above cited, and in a note in 13 A. L. R. 977.

In our opinion there was evidence to support the finding that the accident arose out of the employment. The judgment is affirmed.

Scott, C. J., not participating.

JOLIET & E. TRACTION CO. v. INDUSTRIAL COMMISSION ET AL. (No. 14015.)

(Supreme Court of Illinois. Oct. 22, 1921.)

132 Northeastern Reporter, 794.

1. MASTER AND SERVANT — WRIT OF ERROR IN COMPENSATION CASE HELD TIMELY.

Under Workmen's Compensation Act, § 19, par. (f), subpar. 2, as amended by Laws 1919, p. 548, requiring writs of error to be applied for not later than the second day of the first term of the Supreme Court

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following the rendition of the circuit court judgment, where the judge in fact rendered his decision in vacation on January 13, but as of December 31 previous, and the actual entry was not made until January 21, the time for application for a writ of error *held* to begin January 21, and not December 31, as against a motion to dismiss because more than 30 days had intervened between the rendition of the judgment and the first day of the February term of the Supreme Court.

(For other cases, see Master and Servant, Dec. Dig. § 417[4½].)

2. MASTER AND SERVANT—DISABILITY OF COMPENSATION CLAIMANT QUESTION FOR ARBITRATOR AND INDUSTRIAL COMMISSION.

Whether permanent and complete disability under the Workmen's Compensation Act exists in a given case is a matter for the sound judgment and discretion of the arbitrator and the Industrial Commission acting within the provisions of the statute.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

3. MASTER AND SERVANT—COMPENSATION ACT DOES NOT REQUIRE WORK IF PAINFUL.

The Workmen's Compensation Act does not require an applicant to continue to work if it will cause him to continuously suffer serious discomfort and pain while so engaged.

(For other cases, see Master and Servant, Dec. Dig. § 385[17].)

4. MASTER AND SERVANT — FINDING OF COMPLETE AND PERMANENT DISABILITY SUSTAINED.

In a proceeding under the Workmen's Compensation Act, evidence *held* to sustain a finding by the Industrial Commission that the applicant was completely and permanently disabled by the injury, notwithstanding that he worked for 18 days thereafter.

(For other cases, see Master and Servant, Dec. Dig. § 405[6].)

5. MASTER AND SERVANT — COMPENSATION PAYMENTS NOT DEDUCTED IN COMPUTING LIFE PENSION.

Under Workmen's Compensation Act, § 7, par. a and section 8, par. f, relating to life pensions, the basis upon which the pension is to be fixed *held* properly determined by taking four times the annual wage without deducting the amount that had theretofore been allowed and paid the applicant as compensation.

(For other cases, see Master and Servant, Dec. Dig. § 385[17].)

Error to Circuit Court, Will County; Dorrance Dibell, Judge.

Proceedings under the Workmen's Compensation Act by Gust Walters to recover compensation for injuries sustained while in the employment of the Joliet & Eastern Traction Company. An award of compensation was sustained by the Industrial Commission. On hearing in the circuit court judgment sustaining the award was entered, and the employer brings error. Affirmed.

Garnsey, Wood & Lennon, of Joliet (John H Garnsey and Edward C. Hall, both of Joliet, of counsel), for plaintiff in error.

Faulkner & Faulkner of Joliet (Ray F. Faulkner, of Joliet, of counsel), for defendant in error.

CARTER, J. The record shows that Gust Walters was injured September 24, 1917, while acting as track and section foreman for plaintiff in error. The evidence shows that the injury arose out of and in the course

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of the employment, and that both parties were under the Workmen's Compensation Act; that Walters had been receiving $70 a month for his work previous to his injury; that he had a wife and two children under 16 years of age; that plaintiff in error had paid him $640 compensation up to July 15, 1919, together with a hospital bill of $175 and a doctor's bill of $200.

In the accident Walters had the index finger of his right hand, the right arm and six ribs broken, his back badly wrenched and the right hip injured. He was taken to the hospital at Joliet for medical and surgical attention and remained there until sufficiently recovered to return to his home in Frankfort, nine miles east of Joliet, and thereafter for some time visited Joliet twice a week to see the doctor. On July 8, 1918, while yet using a cane to get about, he put a box on a chair at his home in Frankfort, and stood on the box to saw off a tree limb on which a swarm of bees had settled, and when getting down he fell, causing a fracture of the lower part of the right leg, but whether of both bones is not clear. He was confined to his home under the doctor's care for about six weeks and thereafter used crutches more or less until March 1, 1919, when he discarded them, and so far as the record shows was not using them at the time of the hearing concerning this second injury before the arbitrator in April, 1920. In July, 1919, having become a resident of Joliet, he secured employment with the Michigan Central Railroad Company as a track flagman or torpedo man with a repair gang four miles east of Joliet, riding to and from his work on a hand car, and worked at his employment for about 18 days, when he quit, stating he could not stand it, and after that he did no work up to the time of the hearing. His education was limited, not being beyond the fourth grade at school, and his employment had always been manual labor up to the time of his injury.

The principal question urged here is whether or not the finding of the arbitrator, confirmed by the Industrial Commission, is sufficient under the statute. The recovery seems to have been made under paragraph (f) of section 8 of the Workmen's Compensation Act, which reads in part:

"In case of complete disability, which renders the employee wholly and permanently incapable of work, compensation equal to fifty per centum of his earnings." Hurd's Stat. 1917, p. 1454.

The arbitrator found that the applicant was entitled to have and receive from his employer the sum of $9.69 per week for 346 weeks and 1 week at $7.26, and after that a pension for the remainder of his life at $22.40 per month, as provided in paragraph (f) of section 8, for the reason that the injuries sustained caused permanent and complete disability; that the applicant had received $640, and was then entitled (April 17, 1920) to $619.70, the amount accrued from October 1, 1917, to April 16, 1920, the remainder of the award to be paid in semi-monthly payments, commencing April 23, 1920, except the pension, which should be paid monthly. This award was sustained by the Industrial Commission, and on hearing in the circuit court a judgment to the same effect was entered.

A motion has been made by the defendant in error to deny the petition for a writ of error to this court on the ground that the judgment sought to be reviewed was entered in the circuit court on December 31, 1920, and that more than 30 days intervened between that date and the 1st day of the February term, 1921, of the Supreme Court. It would appear from the record and arguments that the judgment was filed with the clerk of the circuit court on January 21, 1921; that plaintiff in error had no dependable date or record before said last-named date upon which to proceed for review, and that for the purpose of a writ of error in this proceeding the judgment could not be considered entered until filed for record with the clerk. Subparagraph 2 of paragraph (f) of section 19 of the Workmen's Compensation Act provides that judgments and orders of the circuit court under the act shall be reviewed by the Supreme

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Court by writ of error "if applied for not later than the second day of the first term of the Supreme Court following the rendition of the circuit court judgment or order sought to be reviewed," provided, etc. Laws of 1919, p. 548. In Chicago Great Western Railroad Co. v. Ashelford, 268 Ill. 87, 92, 108 N. E. 761, 763, the court said:

"There are certain purposes, however, for which a judgment is required to be duly entered before it can become available or be attended by its usual incidents. Thus, as above remarked, this is a prerequisite to the right to appeal."

See, also, to the same effect, Black on Judgments (2d Ed.) § 106.

[1] Notwithstanding a decree may be entered in vacation as of the preceding term, a transcript of record is regarded as filed in apt time dating from the actual rendition of the decree in vacation. Owens v. Crossett. 104 Ill. 468; Hook v. Richeson, 106 Ill. 392. In our judgment the same rule should apply in an action in the nature of a special statutory proceeding such as this, where the presiding judge in fact rendered his decision in vacation, namely, January 13, but as of December 31 previous, and the actual entry of his judgment and order was not made until January 21. Under the state of facts as shown on this record with reference to the petition for writ of error in this court, we are of the opinthat this court has jurisdiction, and that the motion to dismiss the writ of error must be denied.

[2] It is argued by plaintiff in error that Walters is not entitled to the weekly payments allowed, and after that a monthly pension for the remainder of his life, for the reason that the injuries sustained are not shown to have caused permanent and complete disability; that the testimony in the record does not show that the employee was rendered wholly and permanently incapable of work; that he apparently retained his mental powers and was crippled physically only in part. Counsel have attempted to show by quoting from the dictionaries that the provision of the statute which states, "so as to be permanently incapable of work," indicates a greater degree of infirmity than the words "permanent and complete disability." There can be no plain and district rule laid down that will clearly distinguish between complete and permanent disability which renders one wholly and permanently incapable of work, and such disability which does not render one wholly and permanently incapable of work. A man may have so devoted himself to manual labor without attempting to cultivate his mental faculties that the loss of his right arm might seem to him to have completely disabled him to do any work for which he might feel he was fitted or could fit himself, and yet the experience of different men has shown this is not always true. On the other hand, the fact that one man has been able to secure some kind of employment handicapped by the loss of one or more of his members is no proof that all other men so severely handicapped will be able to continue in employment. In our opinion the only reasonable rule to follow in construing the statute is to make it a matter for the sound judgment and discretion of the arbitrator and Industrial Commission, provided that in enforcing the statute they substantially comply with its provisions. To know whether one is completely incapable of work might in one case require knowledge of many facts, while in another case the fact of complete disability might be so apparent—as where one is totally paralyzed or insane—that there could be no disagreement on the part of any one as to the question. In Frey v. Kerens-Donnewald Coal Co., 271 Ill. 121, 110 N. E. 824, it was held that an award of compensation for a permanent injury was justified by evidence which showed that the applicant had suffered paralysis of one side, so as to incapacitate him for work. The record showed that he could walk, but that he could not work. In McGarry v. Industrial Com., 290 Ill. 577, 125 N. E. 318, the applicant received a shock through a telephone receiver, which left his face partially paralyzed, and he after-

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wards suffered pains in his back and head. There was testimony that he had an organic disease, due, in part, to the habitual use of intoxicating liquors. The Industrial Commission made an award, part of which was a pension for life. On the facts shown in the case this court held that it could not interfere with the Industrial Commission's finding on the merits. In Illinois Midland Coal Co. v. Industrial Board. 277 Ill. 333, 115 N. E. 527, where the finding of the Industrial Board stated that the applicant "is now totally disabled," it was held that a man might be totally disabled and yet be not permanently disabled. In the case before us the finding was that the applicant was both totally and permanently disabled. In Ballou v. Industrial Com., 296 Ill. 434, 129 N. E. 755, it was held that the loss of use of both hands is not necessarily equivalent to the loss of both hands, and that the finding that "the injuries sustained have caused complete disability, which renders the petitioner wholly and permanently incapable of work," was not based upon the testimony, because it was shown that he did janitor work, in which he used a broom and wheelbarrow, and that for two months he earned $50 per month as watchman, and that he worked at clam fishing, poling the boat up and down the river by means of a push pole, which he used with his hands.

[3, 4] The testimony in this record shows that the applicant's pelvis was so injured that it was made narrow, and that the motion of the hip joint was limited and the probable pressure of bone on soft structure might cause pain, and one of the physicians who examined him testified that he might lift some, but would be greatly handicapped in bending and lifting, and would not be able to perform labor requiring considerable walking. While the 18 days he worked as flagman might be some evidence of partial ability to work, the statute does not require an applicant to continue to work if it will cause him to continuously suffer serious discomfort and pain while he is so engaged. In O'Callaghan v. Industrial Com., 290 Ill. 222, 124 N. E. 811, it was held that the weight of the competent evidence as to the extent of the injury does not present a question of law for the consideration of the court; and this would apply whether the testimony concerned a total and permanent disability or one of less extent. We cannot say from the evidence in the record that the Industrial Commission was not justified in finding that the applicant was completely and permanently disabled by the injury in question.

It is further argued by plaintiff in error that in ascertaining the amount to be paid monthly to the applicant as a pension, the Industrial Commission, in arriving at the amount of the annual earnings upon which to base the pension, should have deducted the $640 paid to him. Paragraph (f) of section 8 provides that—

The payments shall commence "on the day after the injury and continuing until the amount paid equals the amount which would have been payable as a death benefit under paragraph (a), section 7, if the employee had died as the result of the injury at the time thereof, * * * and thereafter a pension during life annually equal to eight per cent. of the amount which would have been payable as a death benefit under paragraph (a), section 7, if the employee had died as a result of the injury at the time thereof."

[5] It is further argued that in ascertaining the amount that shall serve as a basis for the pension, paragraph (a) of section 7 must be construed in connection with paragraph (f) of section 8, but that in ascertaining the amount that would be payable as a death benefit under paragraph (a) of section 7 any compensation other than necessary surgical or hospital fees must be deducted before ascertaining the amount payable on the death, and that as Walters' monthly wage was $70, or an annual wage of $840, four times that amount would be $3,360, which would constitute primarily the death benefit payable to the widow and children under paragraph (a) of section 7, and would serve ordinarily, as the basis

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of the pension to be allowed to the applicant under paragraph (f) of section 8, but that as $640 had already been paid to the applicant, this amount, under the provisions of the last sentence of paragraph (a) of section 7, must be deducted from the $3,360 before figuring the pension, leaving $2,760 as the amount upon which the 8 per cent. should be figured, and that this would give a pension, as claimed by counsel for plaintiff in error, of 18.33^{1}/_{3}$ per month, instead of $22.40 per month as fixed by the Industrial Commission. We do not agree with this argument of counsel for plaintiff in error. Paragraph (f) of section 8 with reference to the pension distinctly provides that the pension is to be ascertained under paragraph (a) of section 7, and is to equal the amount payable as a death benefit "if the employee had died as the result of the injury at the time thereof." If the employee had died at the time of the injury there would not have been any compensation payments to be deducted in ascertaining the amount payable as a death benefit. The argument of counsel, if carried to its logical conclusion, it seems to us, would, in effect, require paragraph (f) of section 8 to be construed so that if under the first part of said paragraph the amount paid should equal the amount of the death benefit there could be no pension allowed thereafter, and surely that was not the intention of the Legislature as to the proper construction of said paragraph. Reading paragraph (f) of section 8 in connection with paragraph (a) of section 7, we think it is manifest that the Industrial Commission rightly figured four times the average annual wage of $840 as the basis upon which the pension should be fixed, without deducting the amount that had theretofore been allowed and paid the applicant as compensation.

Finding no error in the record, the judgment of the circuit court will be affirmed.

Judgment affirmed.

ROCKFORD HOTEL CO. v. INDUSTRIAL COMMISSION ET AL.
(No. 14000.)

(Supreme Court of Illinois. Oct. 22, 1921. Rehearing Denied Dec. 9, 1921.)

132 Northeastern Reporter, 759.

MASTER AND SERVANT—DEATH OF EPILEPTIC EMPLOYEE, FALLING INTO ASH PIT AND RECEIVING FATAL BURNS, HELD COMPENSABLE.

Where an employee, while engaged in the performance of the duties of his employment, fell into an ash pit, and was so burned that death resulted, his death was not from epilepsy or pre-existing disease, but from burns received from falling into the pit, and is within the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

Error to Circuit Court, Winnebago County; Robert K. Welsh, Judge.

Proceeding under Workmen's Compensation Act by Ida Madison against the Rockford Hotel Company. The award fixed by the arbitrator was confirmed by the Industrial Commission, and defendant brought certiorari to the circuit court, which set aside the award, and plaintiff brings error. Reversed and remanded, with directions.

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Garrett, Maynard & Hull, of Rockford, for plaintiff in error.

Fisher, North, Welsh & Linscott, of Rockford, for defendant in error.

FARMER, J. Joseph Madison was employed by the Rockford Hotel Company on and prior to September 5, 1919. On that day, while in the discharge of his duties he fell into an ash pit, where hot coals and cinders were thrown when removed by him from the furnace. He was seen by the engineer of defendant in error, a few minutes before he was found in the ash pit, in the act of raising the cover from the pit for the purpose of drawing into it ashes and cinders from the furnace. The witness left the room for 5 or 10 minutes, and when he returned found Madison lying on his back in the pit on the hot cinders. He was unconscious, and before witness could procure help and remove him he was badly burned. After Madison was removed from the pit he regained consciousness and was taken to a hospital, where he remained several days. He was then removed to his home, where he died December 15, 1919.

The doctor who held a post mortem described the conditions he found, and expressed it as his opinion that the death was caused by the burns. Deceased left him surviving a widow, but no child or children. The widow filed an application for compensation, which the arbitrator allowed, and fixed the award at $50 per month for a period of 66 months, one month at $47.72, and the further sum of $50, being the amount which accrued from December 16, 1919, to January 16, 1920. The award fixed by the arbitrator was confirmed by the Industrial Commission on a petition for review. Defendant in error sued out a writ of certiorari from the circuit court. That court set aside the award and held there was no liability. This court granted a writ of error to review that decision.

Liability under the Workmen's Compensation Act (Laws 1913, p. 335) is denied on the ground that Madison's injury did not arise out of his employment. The argument in support of that contention is that the fall into the ash pit was not due to an incident of the employment, but was caused by Madison being seized with an epileptic fit; that he was subject to such fits, of which his employer had no knowledge; that the fit was the direct and only cause of his injury, and the accident did not arise out of the employment. It is generally held by the English courts and the courts of this country that, where the death of an employee results from a prior existing disease, like heart trouble or other impaired physical condition, while the workman was doing his ordinary work in the ordinary way, and there was no sudden, unusual, or violent strain, it will not be considered an accidental death arising out of the employment, within the meaning of the Workmen's Compensation Act.

It is contended by defendant in error those principles are controlling in this case, because there was no evidence of any unusual effort or strain of Madison, which caused or contributed to his fall, or to bring on a fit, as the result of which he fell into the pit. So far, as disclosed by the testimony, Madison was doing his work in the ordinary way when last seen. No one saw him fall, but there was proof by medical and lay witnesses that in the year 1918 he had spasms resembling epileptic fits, and the doctors who testified on that subject believed him afflicted with that trouble. The widow testified she had been married to deceased and lived with him a year before the accident, and that she had never seen or known of his having a fit. It must be admitted the proof of defendant in error tended to show Madison occasionally had spasms or fits. Whatever the disease was that caused the spasms or fits, it was mild in form, and the fits, were not many or of frequent occurrence.

It is contended by defendant in error that it is not as probable Madison's fall into the pit was the result of his being overcome by gases or fumes or other causes while removing the hot ashes and cinders from the

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furnace, as that the fall was caused by an epileptic fit, in view of the testimony referred to. The fact that we cannot overlook or ignore is that Madison, by reason of his falling into the pit while engaged in performing the duties of his employment, was so severely injured that he died from the injuries. He did not die from epilepsy or a pre-existing disease, but from the burns he received from falling into the pit. Some cases hold that, where an employee is seized with a fit and falls to his death, the employer is not liable, because the injury did not arise out of the employment (Van Gorder v. Packard Motor Car Co., 195 Mich. 588, 162 N. W. 107, L. R. A. 1917E, 522; Brooker v. Industrial Com., 176 Cal. 275, 168 Pac. 126, L. R. A. 1918F, 878); but a majority of the courts, American and English, hold that, if the injury was due to the fall, the employer is liable, even though the fall was caused by a pre-existing idiopathic condition.

Defendant in error admits the English decisions "apparently sustain the position of the applicant in this case," but endeavors to point out that those decisions are not all in harmony, and argues the American cases holding the contrary are based on sounder reason and principles. The view of this court on that question was expressed in the opinion in Peoria Railway Terminal Co. v. Industrial Board, 279 Ill. 352, 116 N. E. 651. In that case the employee was fireman on a switch engine. While engaged in performing his duties he fell from the engine, while it was running slowly and smoothly over a practically level roadbed. He died in a short time, without regaining consciousness. An autopsy was held, and there was medical testimony that the fall caused the death, and also that the death was produced by a pre-existing disease. The widow testified she had been the wife of deceased one year, and during that time he was in good health. The court held the death resulted from an accident arising out of the employment, and that the employer was liable, and cited many authorities supporting that conclusion. That decision we think applicable to this case.

The judgment of the circuit court is reversed, and the cause remanded to that court, with directions to confirm the award.

Reversed and remanded, with directions.

SPRINGFIELD DIST. COAL MINING CO. v. INDUSTRIAL COMMISSION ET AL. (No. 13997.)

(Supreme Court of Illinois. Oct. 22, 1921. Rehearing Denied Dec. 9, 1921.)

132 Northeastern Reporter, 752.

1. MASTER AND SERVANT—EVIDENCE HELD INSUFFICIENT TO SHOW COMPENSATION CLAIMANT'S INJURY CAUSED INCAPACITY FROM HEART DISEASE.

Evidence *held* insufficient to prove that compensation claimant's permanent incapacity for work from heart disease was caused solely by accident in which his ribs were injured.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

2. MASTER AND SERVANT — RULE AS TO COMPENSATION FOR INJURY AGGRAVATING DISEASE STATED.

An employee is entitled to compensation, for total incapacity proximately caused by the injury if the incapacity results from accident inde-

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pendent of pre-existing disease, but, if the injury merely accelerates or aggravates such disease, he can recover compensation only to the extent and in the proportion in which the pre-existing disease is increased or aggravated; and if an accident results in a lesion or a new condition of which it is the proximate cause, there may be a recovery of compensation, regardless of predisposing conditions making the employee more susceptible to injury.

(For other cases, see Master and Servant, Dec. Dig. § 376[2].)

Error to Circuit Court, Sangamon County; E. S. Smith, Judge.

Proceedings under the Workmen's Compensation Act (Hurds Rev. St. 1919, c. 48 §§ 126–152i) by A. R. Mercer for compensation for injuries, opposed by the Springfield District Coal Mining Company, employer. Award by arbitrator for employee confirmed by the Industrial Commission and by the circuit court, and the employer brings error. Reversed and remanded, with directions.

T. W. Quinlan, of Springfield, for plaintiff in error.

W. J. MacDonald, of Chicago, for defendant in error.

CARTWRIGHT, J. A. R. Mercer, the defendant in error, was employed in the mine of plaintiff in error, the Springfield District Coal Mining Company, and on December 31, 1918, was getting out an empty coal car when the mule started up, catching him between that car and another one, in the region of his left lower ribs. He made application for compensation, alleging that the accident caused an injury which had resulted in total and permanent disability. At the time of the hearing before the arbitrator he was totally and permanently incapacitated for work from heart disease, which was conceded, and the only question in dispute was whether the injury was the proximate cause, in whole or in part, of his disability. The arbitrator decided that the accident was the cause of the total and permanent disability and awarded the applicant $12 per week for a period of 291 weeks, $8 for one week. and $23.50 per month during the remainder of the life of the applicant as a pension. On a review of the decision of the arbitrator by the Industrial Commission additional evidence was heard and the award was confirmed. On a writ of certiorari from the circuit court of Sangamon county the award was again confirmed, and this court granted a writ of error for a review of the judgment of the circuit court.

[1] The applicant was 50 years old and before the accident, had worked on a farm and for four or five months prior to the accident had worked in this coal mine. He had always been able to do such work, and testified that he never had any kind of heart trouble or internal trouble before his injury; that at the time of the accident he did not think he was hurt and went back to his work, but could not get his breath and was sent home in a buggy; that a doctor bandaged him, and he had been under the care of that doctor and another since his injury; that his heart ached, his head felt like it was going to burst, and his heart felt filled up and heavy. The doctor who treated applicant at the time of the injury and bandaged him and also treated him at differernt times up to the hearing testified that he was suffering from myocarditis, an organic disease of the heart caused by infection and consisting of degeneration of the heart muscles; that the disease is never the result of an outside injury or force applied to the body; that he had examined the applicant thoroughly since the injury, and he was in a bad condition, weak and emaciated, but there were no results remaining from the injury which could possibly cause myocarditis; and that he had a temporary disability only from the injury. The other doctor who had treated the appli-

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cant testified that when he saw him after the accident he had received an injury of the left lower ribs, which from the nature of the injury, appeared to be a light blow; that he had been strapped for the injury and was having considerable trouble with his heart and abnormal respiration, and that the squeezing he had could have aggravated the condition that was already there, but the heart disease was present before the time of the injury. This was all the evidence before the arbitrator and commission and was insufficient to sustain an award that the condition of the applicant was solely the result of the accident.

[2] An employee is entitled by the statute to be compensated for every accidental injury suffered in the course of his employment and arising out of the employment. That is the measure and limit of his right, and if an injury sustained is the proximate cause of the incapacity for which compensation is sought, the previous physical condition of the employee is unimportant, and he may recover for permanent incapacity which results from an accident independent of pre-existing disease. He is not entitled to compensation for a condition resulting from a pre-existing disease, and not from an injury suffered in the course of employment and arising out of it. If there is a pre-existing disease, the employee is entitled to recover for all the consequences attributable to the injury in the acceleration or aggravation of such disease. Such aggravation or acceleration, permanent and progressive in its nature, will entitle the employee to compensation to the extent and in the proportion in which the pre-existing disease is increased or aggravated. Mere predisposing physical condition does not affect the right to compensation. If an accident results in a lesion or a new condition of which it is the proximate cause, there may be a recovery of compensation for the same, regardless of predisposing conditions making the employee more susceptible to the injury. Big Muddy Coal & Iron Co. v. Industrial Board, 279 Ill. 235, 116 N. E. 662; Peoria Railway Terminal Co. v. Industrial Board, 279 Ill. 352, 116 N. E. 651; Spring Valley Coal Co. v. Industrial Com., 289 Ill. 315, 124 N. E. 545. Under these rules, the previous condition of the applicant was a material circumstance to be considered in ascertaining whether his condition of total and permanent disability resulted from the accident suffered in the course of his employment and arising out of it or from the disease, and, if from both, the proportion in which the accident contributed.

The doctor who attended the applicant at the time of the injury, testifying as an expert, said that there were no results remaining from the injury, and that the disability therefrom was temporary, only. The other doctor said that the accident could have aggravated the heart disease which was present before the time of the injury, and, in view of the testimony that the applicant had always been able to do ordinary work, a conclusion that the accident aggravated or increased the heart condition, whether temporarily or permanently, might be justified. There can be no doubt from the evidence that the applicant had heart disease before the injury, which was progressive and organic in its nature and arose from infection, and a right to compensation depended upon the question whether the injury had aggravated and intensified the existing condition. He would be entitled to recover so far as the accident contributed, if at all, to his present condition, but there is no evidence tending to show that such condition was due wholly to the accident. The award cannot be sustained on the evidence in the record, and there should be a further opportunity, if desired, to introduce evidence on the question whether, and, if so, to what extent, the injury contributed to the present permanent incapacity of the applicant.

The judgment of the circuit court is reversed, and the cause remanded to that court, with directions to remand the application to the Industrial Commission for a determination of the right to compensation,

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and, if there is such right, an adjustment of the same in accordance with the law as herein stated, or for a further hearing of evidence, if desired.

Reversed and remanded, with directions.

SWIFT & CO. v. INDUSTRIAL COMMISSION ET AL. (No. 14004.)

(Supreme Court of Illinois. Oct. 22, 1921. Rehearing Denied Dec. 9, 1921.)

132 Northeastern Reporter, 801.

MASTER AND SERVANT — COMPENSATION CLAIM HELD SUBJECT TO SHORT LIMITATION INSTEAD OF EXTENDED LIMITATION IN EVENT OF EMPLOYEE'S RETURN TO EMPLOYMENT.

Workmen's Compensation Act, § 8, subd. (d), providing that in the event of employee's "return to the employment" he shall not be barred from asserting compensation where notice is filed within 18 months, applies only where the injured employee is partially incapacitated, and one who merely visited a doctor at his foreman's direction and lost no time from work was bound by the requirement of six months' notice.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

Error to Circuit Court, Cook County; Oscar M. Torrison, Judge.

Proceedings under the Workmen's Compensation Act by Frank Fox, employee, opposed by Swift & Co. Award by the arbitrator, confirmed by the Industrial Commission, was affirmed by the circuit court with modification, and employer brings error. Reversed, and award set aside.

T. M. Coen, of Chicago, for plaintiff in error.

Bowe & Bowe, of Chicago (Augustine J. Bowe. of Chicago, of counsel), for defendants in error.

DUNN, J. Frank Fox was employed by Swift & Co. in January, 1919, as a bricklayer on a job of bricking up boilers in a new boiler house. After working three or four days he was laid off for several days for lack of material, but returned to work, and on February 18, while at work, scratched the shin of his right leg on some loose brick. He paid no attention to this injury, but the next day he struck his head on a temporary brace, and the foreman, seeing the blood on his head, told him he had better go over to see the doctor. Fox then told the foreman about scratching his leg and went to the doctor, who wiped off his head with a piece of cotton and bandaged the leg. Fox continued at work until the job was completed, about the 1st of March, losing no time. He was then unemployed until in April, when he got a job with the Indian Oil Company, at which he worked about a month, full time, when it was not raining. He quit work on May 14, 1919, because he was sick, and afterward was under the care of physicians or in a hospital for several months. He had a number of abscesses as a result of streptococcus infection. No claim was made for compensation until December 19, 1919, when he made an application to the Industrial Commmission for an award.

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An award was made by the arbitrator which was confirmed by the Industrial Commission, and the circuit court of Cook county on review of the proceedings, after a slight modification confirmed the award of the Industrial Commission.

The employer, Swift & Co., by this writ of error questions the jurisdiction of the Industrial Commission to entertain the application, since no claim was made within six months after the injury. The defendant in error claims that jurisdiction exists by virtue of that part of paragraph (d) of section 8 of the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, § 133), which provides that—

"In the event the employee returns to the employment of the employer in whose services he was injured, the employee shall not be barred from asserting a claim for compensation under this act: Provided, notice of such claim is filed with the Industrial Board within eighteen months after he returns to such employment, and the said board shall immediately send to the employer, by registered mail, a copy of such notice."

The defendant in error contends that his leaving off work at the direction of his foreman and calling on the company's doctor for the purpose of having his injury treated and his return to work at the direction of the doctor brings the employee within this provision; that the employee returned to the employment of the employer in whose service he was injured, and that he was not barred from asserting his claim for compensation within 18 months after such return.

The Workmen's Compensation Act provides that an employer may elect to provide and pay compensation for accidental injuries sustained by any employee arising out of and in the course of the employment. Section 7 of the act provides for the amount of compensation which shall be paid for injury to the employee resulting in death, when it shall be paid, to whom it shall be paid, and how it shall be paid. Section 8 relates to injuries not resulting in death, and provides for the amount of compensation which shall be paid to the employee for such injuries according to a schedule stated in the section. The injuries are all such as result in temporary or partial incapacity to work or serious and permanent disfigurement. The first part of paragraph (d), the last sentence of which has been quoted and is relied upon by the defendant in error, is as follows:

"If, after the injury has been sustained, the employee as a result thereof becomes partially incapacitated from pursuing his usual and customary line of employment, he shall, except in the cases covered by the specific schedule set forth in paragraph (e) of this section, receive compensation, subject to the limitations as to time and maximum amounts fixed in paragraphs (b) and (h) of this section, equal to fifty percentum of the difference between the average amount which he earned before the accident, and the average amount which he is earning or is able to earn in some suitable employment or business after the accident."

It is only where there has been an injury to an employee resulting in his partial incapacity from pursuing his usual and customary line of employment or serious and permanent disfigurement that the act provides for the payment of compensation. It is only after such an injury that the statute provides for the return of the injured employee, who has been partially incapacitated, to the employment of the employer in whose service he was so injured and incapacitated. When the statute speaks of the event of the employee's return to the employment it refers to a return after an injury sustained resulting in partial or permanent incapacity. It fixes a period of six months within which the employee may make his claim for compensation, and the commission is without jurisdiction to make an award unless claim is made within six months, except

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that where the employee, after having been partially incapacitated, returns to his former employment the limitation is extended to 18 months.

The Industrial Commission was without jurisdiction to award compensation to the defendant in error.

The judgment of the circuit court will be reversed, and the award set aside.

Reversed and award set aside.

HUBBARD STEEL FOUNDRY CO. v. REMISZEWSKI ET AL.
(No. 11112.)

(Appellate Court of Indiana, Division No. 1. Nov. 15, 1921.)

132 Northeastern Reporter, 691.

1. MASTER AND SERVANT — EVIDENCE HELD TO SUPPORT FINDING NEGATIVING WILLFUL MISCONDUCT WITHIN COMPENSATION ACT.

In a compensation proceeding, defended on the ground that the employee's death was caused by his own willful misconduct within Workmen's Compensation Act, § 8, evidence *held* sufficient to warrant findings that the employee pulled or turned a switch, or pulled a fuse plug, thereby stopping a machine before starting to work on it, although the machine was found running after his death.

(For other cases, see Master and Servant, Dec. Dig. § 405[1].)

2. MASTER AND SERVANT—DEFENSE OF WILLFUL MISCONDUCT WITHIN COMPENSATION ACT MUST BE ESTABLISHED BY PREPONDERANCE OF EVIDENCE.

The defense of willful misconduct within Workmen's Compensation Act, § 8, must be established by a preponderance of the evidence.

(For other cases, see Master and Servant, Dec. Dig. § 405[1].)

3. EVIDENCE — TESTIMONY IN COMPENSATION PROCEEDING HELD EXPRESSION OF OPINION NOT BINDING ON INDUSTRIAL BOARD.

In a workmen's compensation proceeding, testimony of a witness that he knew deceased did not pull a plug for the purpose of stopping a machine, because he came down right after the accident and the switch and fuse were then in, was merely an expression of the opinion of the witness by which the Industrial Board was not bound.

(For other cases, see Evidence, Dec. Dig. §§ 471[17], 568[1].)

Appeal from Industrial Board.

Proceedings under the Workmen's Compensation Act by Stella Remiszewski, and others for compensation for the death of Walter Remiszewski, opposed by the Hubbard Steel Foundry Company, employer. Compensation was awarded, and the employer appeals. Affirmed.

Frank M. Cox and A. N. Powell, both of Chicago, Ill., and W. J. Whinery, of Hammond, for appellant.

Geo. B. Sheerer and G. C. White, both of Hammond, for appellees.

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ENLOE, C. J. On April 8, 1920, one Walter Remiszewski, who was in the service and employ of appellant, was killed by an accident arising out of and in the course of his employment. An application for compensation was filed by the appellees herein, who are the wife and minor children of said deceased, with whom he was living at the time of his death.

The cause was first heard by a single member, and afterward by the full Industrial Board. An award of compensation at the rate of $13.20 per week for 300 weeks and of $100 for funeral and burial expenses was made to the appellees, and from said award this appeal is prosecuted.

The appellant made its defense under a special answer. It denied all liability in this case, "for the reason that the death of said Walter Remiszewski was caused by his willful misconduct, in that he failed to obey reasonable orders and directions of his employer that he should in no case, mount, or climb upon, or otherwise come in contact with, machinery, unless the precaution was taken to notify the operator in charge and to remove certain plugs, which, when removed, disconnected the power from the machine."

The section of the statute upon which the appellant relies as a defense is section 8 of the Workmen's Compensation Act (Acts 1919, p. 158), which reads as follows:

"No compensation shall be allowed for an injury or death due to the employee's intentionally self-inflicted injury, his intoxication, his commission of a felony or misdemeanor, his willful failure or refusal to use a safety appliance, his willful failure or refusal to obey a reasonable written or printed rule of the employer, which has been posted in a conspicuous place, his willful failure or refusal to perform any statutory duty or to any other willful misconduct on his part. The burden of proof shall be on the defendant."

The full Industrial Board upon the final hearing of this case made its finding herein as follows:

"And the full Board, having considered said evidence, having reviewed the original evidence, having heard the argument of counsel, and being fully advised in the premises, finds that on the 8th day of April, 1920, one Walter Remiszewski was employed by the defendant at an average weekly wage of $24; that on said date he received personal injuries by an accident arising out of and in the course of his employment, resulting in his death on said date. that the defendant had actual knowledge of the injury and death of the said Walter Remiszewski at the time it occurred; * * * that the injury and death of the said Walter Remiszewski was not due to any willful misconduct upon his part by reason of his willful failure to obey reasonable orders and directions of the defendant to the effect that he should in no case mount or climb upon or otherwise come in contact with machinery unless the precaution was taken to notify the operator in charge and to remove certain plugs which would disconnect the power from the machinery."

Counsel for appellant in their brief filed herein say—

"Appellant submits that the above finding of the Industrial Board is not sustained by sufficient evidence. In fact, it is contrary to the evidence and is contrary to law, and that the undisputed evidence shows that the accident and death of Walter Remiszewski was due solely to the willful misconduct of said decedent."

Upon the record before us, three questions are presented: First, Was the failure of the deceased to obey the order and instructions of his foreman, if any such failure is shown by this record, willful misconduct within the provisions of said section 8 aforesaid? Second. Was the death of said deceased due to such conduct? Third. Has the defense of

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willful misconduct been established? In considering the questions thus presented, we shall first examine the proof offered to establish the said defense.

The answer alleged that orders had been given to the deceased not to climb upon or otherwise come in contact with machinery unless: (a) The operator in charge was notified; and (b) certain plugs (fuses) were removed.

[1] As to the order to notify the operator in charge, if any such orders were ever given to the deceased appellants in their brief have failed to set out any testimony even tending to show that fact. There is evidence tending to show that the deceased had been told by the superintendent that whenever he "turned the switch" he should take out the fuse plug.

It appears from the evidence that on the day in question, and at the time he was killed, the deceased was at work endeavoring to tighten or adjust a belt which drove a machine used for grinding sand. The machinery with which he was working was not running. The switch had been turned, or the fuse plug drawn thus throwing off the current. Who turned this switch or drew said fuse plug, and thus threw off the current, is not definitely revealed. For aught that appears, it may have been the deceased. While he was thus working, the machinery started and he was killed. It does not definitely appear who turned the switch or inserted said fuse plug and thus started the machinery, causing his death. Taking this entire record, we think it to be a reasonable inference that the deceased turned the switch and stopped the machine before he began working on said machine, and that thereafter, and while deceased was so at work, some one started the machine either by turning the switch or inserting the fuse plug.

[2] The burden was upon appellant in this case to establish, by a preponderance of the evidence, the facts averred in its answer. There is no competent evidence that the deceased did not "turn the switch" or "pull the plug" and thus shut off the current and stop the machine, as he had been instructed to do, before he began work thereon.

Counsel for appellant, upon oral argument hereof, seemed to insist that the deceased had nothing to do with turning the switch to stop the machine, that the business of turning the switches to stop the various machines in the plant of appellant was in the hands of another person, and that, when it became needful for the deceased to stop a machine, so that he could do any needed work thereon, he was to stop the machine by pulling the "plug," and that this was his safeguard, because, if the plug was out, no electric current could pass to the machine in question to set it in motion. This contention of appellant is not borne out by the evidence, as set forth in its brief. Albert Larson, appellant's superinendent, testified, as such testimony is set forth in said brief:

"I informed him that he was to get his line of work so that he could keep the machine in good working order; that at any time he was to turn the switch and take the fuse plug out. * * * I turned to the switchboard and I told him he should not crawl under the machine without pulling that switch."

This witness also testified that he knew that the plug was not pulled in this machine, because; "I came down right after the accident * * * and there was the switch in and the fuse in."

[3] Clearly this witness, as to whether the switch had been turned or the fuse plug pulled, was simply expressing his opinion, by which the Industrial Board was not, in considering the evidence, bound.

It is clear to us that under this condition of the evidence the Board might well have come to the conclusion that the deceased, before he began working on said machine, either pulled or turned the switch, or

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pulled the fuse plug, and thereby stopped the running of said machine, and that the injury and death of said deceased was not due to any willful misconduct on his part, as set forth in said finding.

Having reached this conclusion, it becomes unnecessary to discuss the other propositions above stated, as they are of no controlling influence.

The award of the Industrial Board is affirmed.

KOTA v. STANDARD STEEL CAR CO. (No. 11243.)

(Appellate Court of Indiana, Division No. 1. Nov. 18, 1921.)

132 Northeastern Reporter, 697.

MASTER AND SERVANT—APPEAL IN COMPENSATION CASE DISMISSED FOR WANT OF NOTICE.

Under Workmen's Compensation Act, § 61, allowing appeal under the terms and conditions governing appeals in civil actions, an appellant who does not prosecute an appeal under Burns' Ann. St. 1914, § 675, by filing bond, may perfect an appeal under section 681; but to perfect such appeal notice is necessary, and where no notice has been given, the court is without jurisdiction, and the appeal must be dismissed.

(For other cases, see Master and Servant, Dec. Dig. § 417[4½].)

Appeal from Industrial Board.

Proceeding by Frank Kota for an award under the Workmen's Compensation Law, opposed by the Standard Steel Car Company, employer. From an order of the Industrial Board, the applicant appeals. Appeal dismissed.

Phillip Greenwald and John M. Stinson, both of Hammond, for appellant.

Whinery, of Hammond, and Albert N. Powell, of Chicago, Ill., for appellee.

ENLOE, C. J. The appellee herein has entered its special appearance in this cause and filed its motion to dismiss this appeal, for the reason that the same was not taken and perfected within the time allowed by the statute.

The section of the statute in question (section 61 of Workmen's Compensation Act, Laws 1915, c. 106) provides:

"But either party to the dispute may within thirty days from the date of the award appeal to the appellate court for errors of law, under the same terms and conditions as govern appeals in ordinary civil actions."

The sections of our statute to which reference is made, as governing appeals in ordinary civil actions, are Nos. 675 and 681, Burns' 1914. The former relates to what are known as "the term time appeals," perfected by filing appeal bond in the lower court, etc., and has no application to the facts as disclosed by the record before us. The later section relates to what are known as vacation appeals, and provides that such an appeal may be perfected in either of two ways, viz.: "(a) By serving of notice in writing upon the adverse party or his attorney, and also

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upon the clerk of the court in which the case was tried, of such appeal; or (b) by procuring a transcript of the record in the cause and filing the same in the office of the clerk of the Supreme Court, and then having such clerk issue notice to all adverse parties of the fact of such appeal.

Where bond is filed and an appeal prosecuted under the provisions of said section 675, no notice to the adverse party is necessary, but an appeal cannot be perfected under the provisions of said section 681 unless the notice therein required is given.

In this case no bond was filed; the appellant had a right to perfect an appeal under the provisions of section 681, supra, if he so desired; but to perfect such appeal notice was necessary, and no notice was ever given, or attempted to be given, in this case, and we are therefore without jurisdiction.

The motion to dismiss this appeal upon this record must be, and is, sustained.

Appeal dismissed.

TERRE HAUTE MALLEABLE & MFG. CO. v. WEHRLE.
(No. 11183.)

(Appellate Court of Indiana, Division No. 2. Nov. 18, 1921.)

132 Northeastern Reporter, 698.

1. MASTER AND SERVANT—INGUINAL HERNIA HELD "PERSONAL INJURY BY ACCIDENT," WITHIN COMPENSATION ACT.

A workman doing his work in the normal and regular way, who sustained inguinal hernia in lifting, *held* to have sustained a "personal injury by accident" within the Workmen's Compensation Act; such injury being accidental.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

2. MASTER AND SERVANT — FINDING OF EMPLOYER'S KNOWLEDGE OF COMPENSATION CLAIMANT'S INJURY HELD JUSTIFIED.

Where compensation claimant, who sustained a hernia, told his foreman about the severity and location of the pain immediately after the injury, and was sent by the foreman to the nurse, and by the nurse to the company's surgeon, *held* that the Industrial Board was justified in finding that the employer had personal knowledge of the injury at the time it was received.

(For other cases, see Master and Servant, Dec. Dig. § 405[1].)

Appeal from Industrial Board.

Proceedings under the Workmen's Compensation Law (Laws 1915, c. 106) by William Wehrle. Compensation for injury opposed by the Terre Haute Malleable & Manufacturing Company, employer. From award of Industrial Board for employee, the employer appeals. Affirmed.

Frederick K. Warne and Joseph W. Hutchinson, both of Indianapolis, for appellant.

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DAUSMAN, J. Two contentions are presented by the appellant, viz.: (1) That there is no evidence to support the finding that the employee received "a personal injury by an accident"; and (2) that the employer had personal knowledge of the injury at the time the injury was received.

The first contention is based on the proposition that to bring a case within the statute two separate and distinct things must exist, viz. an accident and an injury; the accident being the cause and the injury the result. Counsel insist that these two things must not be confused. The record discloses that the injury for which compensation was allowed is inguinal hernia. The workman's testimony, which stands uncontradicted, discloses the nature of his work and the mannerr in which it was performed, and the cause of his injury. He testified as follows:

"My job was to see that the cores were sent out to the molders and to carry them from the bench in the core room out to the rack in the stock room. Some cores are light and some are awful heavy. I should judge some weigh as high as 90 pounds. Some cores are on a board. There is a core that weighs 30 pounds on a board, and there is a core that weighs from 60 to 72 pounds on a board. I was lifting those boards when I was injured. I had to take them off the rack, lift them up, raise them across, get the board, and raise it up and put in on the truck. Sometimes I would put four or six boards on the truck, wheel them out to the storeroom, and then put them in their places. Some went in racks and some on the floor. In lifting them off the track I had to let the board go down on the ground, then straddle out and lift them up easy, so as not to shake the board. When I was lifting those heavy cores I felt something go wrong. I had an awful pain in the right groin."

[1] When taken literally, the statute seems to sustain counsel's contention. Literally it seems to indicate that there must be an accident external to the body of the workman, a mishap in the environment, which results in an injury to his body. In the case at bar there was no external accident, no mishap in the environment. The workman was doing his work in the natural, normal, and regular way. He was doing his work exactly as he intended to do it. But the injury was accidental. It was not expected, anticipated, foreseen, designed, or intended. But it is so well settled as no longer to admit of argument that in cases like the one at bar, where the injury results from muscular strain and exertion, the workman is entitled to compensation. To include cases of that character, the courts regard the words of the statute "personal injury by accident" as equivalent to the words "accidental injury." For this class of cases, the idea of an external accident is thereby eliminated. See, Indian Creek Coal, etc., Co. v. Calvert, 68 Ind. App. 474, 119 N. E. 519, 120 N. E. 709.

[2] As to the second contention, it is sufficient to say that the uncontradicted evidence is that the injured employee immediately after receiving the injury, told his foreman about the severity and location of the pain from which he was suffering; that thereon the foreman sent him to the nurse; and that the nurse, in turn, sent him to the company's surgeon. From all the evidence bearing on this point, the finding is a legitimate conclusion. Hornbrook, etc., Co. v. Stewart, 66 Ind. App. 400, 118 N. E. 315.

The award is affirmed.

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PAYNE, DIRECTOR GENERAL OF RAILROADS, v. WALL. (No. 11108.)
(Appellate Court of Indiana, Division No. 1. Nov. 16, 1921.)
132 Northeastern Reporter, 707.

1. MASTER AND SERVANT—FINDING OF COMPENSABLE INJURY HELD NOT MERE CONCLUSION.

In a workmen's compensation proceeding, a finding of the Industrial Board that the injury was received from an accident arising out of and in the course of the employment is not objectionable as a mere conclusion rather than a finding of ultimate fact.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

2. MASTER AND SERVANT—INJURY WHILE LEAVING PLACE OF WORK HELD COMPENSABLE.

Where an employee, engaged in shoveling coal, after quitting work for the day, went to a nearby desk on the employer's premises to fill out a card pertaining to his work, and, after he started to leave by going down a nearby stairway on the premises, was injured by a lump of coal thrown by another employee, a finding of the Industrial Board that the injury was received from an accident in the course of his employment cannot be disturbed.

(For other cases. see Master and Servant, Dec. Dig. § 375[2].)

3. MASTER AND SERVANT—INJURY IN QUARREL WITH ANOTHER EMPLOYEEE HELD COMPENSABLE.

Where employees doing the same work engaged in a controversy as one was quitting for the day and the other starting work concerning the amount of work done by each, in the progress of which quarrel plaintiff, while leaving the premises, was struck by a lump of coal thrown by the other employee, the Industrial Board was warranted in finding that plaintiff received his injuries from an accident arising out of his employment.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

Appeal from Industrial Board.

Proceedings under the Workmen's Compensation Act by Henry Wall for compensation for injuries, opposed by John Barton Payne, Director General of Railroads, Agent. Compensation was awarded. and defendant appeals. Affirmed.

Beasley, Douthitt, Crawford & Beasley, of Terre Haute, for appellant.
A. Z. Thomas, of Terre Haute, for appellee.

BATMAN, J. [1] This is an appeal from an award of compensation by the Industrial Board, based on a finding which contains the following statement, among others, that:

Appellee "received a personal injury by an accident arising out of and in the course of his employment."

Appellant contends that this is the statement of a mere conclusion, and not the finding of an ultimat fact. The decisions on which this contention is based, in so far as they tend to sustain the same, were expressly disapproved by this court in the case of Muncie, etc., Co. v. Thompson (1918) 70 Ind. App. 157, 123 N. E. 196. The only other questions presented relate to the sufficiency of the evidence to sustain the above finding. There is substantial evidence tending strongly to establish the following

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facts: Appellant had in his employ three men, whose duties required them to shovel coal into certain bents for use in connection with the operation of a railroad. These men were Lape, Dunham, and appellee. They did not all work at the same time, but worked succeessively during the day and night, each working a period of eight hours. On the day appellee received his injuries he had been preceded in this work by Dunham. Appellee took up the work at 6 o'clock in the morning and worked until about 2 o'clock in the afternoon. A few minutes before appellee's quitting time, Lape came up to succeed him in the work, and while appellee was still in the car where he had been shoveling coal, a controversy arose between him and Lape with reference to the work which they and Dunham were performing for appellant, which involved a question as to whether each was doing his full share of the same. . After appellee had quit shoveling coal and had gone to a nearby desk on the premises to fill out a card pertaining to his work, the controversy was continued, and there developed into a quarrel about the same matter, resulting in anger on the part of both, and the use of provoking language, in which the lie was given and threats were made. During the progress of this quarrel, appellee started to leave, by going down a nearby stairway on the premises, and while so doing was struck with a lump of coal thrown by Lape and severely injured.

[2] This court has held that—

In the application of the Workmen's Compensation Act (Laws 1915, c. 106) a servant's employment is not limited "to the exact moment when the workman reaches the place where he is to begin his work, or to the moment when he ceases that work. It necessarily includes a reasonable amount of time and space before and after ceasing actual employment, having in mind all the circumstances connected with the accident. Whether an employee, in going to or returning from the place of his employment, is in the line of his employment, is governed and controlled by the particular circumstances and facts of each case. There must, however, be a line beyond which the liability of the employer cannot continue. Where that line is to be drawn is usually a question of fact." Indiana Creek, etc., Co. v. Wehr, 128 N. E. 765.

Under this rule it is clear that we would not be warranted in disturbing the finding in the instant case that appellee received his injuries by an accident in the course of his employment.

[3] It only remains to be determined whether the evidence is sufficient to sustain the finding that appellee received his injuries by an accident arising out of his employment. An examination of the decisions of the courts in the various states which have Workmen's Compensation Acts similar to ours discloses that much has been said as to what rule should govern in determining whether an injury, inflicted by a fellow servant as the result of a personal controversy in the course of his employment, arises out of his employment. This court has heretofore considered this question, and in the case of Mueller v. Klingman, 125 N. E. 464, quoted the following rule with approval:

"All concur in the rule that the accident, to be within the Compensation Act, must have had its origin in some risk of the employment. No fixed rule to determine what is a risk of the employment has been established. Where men are working together at the same work, disagreements may be expected to arise about the work, the manner of doing it, as to the use of tools, interference with one another, and many other details which may be trifling or important. Infirmity of temper, or worse, may be expected, and occasionally blows and fighting. When the disagreement arises out of the employer's work in which two men are engaged, and as a result of it one injures the other, it may be inferred that the injury arose out of the employment."

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Applying this rule to the instant case, it is clear to us that the Industrial Board was warranted in making the finding that appellee received his injuries by an accident arising out of his employment. In reaching this conclusion we have not been unmindful of the case of Union etc., Co. v. Davis (1916) 64 Ind. App. 227, 115 N. E. 676, cited by appellant. That case, however, will prove misleading unless read in connection with the later case of Polar, etc., Co. v. Mulray (1917) 67 Ind. App. 270, 119 N. E. 149, written by the same judge, wherein a distinction is made, based on a difference in facts. We elect to stand by the rule, stated and approved in the case of Mueller v. Klingman, supra, and the case of Union, etc., Co. v. Davis, supra, must be considered disapproved, in so far as it states any rule to the contrary.

Finding no reversible error in the record. the award is affirmed.

STEPHENS v. STEPHENS ET AL. (No. 11184.)

(Appellate Court of Indiana, Division No. 1. Nov. 29, 1921.)

132 Northeastern Reporter, 747.

MASTER AND SERVANT — CHILD LIVING WITH DIVORCED MOTHER HELD NOT A "DEPENDENT" ENTITLED TO COMPENSATION FOR FATHER'S DEATH.

Findings that a child's parents were divorced, custody being awarded to her mother, whose judgment for $100 for alimony and support of the child was paid, that the divorce judgment was unmodified, and that the child had lived with and had been supported by her mother continuously since the divorce, aside from annual contributions of not over $50, made by the father during the last five years of his life, *held* not to show that the child was a "dependent" within Workmen's Compensation Act, § 38, as amended by Acts 1919, p. 165, providing that a child under 18 years is conclusively presumed dependent upon a parent upon whom the laws of the state impose the obligation to support.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

(For other definitions, see Words and Phrases, First and Second Series, Dependent.)

Appeal from Industrial Board.

Proceeding under the Workmen's Compensation Act by Edith Helen Stephens to recover compensation for death of Shirley Stephens, employee, opposed by the Essenbee Mines Company, employer, in which Oval Stephens and another also claimed the compensation. From an award for Oval Stephens and another against the employer, and denial of award to Edith Helen Stephens, she appeals. Award affirmed.

Geo. W. Wells, of Terre Haute, and W. F. Elliott and Geo. W. Payne, both of Indianapolis, for appellant.

A. L. Miller, of Terre Haute, and G. M. Crane, of Indianapolis, for appellees.

BATMAN, P. J. This appeal involves an award in favor of appellees, Oval Stephens and Richard Charles Richmond, against their coappellee, Essenbee Mines Company, growing out of the death of Shirley Stephens,

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one of its employees, and the denial of an award to appellant. The finding of facts are sufficient to sustain the award in favor of appellees Stephens and Richmond and in addition thereto contains the following:

"That the plaintiff, Edith Helen Stephens, is the daughter of the said Shirley Stephens; that the said Shirley Stephens and mother of Edith Helen Stephens were married on May 22, 1909; that the plaintiff, Edith Helen Stephens, was born March 2, 1910; that on the 15th day of June, 1911, the mother of Edith Helen Stephens obtained a divorce from said Shirley Stephens in the circuit court of Warrick county, Ind.; that, by the judgment of the court in said divorce proceedings, the care and custody of Edith Helen Stephens was granted to her mother, until the further order of the court; that in said proceeding the mother of the said Edith Helen Stephens recovered a judgment against Shirley Stephens for $100 as alimony and for the support and maintenance of Edith Helen Stephens; that said judgment was paid in full by the said Shirley Stephens on June 15, 1911. that there has been no modification or change in the judgment rendered in said divorce proceeding on June 15, 1911; that, continuously since the rendition of said judgment in said divorce proceeding, the plaintiff, Edith Helen Stephens, has lived with her mother; that, during the first five years after the granting of said divorce, the said Shirley Stephens made no contributions whatever to the support of Edith Helen Stephens; that during the last five years immediately prior to his death the said Shirley Stephens made contributions to the support of the said Edith Helen Stephens; that said contributions did not exceed $50 per year during said five years; * * * that, aside from the contributions from Shirley Stephens during the last five years of his life, the plaintiff, Edith Helen Stephens was supported from and after June 15, 1911, by her mother."

Appellant contends that under the facts found she must be conclusively presumed to be wholly dependent for support upon her deceased father, Shirley Stephens, and that therefore the denial of an award of compensation in her favor is contrary to law. A determination of the question raised by this contention requires a consideration of section 38 of the Workmen's Compensation Act. This section, as originally enacted contains, among others, the following provision:

"The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee: * * * (c) A boy under the age of 18, or a girl under the age of 18 upon the parent with whom he or she is living at the time of the death of such parent, there being no surviving dependent parent. * * *" Acts 1915, p. 402.

In 1919 the Legislature evidently realized that under certain circumstances a child under 18 years of age should be conclusively presumed to be wholly dependent for support upon a deceased parent, although such child might not be living with such parent at the time of his or her death, and amended said section so that it now contains the following provisions with reference to a child under 18 years of age:

"The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee: * * *

"(c) A child under the age of eighteen years upon the parent with whom he or she is living at the time of the death of such parent.

"(d) A child under eighteen years upon the parent with whom he or she may not be living at the time of the death of such parent, but upon whom. at such time, the laws of the state imposes the obligation to support such child." Acts 1919, p. 165.

Appellant contends that there are a number of statutes in this state which impose a legal obligation upon a father to support his minor child, and therefore she was entitled to share in the award of compensation made in this case by reason of the death of her father, as stated in the finding of facts, by virtue of said subdivision (d). We cannot agree

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that the mere fact of the existence of the statutes to which appellant refers, imposes an obligation upon a parent to support his child, so as to bring said subdivision (d) into operation in every instance, where such parent meets his death under such circumstances as to warrant an award of compensation against his employer. If such were the case, there would be no occasion for the limitations found in said subdivisions (c) and (d), but a general provision that every child under the age of 18 years shall be conclusively presumed to be wholly dependent for support upon his or her parent, would have sufficed, and no doubt would have been employed. We therefore conclude that the limitations found in said subdivisions are significant.

While it is true, as appellant contends, that the several statutes of our state impose a legal obligation on a father to support his minor child, the existing facts may be such as to so far suspend such obligation that a failure to support such child will create neither a legal nor a criminal liability against him. In such event said subdivision (d) would have no application. An illustration of such circumstances may be found in a case were the parents of a minor child have been divorced, and the custody of such child has been awarded to the mother, who is amply able to support and educate it, without any provision having been made requiring the father to contribute thereto, or if such a provision was made it has been fully met, and the child is being properly supported and educated by the mother. Husband v. Husband (1879) 67 Ind. 583, 33 Am. Rep. 107; Ramsey v. Ramsey (1889) 121 Ind. 215, 23 N. E. 69, 6 L. R. A. 682; Hedrick v. Hedrick (1891) 128 Ind. 522, 26 N. E. 768; Tobin v. Tobin (1902) 29 Ind. App. 382, 64 N. E. 624. In the instant case the finding of facts shows that appellant's parents were divorced; that her care and custody was awarded to her mother until the further order of court; that a judgment was rendered against her father and in favor of her mother for $100, as alimony and for the support, and maintenance of appellant, which was paid on the date of its rendition; that there has been no modification or change of the judgment rendered in said divorce proceeding; that appellant has lived with her mother continuously since said divorce was granted, and has been supported by her, aside from annual contributions thereto, not exceeding $50, made by her father during the last five years of his life. These facts fail to show that the laws of this state imposed any obligation upon said Shirley Stephens to support appellant, within the meaning of said subdivision (d), at the time he met his death. Circumstances may have existed, notwithstanding such decree and the absence of any modification thereof, under which the law would have imposed such an obligation, but the evidence is not in the record, and its sufficiency to sustain the finding is not challenged.

Finding no reversible error in the record, the award is affirmed.

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EMPIRE HEALTH & ACCIDENT INS. CO. v. PURCELL.
(No. 11115.)

(Appellate Court of Indiana, Division No. 2. Nov. 2, 1921.)

132 Northeastern Reporter 664.

1. MASTER AND SERVANT—COMPENSATION ACTS LIBERALLY CONSTRUED.

The words "by accident arising out of and in the course of the employment," in workmen's compensation acts, should be given a liberal construction.

(For other cases, see Master and Servant, Dec. Dig. § 371.)

2. MASTER AND SERVANT—"ACCIDENT ARISING OUT OF EMPLOYMENT," WITHIN COMPENSATION ACT DEFINED.

An accident arises out of the employment, within the Workmen's Compensation Act, when there is a causal connection between it and the performance of some service of the employment; the causal relation being established when the accident is shown to have arisen out of a risk which a reasonable person might have comprehended as incidental to the employment at the time of entering it, or when the evidence shows an incidental connection between the conditions under which the employee works and his resulting injury.

(For other cases, see Master and Servant, Dec. Dig. § 372.)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

4. MASTER AND SERVANT—INJURIES TO INSURANCE COLLECTOR ON STREET HELD DUE TO RISK OF EMPLOYMENT WITHIN COMPENSATION ACT.

Where the duties of an insurance solicitor and collector of premiums required him to travel on foot on the streets, a locality to which he was required to go constituted the place of his employment, and the hazard of being assaulted or robbed on account of his business, as well as the hazard of falling, were incidental to his employment, so as to entitle him to compensation for injuries, though the public generally in that vicinity was exposed to the same hazards.

(For other cases, see Master and Servant, Dec. Dig. § 375[2]

5. MASTER AND SERVANT—EVIDENCE HELD TO SHOW COMPENSABLE INJURIES TO INSURANCE COLLECTOR ASSAULTED.

Evidence *held* sufficient to warrant an inference that the injuries of an insurance collector from an assault resulted from conditions brought about by reason of his employment, so as to entitle him to an award under the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

6. MASTER AND SERVANT—CAUSE OF INJURY JUSTIFYING COMPENSATION.

For causal relation to exist between an employment and the injury, so as to justify compensation, it is not necessary that the injury be one which ought to have been foreseen or expected, but it must be one which, after the event, may be seen to have had its origin in the nature of the employment.

(For other cases, see Master and Servant, Dec. Dig. § 372.)

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7. MASTER AND SERVANT—FINDING HELD ONE OF ULTIMATE FACT SUFFICIENT TO SUSTAIN COMPENSATION AWARD.

The Industrial Board's finding that claimant received a personal injury by an accident arising out of and in the course of his employment is a finding of ultimate fact, within Workmen's Compensation Act, § 59, and is sufficient to sustain an award.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

Appeal from Industrial Board.

Proceedings under the Workmen's Compensation Act by William F. Purcell for compensation for injuries, opposed by the Empire Health & Accident Insurance Company, employer. Compensation was awarded by the Industrial Board, and the employer appeals. Award affirmed.

White & Jones and H. B. Johnson, all of Indianapolis, and Samuel A. Harper, of Chicago, for appellant.

James M. Berryhill, of Indianapolis, for appellee.

McMahan, J. This is an appeal from an award of the Industrial Board on account of accidental injuries sustained by appellee while in appellant's employ. The errors assigned are : (1) The award is contrary to law: (2) the facts found by the Board are insufficient to sustain the award; (3) the facts found are not sustained by sufficient evidence. Appellant contends there is no evidence tending to show appellee's injury was one "arising out of" or "in the course of" the employment.

The evidence discloses the following facts: December 7, 1920, appellee was in the employ of appellant as an insurance solicitor and collector of premiums at an average weekly wage exceeding $24. About 5 p. m. on said day he received a personal injury by accident as a result of which he has been totally disabled and unable to work since receiving said injury. Appellant had knowledge of said injury December 9, 1920. About 5 p. m. December 7, 1920, appellee, in the course of his employment, called at the home of one Williams, for the purpose of collecting a premium from Williams on a policy issued by appellant. One Charley Wood was living with Mr. Williams at that time, and was present when appellee made the collection from Williams. A friend of Wood, by name of Mason, was also present at that time. After appelleee made his collection from Williams and as he was going out of the door he asked Wood what he had for him. Wood replied that he did not have anything, as he had been sick and not able to work. Appellee and Wood stood just outside or near the open door, when Wood asked appelleee about a claim he (Wood) had against appellant and why it had not been paid, to which appelleee replied that when the company "catches you up it won't pay you." By this time appellee and Wood had gotten outside of the house and closed the door. Mason had also left the house. Appellee and Wood as they left the room were discussing the question of Wood's claim in a friendly manner. From three to five minutes later appellee pushed the door open and came back into the house, sat down on the side of the bed, saying he was sick, and when asked if he wanted a doctor told Williams to call up the "force". Neither Wood nor Mason came back into the house and have not been seen or heard from since that time. Williams testified that he did not hear any noise or any blows; did not know whether appellee was struck or whether he fell; did not know whether Wood or Mason, or either of them, struck him; they were outdoors, and he did not know anything about it until appellee came back into the house. When appellee came back into the house he was suffering from a depressed fracture of the skull and a laceration of the brain caused by bone fragments, since which

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time he has not at times been rational. When appellee came back into the house he was unable to make himself understood, and Williams called in a neighbor, after which the police were called and appellee was taken to the hospital. Wood was insured in more than one insurance company and had more than one policy for which appellee collected. At the time of appellee's injury and prior thereto Wood had a policy issued by appellant upon which he had made a claim for benefits which had not been paid. Williams and a fourth man were busy getting supper when appellee first called.

It was admitted that on December 7, 1920, appellee was in the employ of appellant at a weekly wage in excess of $24; that on said date he received a personal injury, as a result of which he had ever since that time been totally disabled and unable to work; that appellant had knowledge of such injury two days later; and that the only question was whether or not the accident arose out of the employment.

[1, 2] The words "by accident arising out of and in the course of the employment," as used in workmen's compensation acts, should be given a liberal construction in order that the humane purpose of their enactment may be realized. An accident is said to arise out of the employment when there is a causal connection between it and the performance of some service of the employment. The causal relation is established when the accident is shown to have arisen out of a risk which a reasonable person might have comprehended as incidental to the employment at the time of entering into the employment, or when the evidence shows an incidental connection between the conditions under which the employee works and his resulting injury. Holland, etc., Sugar Co. v. Schraluke, 64 Ind. App. 545, 116 N. E. 330.

Appellant contends that there is no direct evidence showing or tending to show by what means or in what manner appellee was injured; that the facts disclosed by the evidence do not warrant the conclusion that the injury to appelleee arose out of or in the course of his employment.

The record presents a peculiar situation. Appellee was not present at the hearing, and did not testify as a witness before the single member of the Board or at the hearing before the full Board. He was not represented on either hearing by a lawyer. His wife was present, but took no part in the examination of the witnesses, and although sworn as a witness, she was unable to testify to any fact which tended to show how appellee came to be injured other than that he was injured while at work. She started to tell what her husband in his "last declaration" told her about his injury, but was prevented from doing so on the ground that all she knew was hearsay. The doctor, when asked concerning appellee's condition, replied, "not always rational." Whether appellee was rational and able to testify at the time of the hearing is not directly and positively disclosed by the evidence.

[3] Appellant insists that the failure of appellee to testify raises a presumption that had he testified his testimony would have been against him. As before stated, appellant admitted all the facts necessary to sustain an award in favor of appellee, except that it did not admit that the injury to appellee arose out of his employment. The statement of the physician, when asked about appelleee's condition, that he was not always rational, and the character of appellee's injury, when taken in connection with the facts and circumstances as disclosed by the record, are sufficient, in our judgment, to explain the absence of appellee and his failure to testify as a witness and to overcome any presumption that might possibly be indulged against him because of his failure to testify.

In view of the stipulation "that the only question is whether or not the accident arose out of the employment," there is no merit in appellant's contention that the evidence fails to show that the injury occurred in the course of the employment.

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Where an insurance agent was injured as a result of slipping on an icy sidewalk while going from his train to the hotel in a town to which his employer had sent him to transact business for the company, it was held that the injury arose out of the employment. In Re Harraden, 66 Ind. App. 298, 118 N. E. 142, the court said:

"Where the employment of the injured person requires him to be at the place where his injury is received, and he is in fact at such place in pursuance of the discharge of the duties of his employment, the risk thereby encountered is held to be incident to such employment, though the injury may have resulted from conditions produced by the weather to which persons generally in that locality were exposed. Where the duties of the employee require him to travel and visit different places in order that he may discharge the duties of his employment, his place of work is thereby enlarged or extended to include all the places to which such employee necessarily goes in discharging the duties of his employment. While the condition produced by the weather may in a sense affect all alike in the particular vicinity, yet the fact remains that a person so employed is much more exposed to such hazards than the public generally because of the duties enjoined upon him by his employment and the place or places to which he must necessarily go in the discharge of such duties."

And, continuing (66 Ind. App. on page 306, 118 N. E. 144), it is said:

"If the nature of the employment, or the conditions under which it was pursued, or the exposure to injury it entails, or the doing of something incidental to the employment, was a proximate cause of the injury, it arises out of the employment. An injury of this description is one of the risks of the empolyment; for it is due to it and arises from it, either directly or as incident to it, or to the conditions and exposure surrounding it. And the proximate cause of the injury is not necessarily that which immediately arises out of the employment, but may be that which is reasonably incidental to it."

[4-6] In the instant case the duties of appellee required him to travel from place to place for the purpose of soliciting insurance and making collections. The localities to which he was required to go in the course of the business constituted the place or places of his employment. It was by reason of his employment that he was at the place where he was injured. He was where his employment took him. The hazard of being injured as the result of an attempt to collect money due appellant, the hazard of being assaulted or robbed on account of his business, as well as the hazard of being injured by reason of accidentally falling while in the course of his employment, were all hazards incidental to his employment. This proposition is not changed by the fact that the public generally in that vicinity was exposed to the same hazards. Appellee's employment as a collector of money exposed him to increased hazards generally. The evidence warrants the inference that his injury resulted from conditions brought about by reason of his employment and because he was in that locality at the time in question. As was said by the court in the Harraden Case:

"The facts admit of no other inference but that for his employment he would not have been in that locality at the time of his injury. His employment was therefore a contributing proximate cause of his injury. By reason of it he was exposed to a hazard which in all reasonable probability he would not oherwise have encountered. The work he was employed to do required travel and made him particularly subject to hazards to an extent far greater than like hazards encountered by the general public. Such being the case, the facts not only warrant the conclusion that the injury of Harraden was received in the course of his employment, but they likewise compel the inference that his injury arose out of his employment within the spirit, purpose, and meaning of the Workmen's Compensation Act, supra. The facts on which the question is based invoke

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the application not only of the principles applied in cases of accident due wholly to conditions produced by the weather, but likewise invoke the principles applied to accidents causing injuries to persons whose employment requires them to go upon public streets or into like places of danger."

In Refuge Assurance Co. v. Miller, 49 Sc. L. R. 67, 5 B. W. C. C. 522, an insurance agent employed to collect premiums from door to door slipped on some stairs while on his rounds and injured himself. It was held that the accident arose out of the employment. In the course of the opinion it is said:

"If this man was on this stair simply and solely for the purpose of his business, namely, to go to the person whom he was calling upon, this accident fairly arose out of his employment as well as in the course of it."

As said by this court in Re Bollman, 126 N. E. 639:

"The question in each case must be determined from a consideration of its own facts and circumstances. The question whether the accident resulting in injury or death in a given case arises out of the employment does not depend upon the minute details of what the employee was doing at the time, but rather upon the question as to whether the accident was due to a hazard to which the employee would not have been exposed apart from the business in which he was employed. * * * The accident which caused Bollman's death was due to a hazard to which he would not have been exposed apart from his employment. The accident was the result of a risk which was reasonably incidental to the employment."

Appellee was known to Wood and Mason as a collector for insurance companies and likely to have considerable money in his possession. Within a few minutes before he was injured, appellee, in the presence of Wood and Mason, collected some money for the man with whom Wood was living. Wood and Mason left the house just before appellee did. Appellee started to leave the house and in so doing met Wood at the open door, and there asked Wood what he had for him. It is clear he was inquiring of Wood about the payment of the premium on an insurance policy carried by Wood and issued by appellant. Appellee and Wood became engaged in a conversation relative to a claim Wood had against appellant. At this point the door was closed. Appellee, Wood, and Mason were outside and alone. No one saw or heard what took place between them. From three to five minutes later appellee came back into the house. His skull was fractured and his brain lacerated and torn by bone fragments which had been driven into it. He was unable to give any account of what had taken place, became unconscious, was taken to the hospital, and ever since that time has been unable to perform any labor and only at times seemingly rational. Wood and Mason disappeared in the darkness, without waiting to get their supper, and have never been seen since that time. The disappearance and flight of Wood and Mason, when coupled with the other facts disclosed, are sufficient to warrant an inference that they committed an assault and battery upon appellee which resulted in his injury, and that such injury was occasioned because of his employment.

The law as to "street risks" is well stated in Redner v. Faber & Son, 223 N. Y. 379, 119 N. E. 842, where the court, quoting from Dennis v. White & Co. [1917], App. Cas. 479, said:

"If a servant in the course of his master's business has to pass along a public street, whether it be on foot or on a bicycle, or on an omnibus or car, and he sustains an accident by reason of the risk incidental to the streets, the accident arises out of as well as in the course of his employment. * * * The use of the streets by the workman merely to get to or from his work of course stands on a different footing altogether, but as soon as it is established that the work itself involves exposure to the perils of the streets the workman can recover for any injuries so occasioned."

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It has been held that the risk of an employee being injured when using an automobile for transportation, by and when being stopped by officers of the law for speeding or other traffic violations, is a risk to be anticipated. Wold v. Chevrolet Motor Co. (Minn.), 179 N. W. 219.

While there must be some causal relation between the employment and the injury, it is not necessary that the injury be one which ought to have been foreseen or expected, but it must be one which, after the event, may be seen to have had its origin in the nature of the employment. Mueller v. Klingman, 125 N. E. 469. A man who is known to be carrying money is a tempting object for criminals to attack, and is exposed to dangers and hazards not common to all who travel the streets. Nisbet v. Rayne & Burn, [1910] 2 K. B. 689.

When one so cituated and employed as was appellee receives an injury by reason of the hazards and conditions surrounding him, it is ordinarily a question of fact as to whether the employment of such person was or was not a contributing proximate cause of the injury. We are of the opinion that the Industrial Board was justified in drawing the inference that appellee's injury arose out of his empolyment. This conclusion is supported by Ohio, etc., Co. v. Industrial Board, 277 Ill. 96, 115 N. E. 149; Hellman v. Manning, etc., Co., 176 App. Div. 127, 162 N. Y. Supp. 335, affirmed in 221 N. Y. 492, 116 N. E. 1051.

[7] Appellant also contends that the facts as found by the Industrial Board are not sufficient to sustain the award. The Board found that appelee received a personal injury by an accident "arising out of and in the course of his empolyment." This finding, appellant says, is "a statement of an ultimate conclusion and not a finding of fact," and that the facts should be stated upon which the Board stated its ultimate finding. After calling attention to Weaver v. Industrial Com. (Colo.) 194 Pac. 941, which lends support to its contention, appellant cites Inland Steel Co. v. Lambert, 66 Ind. App. 246, 118 N. E. 162, in support of its contention. It was held in the Lambert Case, as contended for by appellant, that the determination by the Industrial Board that an accident did or did not arise out of or in the course of the employment was a legal conclusion and not the statement of an ultimate fact, such as is contemplated by section 60 of the Workmen's Compensation Act (Laws 1915, c. 106). That holding, however, was disapproved in Muncie Foundry & Machine Co. v. Thompson, 123 N. E. 196. See, aso, Board of Com. v. Shertzer (Ind. App.) 127 N. E. 843, and American, etc., Co. v. Davis (Ind. App.) 126 N. E. 703.

In harmony with the cases last cited, we hold that the question as to whether the accident arose out of and in the course of the employment is an ultimate fact which must be found by the Board, and that the facts as found by the Board are sufficient to sustain the award. The cases of Inland Steel Co. v. Lambert, 66 Ind. App. 246, 118 N. E. 162, and Retmier v. Cruse, 67 Ind. App. 192, 119 N. E. 32, in so far as they conflict with this opinion, are hereby overruled.

There being no reversible error in the record, the award is affirmed.

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IN RE MOODY. (No. 11305.)

(Appellate Court of Indiana, Division No. 2. Nov. 4, 1921.)

132 Northeastern Reporter 668.

1. MASTER AND SERVANT—INJURY TO MINOR UNLAWFULLY EMPLOYED NOT COMPENSABLE.

A minor not lawfully employed cannot recover for his injuries under the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 366.)

3. MASTER AND SERVANT—MINOR 16 YEARS OLD ENGAGED IN MINING HELD AN "EMPLOYEE" LAWFULLY EMPLOYED WITHIN COMPENSATION ACT; "OTHER."

Under School Attendance Act, § 23, prohibiting the employment of minors under 18 years at certain highly dangerous occupations, or "other occupations dangerous to life or limb or injurious to health or morals," and section 22, prohibiting the employment of minors under 16 years in a number of less hazardous occupations, including mining, the two sections being reconcilable, and the specific occupation of mining mentioned in section 22 constituting an exception to the occupations generally included in section 23, a minor over 16 years may lawfully be employed in a mine so as to bring him withn the definton of an "employee in Workmen's Compensation Act, § 76, as amended by Laws 1919, c. 57, § 1.

(For other cases, see Master and Servant, Dec. Dig. § 366.)

(For other definitions, see Words and Phrases, First and Second Series, Employee.)

Appeal from Industrial Board.

Proceedings by John Moody, under the Workmen's Compensation Act, before the Industrial Board, in which said Board certified questions of law for determination by the Appellate Court. Questions answered.

NICHOLS, P. J. On the facts hereinafter stated, the Industrial Board of Indiana hereby certified for our consideration and determination the questions of law hereinafter stated.

Statement of Facts.

John Moody was born on May 1, 1904, and at all times hereinafter stated was over 16 years of age and under 18 years of age; on the 3d of June, 1921, said Moody entered the service of a corporation engaged in mining coal in Sullivan county, Ind.; said corporation is hereinafter designated as the operator; at said time and ever since said operator has been engaged in mining coal in Sullivan county, Ind., and has had employed in its mine more than 10 men; said Moody worked for said operator in said mine as a coal miner continuously from June 3, 1921, until September 6, 1921, at an average weekly wage in excess of $24; on said date, while engaged in the discharge of the duty that he was hired to perform, to wit, loading coal, he received a personal injury by an accident arising out of and in the course of the performance of said work, resulting in the loss by amputation of his right foot; said operator had actual knowledge of said injury at the time that it occurred. Said Moody has filed with the Industrial Board of Indiana his claim against said operator and against the insurance carrier of said operator, as authorizeed by amended section 73 of the Workmen's Compensation Act, clause "e" (Acts 1919, p. 174),

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for compensation on account of his injury. Said operator admits liability for compensation, but its insurance carrier denies liability upon the sole and only ground that said Moody at the time of his injury was not lawfully in the service of said operator. This contention is based upon the single proposition that a boy under 18 years of age, having filed with the coal operator his written statement showing his age, residence, birthplace, and next of kin, as required by section 7 of an act to prevent industrial accidents, etc. (Acts 1921, p. 877), and having procured and filed with the operator the certificate of competency required by section 3 of an act concerning labor, etc. (Act 1911, p. 660), and having procured and filed with the operator the certificate required by section 19 of the Child Labor Law of 1921 (Acts 1921, p. 346), is not an employee within the meaning of the Indiana Workmen's Compensation Act. In other words, that under such conditions he is not lawfully in the service of the operator. In support of its contention said insurance carrier relies upon the definition of an employee as set out in clause "b" of section 76 of the Indiana Workmen's Compensation Act (Acts 1919, p. 175); upon the rulings of the Supreme and Appellate Courts in the cases of New Albany Box & Basket Co. v. Davidson, 125 N. E. 904, and In re Stoner, 128 N. E. 938; upon the legislative declaration in section 1 of an act concerning labor (Acts 1911, p 658), "that the business of mining coal is hereby declared a dangerous occupation, industry, and business subject to the provisions of this act;" and upon the legislative declaration in section 23 of the Child Labor Law of 1921 (Acts 1921, p. 353) that no minor under 18 years of age shall be employed to work in any capacity in certain occupations therein enumerated or "in any other occupation dangerous to life and limb."

On the other hand, the injured party and the operator contend that the injured party, a boy of 16 years of age, is a lawful employee within the meaning of clause "b" of section 76 of the Indiana Workmen's Compensation Act; that section 22 of the Child Labor Law of 1921 expressly provides that no minor under the age of 16 years shall be employed, permitted, or suffered to work in any capacity in or about any mine, and that the evident intent and effect of this section is to authorize the employment of boys more than 16 years of age in mines when they have complied with the other provisions of the statute, as it is admitted Moody had done; that the declaration in section 1 of an act concerning labor (Acts 1911, p. 658) that the business of mining coal is declared a dangerous occupation, and industry subject to the provisions of said act, is a declaration merely for the purpose of requiring the examination of coal miners and their certificates of competency and permits for apprentices as therein provided.

The Industrial Board of Indiana submits to this court the following questions of law for determination:

First: Upon the foregoing facts, was John Moody an employee of the coal operator for whom he was working at the time he received his injury?

Second: Does the Industrial Board have jurisdiction to hear and determine his claim for compensation?

Said Moody had complied with all laws necessary to his lawful employment and he was lawfully employed, unless precluded from such employment by reason of his age as hereinafter discussed.

[1] It is manifest, under the cases of New Abany Box & Basket Co. v. Davidson, supra, and In re Stoner, supra, that if the injured person was not lawfully employed he cannot recover for his injuries under the Workmen's Compensation Act.

[2, 3] Section 23 of the School Attendance Act (Acts 1921, p. 352), provides that no minor under the age of 18 years shall be employed, permitted, or suffered to work in any capacity in any of the following occupations:

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"Oiling and cleaning moving machinery; in the operation of emery wheels except for sharpening tools used by an apprentice in connection with his work; or at any abrasive, polishing or buffing wheel; in the operation of an elevator, life (lift) or hoisting machine, in or about establishments where nitroglycerine, dynamite, dualin, guncotton, gunpowder, or other high expolsives are manufactured, compounded or stored; in dipping, dyeing or packing matches."

Following this inhibition of the employment of minors in such occupations, and after other inhibitions pertaining to the minor's welfare, the statute provides:

"Or in any other occupation dangerous to ilfe or limb or injurious to health or morals of such minors."

It will be observed that each of the specific occupations enumerated above are of a highly dangerous character.

19 Corpus Juris, p. 1255, stated the doctrine of ejusdem generis to be that, where an enumeration of specific things is followed by some general word or phrase, such more general word or phrase is to be held to refer to things of the same kind. Many authorities are cited as applying the rule.

We have here an enumeration of specific occupations each of which is highly dangerous, and a general phrase following including others, and under the rule aforesaid it must be held to refer to occupations of the same class or character. Section 22 of the same act prohibits the employment of any minor under the age of 16 years in a number of employments there named, each of which is less hazardous in its nature, and included in such less hazardous occupations is that of employment in or about any mine, quarry, or excavation. As said section 22 prohibits the empolyment of persons under 16 years of age in the less hazardous, though dangerous, occupations, including employment in or about any mine, quarry, or excavation, the necessary implication is that persons over 16 years of age may be lawfully emloyed therein.

It being, then, lawful to employ any person over 16 years of age in or about any mine under the provisions of section 22, unless the provision of such section 22 as to mines can be differentiated from "other occupations dangerous to life or limb or injurious to health or morals," as found in section 23, the two section are irreconcilable. But it appears that the phrase with reference to employment in or about any mine in section 22 names an occupation that is in a different class from the occupations named in section 23, and that therefore they are not irreconcilable.

This result may be reached by another process of reasoning. It is a well-established rule of construction that—

"Where a general intention is expressed, and the act also expresses a particular intention incompatible with the general intention, the particular intention is to be considered in the nature of an exception. While, if a particular thing is given out or lmited in a preceding part of a statute, this shall not be taken away or altered by any subsequent general words of the same statute." State ex rel. Lutfring v. Goetze, 22 Wis. 364.

The same principle is stated in the case of State v. Board, 175 Ind. 400, 94 N. E. 716, in the following language:

"Words of general import in a statute are limited where they are followed immediately by restrictive terms relating to the same subject."

It can make no difference whether the restricted terms follow the terms of general import, or whether they precede them. The rule is stated in Endlich on Interpretation of Statutes, § 216, as quoted in Commonwealth v. Lehigh, etc., R. Co., 268 Pa. 271, 110 Atl. 725, as follows:

"That where there are in an act specific provisions relating to a particular subject they must govern in respect to that subject, as against

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general provisions in other parts of the statute; although the latter, standing alone, would be broad enough to include the subject to which the more particular provisions relate. Hence, if there are two provisions in the same act, of which one is special and particular, and clearly includes the matter in controversy, whilst the other is general, and would, if standing alone, include it also, and if, reading the general rule side by side with the particular one, the inclusion of that matter in the former would produce a conflict between it and the special provision, it must be taken that the latter was designed as an exception to the general provision."

Other authorities sustaining the rule are the following: State ex rel. Pike County v. Gordon, 268 Mo. 321, 188 S. W. 88; Hodges v. Swastika Oil Co. (Tex. Civ. App.) 185 S. W. 369; Pence v. Pettett, 211 Ill. App. 588; Regan v. Ensley, 283 Mo. 297, 222 S. W. 773; Commonwealth v. Lehigh, etc., R. R. Co. (Pa.) 110 Atl. 725; Briggs v. Bloomingdale Cemetery Ass'n., 113 Misc. Rep. 685, 185 N. Y. Supp. 348; Sanford v. King, 19 S.D. 334, 103 N. W. 28; State ex rel. Donnelly v. Hobe. 106 Wis. 411, 82 N. W. 336; City of Covington v. McNickle's Heirs, 57 Ky. (18 B. Mon.) 262; State v. Moore, 108 Md. 636, 71 Atl. 461; U. S. Cement Co. v. Cooper, 172 Ind. 599, 88 N. E. 69; Brookings v. Murphy, 23 S. D. 311, 121 N. W. 793; In re Clyne, 72 Misc. Rep. 593, 131 N. Y. Supp. 1090.

In State v. Shanks, 178 Ind. 330, 99 N. E. 481, it was held that statutes are to be construed so that full force and effect shall be given to all parts thereof, and this rule must be applied in ascertaining wherein language which is specific necessarily comes in conflict with that which is general. The efforts must, in the first instance, be to harmonize all the provisions of the statute by construing all parts together, and it is only when on such construction the repugnancy of special provisions to the general language is plainly manifest that the intent of the Legislature as declared in the general enacting parts of the statute is superseded.

Applying this rule in the construction of the act here involved, we hold that the mine employment mentioned in section 22 is a different class of employment from that of the dangerous occupations mentioned in section 23, and that the provision in said section 22 is therefore not incompatible with the provision in said section 23; but that, if we were to concede that the provisions of the two sections are irreconcilable, we must then hold that the specific occupation of mining mentoned in section 22 constitutes an exception to the occupations generaly included in said section 23. Having reached this conclusion, we do not need to construe the act of 1911 (Acts 1911, p. 658), for if it be conceded that the declaration in that act as to the business of mining being a dangerous occupation has a general application, rather than specific to the act in which it is found, still, though it be a dangerous occupation, it is not of that class of dangerous occupations mentioned in said section 23. We hold that Moody's employment was lawful under the provsions of section 22 of the School Attendance Act, and is not prohibited by section 23 of said act.

We answer each of the questions propounded by the Industrial Board in the affirmative.

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STANDARD CABINET CO. v. LANDGRAVE. (No. 11141.)

(Appellate Court of Indiana, Division No. 2. Nov. 7, 1921.)

132 Northeastern Reporter, 661.

1. MASTER AND SERVANT — QUESTION OF COMPENSABLE INJURY HELD NOT DECIDED ON FIRST APPEAL.

On second appeal in Workmen's Compensation case, *held* that the question as to whether there was an injury by accident arising out of and in the course of the employment was not impliedly decided in favor of the employee on the first appeal deciding only that failure to find that the employer had the statutory notice was fatal to the award.

(For other cases, see Master and Servant, Dec. Dig. § 417[5].)

2. MASTER AND SERVANT—INJURY TO CARPENTER DEVELOPING "HOUSEMAID'S KNEE" HELD "ACCIDENT," "ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT" WITHIN COMPENSATION ACT.

Where employee, a carpenter for 19 years, developed "housemaid's knee" from being on his knees scraping and polishing floors a few days before he was disabled, the injury, even if an occupational disease, was an "accident arising out of and in the course of employment," within the Workmen's Compensation Act. as "accident" means as unlooked for mishap. or untoward event not expected or designed.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

(For other definitions, see Words and Phrases. First and Second Series. Accident—Accidental; Course of Employment.)

3. MASTER AND SERVANT — COMPENSATION. FOR PERMANENT PARTIAL DISABILITY COVERS TEMPORARY TOTAL DISABILITY.

Under Workmen's Compensation Act. § 31, an award for permanent partial disability cannot include an award for temporary total disability, where the temporary disability relates solely to the condition resulting in the permanent disability.

(For other cases. see Master and Servant Dec. Dig. § 387.)

4. MASTER AND SERVANT — EVIDENCE NOT WEIGHED ON APPEAL IN COMPENSATION CASE.

On appeal from an award under the Workmen's Compensation Act, the court will not weigh the evidence, and it is sufficient that there is some evidence to support the award.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Appeal from Industrial Board.

Proceedings for compensation under the Workmen's Compensation Act by Philip D. Landgrave, employee, opposed by the Standard Cabinet Company, employer. Compensation awarded. and the employer appeals. Reversed. with instructions to modify.

Joseph W. Hutchinson, of Indianapolis for appellant.

Charles R. Hughes, of Peru, and Turner, Merrell & Locke, of Indianapolis, for appellee.

NICHOLS, P. J. This is the second appeal in this cause; the opinion reversing the first award being reported in 128 N. E. 358.

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[1] Appellee contends that the question as to whether there was an injury by accident arising out of and in the course of the employment is not open for review on this appeal, for the reason that it was presented by appellant on the first appeal, and was decided by necessary implication. But we are not in harmony with this contention. A failure to find that appellant had notice as required by the statute was fatal to the award, and the question being properly presented on appeal was, independent of any other question, sufficient to reverse the award. It is apparent that this court gave no consideration to the question as to whether the injury was by accident arising out of the course of the employment. Had it done so, and had it reversed the award because of a failure of finding or proof on that question, additional evidence could have been heard at the second hearing, as on the question of notice or knowledge.

[2] We proceed, then, to determine the question as to whether appellee received a personal injury that entitled him to compensation under the provisions of the Workmen's Compensation Act (Laws 1915, c. 106).

It appears by the evidence that appellee had been in the employ of appellants for about 19 years as a carpenter. At the time of his injury he had been polishing and scraping floors for six or seven days in the home of the president of appellant company. This required him to work on his knees. His knee had been paining him some for a few days before April 23, 1919, and upon that date he had a chill and had to go home, and was wholly disabled from work for about 20 weeks. His physician testified that he treated his knee for brusitis, which is sometimes called "housemaid's knee," a name given to it because it is an injury common to housemaids and resulting from being on their knees when scrubbing floors. That his injury was caused by being on his knees and scraping floors is a reasonable inference from the evidence, and justifies the finding of the Industrial Board that on April 23, 1919, appellee received a personal injury by accident arising out of and in the course of his employment. Appellant contends that appellee is suffering from an occupational disease, and that his ailment cannot be classed as an injury resulting from an accident. But, we need not consider whether such disease is or is not an occupational disease, for if it be conceded that it is in the nature of such, compensation may nevertheless be allowed, if it is contracted under such conditions as to constitute an accidental injury, as found in this case. It has been repeatedly held by this court that the words "by accident arising out of and in the course of employment," as used in the Workmen's Compensation Act, should be liberally construed in harmony with the humane purposes of the act, and that the word "accident" means an unlooked for mishap, or untoward event, not expected or designed. It cannot be contended that the injury suffered by the appellee was other than an untoward event. For 19 years his occupation as a carpenter in the employ of appellant had not developed the disease. The most of his work had been, not scraping floors, but general carpentering and repairing, but only a few days before he was finally disabled, and his knee began to pain. He had no warning of the approach of his disability, and no knowledge that he had brusitis till his physician informed him. An instructive interpretation of the meaning of the word "accident" and its application under the Workmen's Compensation Act is found in Indian Creek Coal & Mining Co. v. Calvert, 68 Ind. App. 474, 119 N. E. 519, 120 N. E. 709. See, also, Haskell & Barker Car Co. v. Brown, 67 Ind. App. 178, 117 N. E. 555, and United Paperboard Co. v. Lewis, 65 Ind. App. 356, 117 N. E. 276.

[3] It is next contended by appellant that, even if it be conceded that there was a right of recovery, the board was not authorized by law to include in an award on account of permanent partial disability an additional award for temporary total disability, where the temporary total disability relates solely to the condition resulting in permanent partial

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disability, the positive mandate of the law being that the award for permanent partial disability shall be "in lieu of all other compensation." Appellant bases this contention upon the provisions of Acts 1915, p. 401, and the case of In re Denton, 65 Ind. App. 426, 117 N. E. 520, construing section 31 together with other sections of said act. The Industrial Board in this case finds that appellee "received a personal injury by an accident arising out of and in the course of his employment, as a result of which he was totally disabled for work for a period of 20 weeks and suffered permanent impairment of his right leg, which, together with the period of disability, would entitled him to 40 weeks' compensation.

It is contended by appellant that the total disability for a period of 20 weeks was the result of the same injury that produced the permanent impairment of his right leg, and that therefore recovery must be for a permanent impairment only excluding from the amount of recovery that which was given because of the total disability. There is merit in this contention. It is clear from the evidence that the total disability resulted from the same injury as resulted in permanent partial disability, and under the law then in force as decided in the Denton Case, supra, there can only be a recovery for 21 weeks, being for the permanent partial impairment of the right leg.

[4] As to the question of notice or knowledge, while, in view of the seeming contradiction in appellee's evidence as to notice or knowledge as given in the original hearing, and as given in the hearing upon review, we might in weighing the evidence have found against the appellee, yet appellee's testimony at the last hearing that about 10 days after his accident he informed the appellant's president of the injury and its cause was some evidence of notice to appellant, and this court will not weigh the evidence.

The award is reversed, with instructions to the Industrial Board to modify its award in harmony with this opinion.

McMahan, J., not participating.

BUNCLE v. SIOUX CITY STOCKYARDS CO. (No. 34183.)

(Supreme Court of Iowa. Nov. 22, 1921.)

185 Northwestern Reporter, 139.

1. MASTER AND SERVANT—FINDING AS TO COMPENSABLE INJURY HELD CONCLUSIVE.

In a proceeding to recover compensation for hernia caused by a strain during employment, evidence *held* sufficiently vague and uncertain to make the finding of the committee and the Commissioner that the injury did not arise out of or in the course of the employment, and was not a personal injury within Workmen's Compensation Act, § 1, conclusive.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

2. MASTER AND SERVANT — COMPENSATION CLAIMANT NEED NOT BE CORROBORATED TO RECOVER FOR HERNIA.

Under the Workmen's Compensation Law for compensation for hernia or similar bodily misfortune, it is not necessary, as matter of law, that the employee be corroborated, or that the claimant break down and

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cease to work, or that he report to his employer immediately. or be compelled to seek medical assistance, though, such circumstances being admissible, the absence of any one or more is not necessarily conclusive against the employee.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

4. MASTER AND SERVANT — PREPONDERANCE OF EVIDENCE SUFFICIENT TO JUSTIFY FINDING OF COMPENSABLE INJURY.

In proceeding for compensation for hernia involving issue as to whether employee's condition resulted from exertion made during employment or from exertion made outside of the course of employment, the arbitration committee and the Commissioner should closely scrutinize the testimony and satisfy themselves as nearly as possible as to the origin of the injury, but may base finding merely upon preponderance of the evidence.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Appeal from District Court, Woodbury County; W. G. Sears, Judge.

The plaintiff, an employee of the defendant, made claim for compensation for an alleged injury resulting in hernia while in the defendant's service. The arbitration committee called to consider the claim rejected it by a majority finding, which was concurred in by two of its members, the third member dissenting. The Industrial Commissioner sustained the majority report of the arbitrators, and plaintiff thereupon took an appeal to the district court which reversed the Commissioner's finding. Defendant appeals. Reversed.

C. Woodbridge, of Des Moines, for appellant.

Clarence A. Plank, of Hawarden, for appellee.

WEAVER, J. It is the plaintiff's claim that in pursuance of his line of duty in the defendant's service at the stockyards in Sioux City he was engaged in repairing certain electric wires extending along or over the top of a high board fence. For that purpose he climbed upon the fence, which act was accomplished by reaching his arms up and over the fence and throwing his leg over the plank at the top. As he made that movement he felt a sharp pain in his right groin, but went on with his work. He had never experienced such pain before, nor had he ever before developed a hernia, and did not at the time realize the nature of his hurt. This incident occurred on September 14, 1916. He did not report the matter to the defendant or consult a physician until October 2, 1916, when he called upon a doctor, who discovered a small hernia in the groin, and advised the use of a truss. Plaintiff procured a truss, and continued to work for defendant as before until February 3, 1917, when he was discharged. He says that after the alleged hurt, and before he applied the truss, he suffered frequent pains at that point, compelling him sometimes to suspend work. His physician testifies that a common immediate cause of such a hernia is a "strain from exertion or something of that sort." This witness further says that a man "might continue at work with a traumatic hernia until after several days had gone by." It is not, he says an unusual thing for a man to suffer hernia and "continue at work for a period of several days and put up with the pain. This is true of enough cases to justify the statement."

The only evidence offered for the defendant was a signed statement, dated November 14, 1916, made by the plaintiff to an agent or representative of the defendant or its insurer. This statement does not differ materially from his evidence on the trial, but adds:

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"I kept on working but felt something there all the time. I didn't look at it for about a week, then I found a little bit of a lump." In getting on the fence "I did not slip or fall. Nothing hit me."

On this showing a majority of the arbitration committee found that—

The alleged injury "did not arise out of or in the course of plaintiff's employment, and is not a personal injury within the meaning of section 1, chapter 147, Laws of the Thirty-Fifth General Assembly of Iowa," and that "he has not met the requirements of the burden of proof to an extent justifying the award of compensation."

This finding was affirmed by the Commissioner upon plaintiff's petition for a review of the case.

[1] We are inclined to the view that the showing made by the plaintiff is sufficiently vague and uncertain to bring the case within the statutory rule which makes the finding of the committee and of the Commissioner final upon questions of fact, and, such being the situation, the judgment of the district court must be reversed. We think, however, it should be said in this connection that if the opinion rendered by the Commissioner in making his finding is capable of the construction put upon it by appellant's counsel, it is not to be approved. As interpreted by counsel, in order to justify a recovery of compensation for hernia, it must appear: (1) That there is corroborating evidence; (2) that the injured man broke down and was compelled to cease work; (3) that he was within reasonable time compelled to seek medical assistance. (4) that he reported to his employer immediately, and gave notice of the injury; and (5) that the injury was such as was capable of producing hernia. There are expressions to be found in the opinion which, segregated from their context, might be held capable of sustaining the interpretation which counsel places upon them, but, taking the Commissioner's discussion as a whole, we are very sure the deduction made therefrom in counsel's argument is erroneous, and that the Commissioner did not commit himself to any such holding.

[2] It is not true, as a matter of law, that to justify a finding of compensable injury by hernia or other bodily misfortune the claimant must be corroborated, or that the claimant broke down and was compelled to cease work; or that he reported to his employer immediately; or was compelled to seek medical assistance. Such circumstances are, of course, admissible in testimony, and may be considered with other facts and circumstances in arriving at the truth as to the alleged fact of injury and of its nature and extent, but the absence of any one or more or even of all of these so-called tests is not necessarily conclusive against the claimant. Where there is no statute requirement of corroboration, it is not within the province of any court to lay down an ironclad rule that a party seeking the enforcement of a legal right will be denied a remedy unless he produces corroboration of his claim. It ought to go without saying that it is still possible for a claimant of compensation to be an honest man, and that his testimony may be so candid and so inherently probable as to command the confidence of a fair-minded court or juror even though he is unable to produce any other witness to corroborate him. To turn such a party out of court for no better reason than his inability to offer corroboration would be a perversion of the forms of legal justice.

[3, 4] Still less is it permissible to say that the claimant in such case must, as a condition precedent to a recovery, show that his alleged injury was followed by an immediate breakdown and cessation of work. To so hold is in effect to ingraft a judicial amendment upon the compensation statute. No court is so letter-perfect in human anatomy or so accomplished in surgical or medical lore that it can say that every case of traumatic hernia produces immediate prostration. In the contrary, notwithstanding the learning of the books and the dogmatic declarations

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of expert witnesses, it is a matter of common knowledge that thousands of men suffer from inguinal hernia, and that many of them are able to point to the time and place where it developed and the physical strain or exertion which occasioned it and yet were never prostrated by it. It is doubtless true that in very many cases the lesion takes place from the gradual enlargement of the inguinal rings, and is not traceable to any accident or unnatural strain or exertion; and that much difficulty exists in determining whether in a given case the hernia, if one is found, is of a compensable character. This difficulty justifies the arbitration committee and the Commissioner in closely scrutinizing the testimony and satisfying themselves as nearly as possible as to the origin of the alleged injury in order that they may do equal and exact justice between the parties, but the rule applicable is the same as in other cases and requires only a preponderance of evidence.

Further discussion at this point is unnecessary. For the reasons hereinbefore stated the judgment of the district court is reversed, and the finding of the Industrial Commissioner is sustained.

Reversed.

Evans, C. J., and Preston and De Graff, JJ., concur.

ANDREWS STEEL CO. v. McDERMOTT.

(Court of Appeals of Kentucky. Nov. 1, 1921.)

234 Southwestern Reporter, 275.

MASTER AND SERVANT — FINDINGS BY COMPENSATION BOARD ON EVIDENCE NOT REVIEWABLE.

On an appeal from the Board of Compensation to the circuit court under Workmen's Compensation Act (Ky. St. Supp. 1918, § 4935), providing that an award or order of the Board shall be conclusive as to all questions of fact unless the award or order is the result of fraud, an order denying compensation supported by findings of fact which have some evidence to support them cannot be disturbed, though the evidence appears to preponderate in the favor of the claimant.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Appeal from Circuit Court, Campbell County.

Proceeding by Joseph M. McDermott for an award under the Workmen's Compensation Act, opposed by the Andrews Steel Company, employer, in which an award was refused by the Workmen's Compensation Board and the petitioner appealed to the circuit court, where the order of the Board was set aside and the cause remanded, and the employer appeals. Judgment reversed, with directions to dismiss petition

Frank V. Benton, of Newport, for appellant.

William A. Byrne, of Covington, for appellee.

SAMPSON, J. Appellee Joseph P. McDermott was in the employ of of the Andrews Steel Company, in Newport, in February, 1919, and while in the performance of his duties received an injury to his left eye which he contends later caused the loss of the vision of that eye. As the steel company was operating under the Workman's Compensation Act, Mc-

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Dermott made application to the Board administering the act for compensation for his injury. Evidence was taken and the case prepared. In refusing the allowance the Board made the following finding of fact:

"It was not established by the testimony that there was any chemicals in the dirt or dust blown into plaintiff's eye. In fact the weight of testimony is otherwise. There was slag around the plant, but slag is a hard substance like rock and it was not established by the testimony of the plaintiff or any of the physicians, who examined the plaintiff, that any hard substance hit him in the eye or that any hard substance penetrated the eye, in fact no piece of steel, slag or other hard substance was removed from the eye.

"(2) The plaintiff is suffering from cataract. There are several kinds of cataract, among them traumatic, congenital, senile and systemic. No physician directly stated that traumatism was the cause of plaintiff's cataract. In cases of traumatic cataract, the lens of the eye is necessarily involved. Traumatic cataract arises either by a foreign substance penetrating the cornea, going through the anterior chamber and reaching the lens or by a blow injuring the lens capsule. There is an entire absence of evidence to the effect that there was any penetration of the cornea by a foreign substance or a blow upon the eye. It is true that on April 9, 1919, an operation was performed by Drs. Thommasson and Miller, which punctured the anterior chamber to exclude pus and to save the eyeball, but the sight, at that time, was gone.

"(3) The loss of the sight of the left eye of plaintiff was not caused by traumatic accidental injury."

On the foregoing facts the Board declared the law as follows:

"(1) There must be some cause or connection between the employment and the accidental injury. Where there is no natural connection between the risk and the employment, such as wind or lightning, it must affirmatively be shown that the nature of the employment peculiarly exposed the employee to such danger. Ordinarily an employee, while at work, who is injured by some force of nature, like wind, is not entitled to compensation unless the employment itself peculiarly exposes the employee to the hazard in a greater degree than the average member of the commonalty or unless the force of nature especially combined with some element or hazard of the employment to produce the injury.

"(2) The alleged accident did not arise out of and in the course of the employment.

"(3) The burden of proof is upon the plaintiff to show, not only that the accident and the injury arose out of and in the course of the employment, but that the condition of plaintiff was not the result of preexisting disease."

Feeling aggrieved at the failure of the Board to award him compensation, McDermott appealed in the way and manner provided by section 4935, Ky. St. Supp. 1918, to the Campbell circuit court, where the case was tried upon the record certified to it by the Board of Compensation. The trial court arrived at a different conclusion from that of the Board of Compensation and ordered the findings of the Board set aside and cause remanded to the Board for further proceedings looking to an award of compensation to McDermott. From this judgment the Andrews Steel Company appeals to this court.

The first and only question we need consider on this appeal is may a court review the finding of fact made by the Board; for if we cannot do so and are confined to the application of the law to the facts as found by the Board, such finding of fact being entirely adverse to his contention, there can be no relief granted appellee McDermott. No new or additional evidence can be heard on appeal to the circuit court, the review of the court being confined to determining whether—

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(1) The Board acted without or in excess of its powers.

(2) The order, decision, or award was procured by fraud.

(3) The order, decision, or award is not in conformity to the provisions of the act.

(4) If findings of fact are in issue, whether such findings of fact support the order, decision, or award.

No claim of fraud in the order or decision is made by appellee, and the trial court did not hear evidence on that subject.

The act under which this proceeding is had provides, in section 4935, that an award or order of the Board of Compensation shall be conclusive and binding as to all questions of fact unless the order or award is the result of fraud or misconduct of some person engaged in the administration of the act. Appellee McDermott rests his claim to compensation upon the loss of the sight of his left eye occasioned by traumatic accidental injury received in the course of his employment and arising out of such employment. The facts appear to preponderate in favor of appellee McDermott's contention, but there is evidence in the record which supports a contrary view. Construing the statute with reference to the conclusiveness of findings of facts by the Board, most of the courts, both of this country and of England, have given the language its literal meaning, holding a finding or decision of a board having original jurisdicion of a claim under the act conclusive on a question of fact, if the finding has any support in the evidence; but the entire absence of evidence to support such finding presents a question of law, subject to appellate review. In re Buckley (notes) Ann. Cas. 1916B, p. 475. Courts can and do review findings of law, but not of fact except in cases of the fraudulent administration of the act. If there be any evidence warranting a finding of fact, or if there be no controversy about the facts, there is and can be but a question of law which a court may review, and, if proper, reverse the order, decision, or award of the board. In the case of Hollenbach v. Hollenbach, 181 Ky. 262, 204 S. W. 152, 13 A. L. R. 524, which was the first opinion dealing with appeals from order of the Board of Workman's Compensation which came to this court, we said:

"One of the primary purposes of the act was the establishment of a board which would summarily determine all questions of fact and afford ready relief to claimants. Another object to be accomplished was the settlement of claims by a method in the nature of arbitration instead of by prolonged litigation, and a third reason was the relief of the courts, even where appealed to, from the necessity of passing upon questions of fact. It is the duty of the Board to make findings of fact, and if there be competent and credible evidence tending to support the award, or finding of fact, it, like the verdict of a properly instructed jury, will not be disturbed by a court in review."

Following this general rule, we held in Nelson v. Ky. River Stone & Sand Co., 182 Ky. 317, 206 S. W. 473, all awards or orders of the Workman's Compensation Board are in the absence of fraud conclusive and binding as to all questions of fact, the court being forbidden by statute to review the finding of fact made by the Board if that finding is such as to support the order of the Board, there being nothing in the record to indicate that the finding of fact or the order was the result of fraud or misconduct on the part of any person administrating or assisting in the administration of the act.

The finding of fact by the Board in effect is that appellee McDermott had a diseased eye before and at the time he went to work for the Andrews Steel Company and as time passed the affected eye grew worse until the vision of the eye was wholly lost; that the loss of the sight of the left eye of appellee McDermott was not the result of traumatic accident injury. There is some evidence in the record to support this finding.

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In such case courts must accept the finding of fact as true, and can only review the law of the case as applied to the facts as found by the Board. Obviously, if the loss of the sight of the left eye of appellee McDermott was the result of a diseased condition of that organ existing at the time he began to work at the steel mills, it could not have resulted from "accident arising out of and in the course of his employment" within the meaning of the act, and the Board properly refused him compensation.

The trial court erred in attempting to review the facts, and from this mistake come the erroneous judgment remanding the case to the Board for reconsideration and the allowance of compensation to McDermott. There is some evidence in the record to support the finding of the Board, and where there is such evidence only questions of law are reviewable by the courts unless there be some jurisdictional fact which is unsupported by substantial evidence. 1 Honnold, p. 821.

Judgment reversed, with directions to dismiss the petition.

HARRIS ET UX. v. CALCASIEU LONG LEAF LUMBER CO.
(No. 24621.)

(Supreme Court of Louisiana. Oct. 31, 1921.)

89 Southern Reporter. 885.

(Syllabus by Editorial Staff.)

1. MASTER AND SERVANT — COMPENSATION TO DEPENDENT PARENTS NOT MEASURED BY EXTENT OF DEPENDENCY.

Under Employers' Liability Act, § 8, subsec. 2, par. "g,"allowing surviving parents "actually dependent upon the deceased employee to any extent" 55 per cent. of his wages for 300 weeks, the extent of liability is not measured by the extent of the parents' dependency, and where the parents were actually dependent on the deceased employee to any extent, it was immaterial that only about half of his contributions to the family support was used for the support of others than himself.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

2. MASTER AND SERVANT—COMPENSATION RECOVERABLE BY PARENTS "DEPENDENT" ON CHILD FOR SUPPORT OF OTHER CHILDREN.

Under the Employers' Liability Act, § 8, subsec. 2. par. "g." parents of an employee are dependent on him if dependent on him for aid in supporting other children who are dependent upon them for support in view of the legal and moral obligation of the parents to support their children under Rev. Civ. Code, art. 227.

(For other cases, see Master and Servant, Dec. Dig. § 389.)

(For other definitions, see Words and Phrases, First and Second Series, Dependent.)

Appeal from Fifteenth Judicial District Court, Parish of Beauregard; Jerry Cline, Judge.

Proceedings under the Employers' Liability Act by Charles W. Harris and wife for compensation for the death of their son, opposed by the Calcasieu Long Leaf Lumber Company, employer. Compensation was awarded, and the employer appeals. Affirmed.

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Pujo & Liskow. of Lake Charles, for appellant.
Robert J. O'Neal, of De Ridder, for appellee.

O'NIELL, J. Defendant appeals from a judgment allowing plaintiffs compensation at the rate of $14.337 a week for 300 weeks, under the Employers' Liability Act (Laws 1918, No. 38) for the accidental killing of their son. He was under 21 years of age and was the eldest of plaintiffs' seven children. The father was earning $156 a month. The deceased had been contributing approximately $44 a month to the support of the family, and to that extent the parents were dependent upon him for the family's support. His average weekly wages were $26.14. The compensation allowed by the judgment is therefore 55 per cent. of the weekly wages for the 300 weeks; which is in accord with paragraph (g) of subsection 2 of section 8 of Act 38 of 1918, viz.:

"That for injury causing death within one year after the accident weekly compensation shall be paid under this act for a period of three hundred weeks to the following persons:

"(g) If there be neither widow or widower nor child, then to the father or mother of the deceased employee if actually dependent on the deceased employee to any extent for support at the time of the injury and death, twenty-five per centum of wages. if in such event both the father and the mother of the deceased survive and were actually dependent on the deceased employee to any extent for support at the time of the injury and death, fifty-five per centum of wages for their joint benefit."

[1, 2] Appellee contends that the amount of compensation allowed in this case is excessive, because, as the cost of maintenance of the family of nine was approximately $22 a month for each person, only half of the $44 contributed monthly by the deceased went to the support of the other members of the family. The answer to the argument is that the statute does not measure the extent of liability by the extent to which the parents of the deceased employee were dependent upon him for support. Th statute arbitrarily fixes the liability at 55 per cent. of the weekly wages for 300 weeks, if the parents "were actually dependent on the deceased employee to any extent for support." Therefore the extent of liability for compensation is not governed by the extent to which the parents were dependent upon the employee for support. It is sufficient that they were actually dependent upon him to any extent. And it has been decided that such dependence may include dependence for aid in supporting children who are dependent upon the parents for support, because the parents are under a legal as well as moral obligation to support their children. R. C. C. art. 227; Heinzelman v. Board of Commissioners, 149 La. —, 88 South. 798.

The judgment appealed from is affirmed at appellant's cost.

GOLDEN'S CASE.

(Supreme Judicial Court of Massachusetts. Worcester. Nov. 26, 1921.)

132 Northeastern Reporter, 726.

1. MASTER AND SERVANT — PROPER PRACTICE FOLLOWED IN APPROVAL OF FEE FOR MEDICAL SERVICES TO COMPENSATION CLAIMANT.

Under the Workmen's Compensation Law, §§ 8, 30, referring to the approval of charges for medical services, etc., the single member of the

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Industrial Accident Board to which a petition for approval of a charge for services as masseuse was referred properly reported the facts to the Board for decision instead of making a decision, and, no decision having been made by the single member, the provision for review by the Board was inapplicable.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

2. MASTER AND SERVANT—COMPENSATION INSURER NOT LIABLE FOR SERVICES OF MASSEUSE NOT RENDERED UNDER PHYSICIAN'S DIRECTION.

Under Workmen's Compensation Law, § 30, providing that during the first two weeks after an injury to an employee, etc., and, in unusual cases, in the discretion of the Department of Industrial Accidents, for a longer period, the insurer shall furnish medical and hospital services, an insurer was not liable for services in massaging an injured arm solely upon the employee's request, and not as a part of treatment by a physician, even though the injury constituted an unusual case, and assuming that massage as part of treatment by a physician might properly be classed as medical services.

(For other cases, see Master and Servant, Dec. Dig. § 385[16].)

Appeal from Superior Court, Worcester County.

Proceeding under the Workmen's Compensation Act by Gertrude R. Doyle for the approval of her fee for services rendered the employee, Newton Golden, opposed by the Worcester Electric Light Company, employer, and the Employers' Liability Assurance Corporation, Limited, insurer. The bill was approved by the Industrial Accident Board, and decree therefor entered in the superior court, and the insurer appeals. Reversed, and petition dismissed.

The petitioner claimed to have performed services for the employee as masseuse commencing several months after the accident. The Industrial Accident Board ruled that the case was an unusual case under the statute necessitating such treatment.

Charles C. Milton and Frank L. Riley, both of Worcester, for appellant.

John F. McGrath and J. Joseph MacCarthy, both of Worcester, for appellees.

JENNEY, J. The employee, on March 29, 1918, while working for the Worcester Electric Light Company, received an injury to his shoulder resulting in the complete atrophy of his right hand and arm. On January 15, 1920, the insurer paid to him under the provisions of the Workmen's Compensation Act (St. 1911, c. 751, as amended by St. 1912, c. 571) $500 as specific compensation for "the loss of the use of his hand," apparently on the ground that it had been so injured as to be permanently incapable of use. He was also paid compensation for seven months following the injury, but received nothing for partial disability.

From early in September, 1919, to the date of the hearing upon the petition hereinafter described, he has been treated upon three hundred and three different days by Gertrude R. Doyle as masseuse. Her bill for services amounts to $909.

The present proceeding was begun by the petition of the masseuse for the approval of her charges under St. 1911, c. 571, pt. 3, § 13, as amended by St. 1914, c. 708, § 12, and St. 1917, c. 297, § 12, now contained in G. L. c. 152, § 13. This section of the statute provides that the

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fees of attorneys and physicians and charges of hospitals for services under the act shall be subject to the approval of the Industrial Accident Board.

A petition by the masseuse for the approval of her bill was filed with the board and heard by a single member, upon whose report of the facts the board found that the nature of the injury constituted "an unusual case" (St. 1911, c. 571, pt. 2, § 5, as amended by St. 1914, c. 708, § 1. and St. 1917, c. 198, now G. L. c. 152, § 30), inasmuch as it resulted in complete atrophy of the right hand and arm of the employee, that the amount was a reasonable charge for the services, and ordered its payment by the insurer.

[1] The procedure in this case was correct. The statute did not provide for the decision of a single member which was subject to review. The procedure differs materially from that specified when the insurer and the injured employee fail to reach an agreement as to the compensation of the latter. In such cases the claim is assigned for hearing by a single member of the board, whose "decision * * * together with a statement of the evidence, his findings of fact, rulings of law, and any other matters pertinent to questions arising before him * * * [is] filed with the Industrial Accident Board. Unless a claim for review is filed by either party within seven days," the decision of the single member is enforceable under the statute. St. 1911, c. 751, pt. 3, § 7, as amended by St. 1912, c. 571, § 12, and St. 1917, c. 297, § 4, G. L. c. 152, § 8. In the proceedings now considered no decision of a single member was made. All that such member was authorized to do was after hearing to "report the facts * * * for decision." See Huxen's Case, 226 Mass. 292, 115 N. E. 426. Inasmuch as the single member made no "decision," the statutory provision for a review by the board was wholly inapplicable.

[2] We do not find it necessary to decide whether the employee's injury properly could have been found to constitute "an unusual case," or whether payment for medical services for a period commencing nearly a year and a half after the accident could rightly have been ordered.

The statute provides for the payment of only physicians and hospitals. Under the procedure now considered, that which is to be furnished (St. 1911, c. 751, pt. 2, § 5, as amended by St. 1914, c. 708, § 1. and St. 1917, c. 198, now G. L. c. 152, § 30) is "adequate and reasonable medical and hospital services, and medicines, where they are needed." Detailed provisions as to the selection of a physician are set forth. While the term "medical services," if used without limitation, may be susceptible of a broad construction, the statutes cited clearly indicate that those words, as therein used, are restricted to medical assistance rendered by the physician or under his direction and control. See People v. Pierson., 176 N. Y. 201, 68 N. E. 249, 63 L. R. A. 187, 98 Am. St. Rep. 666.

It is not necessary to decide whether massage may be employed in connection with or as a part of treatment by a physician, and under such circumstances properly classed as medical services. The massage performed, so far as it appears solely upon the employee's request and not as a part of treatment by a physician, was not medical services within the statute, and the insurer is not liable therefor in this proceeding.

The decree of the superior court ordering the insurer to pay to the petitioner the amount of her charges must be reversed, and a decree entered dismissing the petition.

So ordered.

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ULASKI v. MORRIS & CO. (No. 22191.)

(Supreme Court of Nebraska. Oct. 14, 1921.)

184 Northwestern Reporter 946.

(Syllabus by the Court.)

1. MASTER AND SERVANT—DISTRICT COURT'S FINDING ON CONFLICTING EVIDENCE IN COMPENSATION CASE CONCLUSIVE.

"Where the district court in workmen's compensation case finds, on substantially conflicting evidence, that the employee was injured in a particular manner, such finding of fact will not be reversed on appeal unless clearly wrong." Swift & Co. v. Prince, 106 Neb. ——, 183 N. W. 557.

(For other cases, see Master and Servant, Dec. Dig. § 418[6].)

2. MASTER AND SERVANT—COMPENSATION ALLOWABLE FOR LOSS OF FINGER STATED.

Where the injured employee suffered 25 per cent partial permanent loss of the normal use of his second or middle finger of his right hand, the extent of the injury not being ascertainable until 10 weeks after the accident, then he is entitled, under Rev. St. 1913, § 3662, as amended by Laws 1917, c. 85, to compensation for the period of 7½ weeks at $15 a week, commencing, not with the day of the accident, but with the day when the extent of the injury is ascertainable, and in addition is entitled to $15 a week for 10 weeks.

(For other cases, see Master and Servant, Dec. Dig. § 385[6].)

(Additional Syllabus by Editorial Staff.)

4. MASTER AND SERVANT — ATTORNEY'S FEE ALLOWED COMPENSATION CLAIMANT HELD REASONABLE.

Seventy-five dollars, allowed compensation claimant by district court on appeal, *held* a reasonable attorney's fee provided for under Rev. St. 1913, § 3666, as amended by Laws 1917, c. 85, and Laws 1919, c. 91.

(For other cases, see Master and Servant, Dec. Dig. § 420.)

Appeal from District Court, Douglas County; Wakeley, Judge.

Application by Frank Ulaski to the Compensation Commissioner for an award under the Workmen's Compensation Act, opposed by Morris & Co., employers, in which an award was made and upheld and increased on appeal to the District Court, and the defendant appeals. Modified and affirmed.

James C. Kinsler, of Omaha, for appellant.

A. H. Bigelow, of Omaha, for appellee.

Heard before Morrissey, C. J., and Aldrich, Day, Dean, Flansburg, and Rose, JJ.

ALDRICH, J. On September 11, 1920, Frank Ulaski, an employee of defendant, was injured while in the course of his employment. He was what is called a "beef lugger." On that day he says that a beef fell from an overhead rail, and in catching it a bone sliver was forced into the first joint of the middle finger of the right hand. The defendant's physician administered some iodine and bandaged the finger and he had daily dressings at the doctor's office. In the meantime an infection developed and it became necessary to open the wound. Finally, he was sent home, where

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he stayed during the succeeding week and two days. He was treated daily by the company physician and his finger was repeatedly lanced. He returned on September 29, under direction of the company's physician, and was assigned a lighter task in which he did not have to use the injured finger.

On October 1, he was called to the office and given a check for $5 to cover his compensation for two days, the 27th and 28th of September, the first week being exempted by law. He signed a release; and then returned to work and was required to do work that necessitated the use of his finger. He told the foreman he could not do that work because of his sore finger. An altercation ensued and he was permanently discharged. This discharge occurred about two hours after he had signed the release, and, notwithstanding his discharge, he was treated by the company physician for several days afterwards. Later, while his finger was still swollen and open. the company physician refused him further treatment. It was on October 7 that he was refused further compensation, and then he went to the compensation commissioner, who informed the company's claim agent and told him that Uuaski was at that time entitled to a week's compensation. Ulaski then went to the company's office and was paid the sum of $15 and was required to sign two releases. His finger was at that time still sore and swollen. He returned to the deendant company on November 16, seeking work. The defendant company had not at that time begun to lay off men, although they refused him employment. It is claimed that plaintiff was not yet in condition to work and was not able to use the knife. Even at this time his finger was in such a condition that he was unable to work and was forced to quit after shoveling coal a few hours. January following he applied for compensation and was awarded a hearing and was allowed additional compensation. Upon a hearing in the district court being had, the trial court, among other things, held that—

"The plaintiff have and recover from the defendant company, in addition to the sum already paid, compensation at the rate of $15 per week for a period of 17½ weeks, all of which is now due and payable forthwith; that the defendant company be and it is hereby ordered to pay plaintiff the sum of $75 for attorney's fee in this court, and to pay to the plaintiff for expert witness fees charged as costs the sum of $50, and to pay into court the costs of this suit; that, unless said payments are made forthwith, the defendants shall also pay 50 per cent of the said compensation for 17½ weeks as the statutory waiting time."

From the judgment so rendered the defendant appealed.

[1] In Swift & Co. v. Prince, 106 Neb. ——, 183 N. W. 557, the court said:

"The trial court saw the witnesses and heard their testimony, and its findings, upon conflicting evidence, should not be disturbed. It is the rule in cases of this kind that finding of fact supported by sufficient evidence, or findings of fact on substantial conflicting evidence, will not be reversed unless clearly wrong."

The rule announced in the Prince Case is applicable to the facts before us and we adhere thereto. The finding of fact is amply supported by the record. The court was justified in allowing Ulaski 10 weeks for total disability in addition to the week and two days formerly allowed by the court under the finding of fact.

[2] The record shows conclusively that plaintiff was allowed 10 weeks' compensation for time lost dating from October 7, 1920. After he had rested and had had time to make improvement it was further found that he had lost 25 per cent of the normal use of his injured finger. His loss altogether, then, was 10 weeks for total disability and 7½ weeks for permanent partial loss of the finger, making a total loss of time of 17½ weeks at $15 a week, as provided by statute. The defendant refused to

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pay the award as made by the compensation commissioner. Then the case was tried in the district court and the decision of the compensation commissioner affirmed.

As appears of record there was total disability of 10 weeks, and according to the spirit and intent of the statute the plaintiff was entitled to a recovery of $15 a week pending that time, and to a permanent partial disability for a period of 7½ weeks. This in the aggregate constitutees the total loss of the plaintiff for the entire time of the injury, and we concur in the finding of the court in this regard as it is amply sustained by the record. This case is not unlike the principle found in Addison v. Wood Co., 207 Mich. 319, 174 N. W. 149. The principles of the statute as applied to this case are fully discussed and the application of the law which we follow is made. We adhere to the principle of law therein involved. It is in point in the instant case. We believe the court was right in allowing a total disability for a period of 10 weeks and was correct in allowing permanent partial disability at the rate of $15 a week. The requirements of the statute have been amply complied with, and the court has met the situation as shown in plaintiff's case.

We are not unmindful of the fact that in the discussion and conclusion of the instant case there are cases holding a different principle and conclusion from what we have arrived at, but at the same time we believe that our conclusion has the support of law and does ample justice to the parties under these facts.

[4] On the question of attorney's fees, section 3666, Rev. St. 1913, as amended by chapter 85, Laws 1917, and chapted 91, Laws 1919, provides as follows:

"Whenever the employer refuses payment, or when the employer neglects to pay compensation for thirty days after injury, and proceedings are had before the compensation commissioner, a reasonable attorney's fee shall be allowed the employee by the court in the event the employer appeals from the award of the commisioner and fails to obtain any reduction in the amount of such award, the appellate court shall in like manner allow the plaintiff a reasonable sum as attorney's fees for the appellate proceedings."

The $75 so allowed by the trial judge is correct and just and we affirm it. It follows that defendant must pay the costs of this suit.

[3] There is, however, no provision in the law for the payment of expert witness fees. The expert witnesses are therefore allowed the usual and lawful witness fee, and no more. Main v. Sherman County, 74 Neb. 155, 103 N. W. 1038.

The judgment of the district court is affirmed, except as modified herein. It is ordered that the court disallow the expert witness fees in the amount of $50, and that the expert witness recover only the usual and lawful witness fees; and that defendant receive credit for one and one-third weeks' compensation which defendant has already paid on plaintiff's claim. It is further ordered that defendant pay an attorney fee for plaintiff, as costs, in this court, in the sum of $100.

Affirmed as modified.

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ADAMS v. ATLANTA CONST. CO.

(New York Supreme Court, Appellate Division, Third Department. November 16, 1921.)

190 New York Supplement, 681.

MASTER AND SERVANT — APPELLANT ENTITLED TO 33 DAYS TO SERVE NOTICE AFTER NOTICE OF COMPENSATION AWARD IS "SENT."

Under Workmen's Compensation Law, § 23, providing that appeal may be taken within 30 days after notice of the award has been "sent" to the parties, and that except as otherwise provided the appeal is subject to practice in civil actions, and Code Civ. Proc. § 798, granting 3 days' additional time in which to take appeals subject to the law and practice in civil actions, appellant had 33 days to serve notice; the word "sent" not limiting the time in all cases to 30 days, it implying either sending by messenger, which is a personal service, or sending by mail, which is service by mail.

(For other cases, see Master and Servant, Dec. Dig. § 417[4½].)

(For other definitions, see Words and Phrases, First and Second Series, Send.)

Claim by Elizabeth Adams for compensation under the Workmen's Compensation Law against the Atlanta Construction Company. Motion by claimant to dismiss the appeal of the Globe Indemnity Company, insurer, on ground that notice of appeal was not served in time. Motion denied.

Argued before John M. Kellogg, P. J., and Cochrane, Henry T. Kellogg, Kiley, and Van Kirk, JJ.

Thomas H. Dowd, of Salamanca, for claimant.

Robert M. McCormick, of New York City (Thomas J. Skelly and Andrew Eckel, both of New York City, of counsel), for Globe Indemnity Co.

COCHRANE, J. Notice of award was mailed to the attorneys for the appellant August 6, 1921. Thirty-two days thereafter and on September 7, 1921, notice of appeal was served. Section 23 of the Workmen's Compensation Law (Consol. Laws, c. 67) provides as follows:

"Within thirty days after notice of the filing of the award or the decision of the Commission has been sent to the parties an appeal may be taken to the Appellate Division of the Supreme Court, Third Department."

After containing various provisions not here material, said section continues:

"Otherwise such appeal shall be subject to the law and practice applicable to appeals in civil actions."

When this appeal was taken, section 798 of the Code of Civil Procedure was in effect, and that section afforded this appellant 3 days' additional time in which to take the appeal, provided it was "subject to the law and practice applicable to appeals in civil actions." We discover no reason why it was not thus subject to such law and practice. The argument to the contrary is based on the use of the word "sent"

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in the statute instead of the word "served," and it is claimed therefore that an appellant is limited in all cases to 30 days for the service of a notice of appeal. The statute does not say "sent by mail" or "mailed." The word "sent" implies either sending by messenger, which is a personal service, or sending by mail, which is a service by mail. The statute should be construed according to its obvious intent, and we think that, as in the case of an appeal in a civil action, the appellant here was entitled to 3 days' additional time in which to serve the notice of appeal. Furthermore, said section 23 provides that an appeal may be taken to the Court of Appeals "in the same manner and subject to the same limitations not inconsistent herewith as is now provided in civil actions." This clearly gives an appellant under this section the same time within which to take an appeal to the Court of Appeals as exists in civil actions, and it would be an obvious incongruity to hold that an appellant has the additional time in appealing to one court but not to the other. The Legislature did not so intend.

The motion should be denied.

KNIGHT v. FERGUSON.

(New York Supreme Court, Appellate Division, Third Department. November 16, 1921.)

190 New York Supplement, 659.

1. MASTER AND SERVANT—COMPENSATION RECOVERABLE FOR PERMANENT INJURY TO NERVE IMPAIRING UPWARD MOTION OF ARMS.

Where claimant sustained a permanent injury to a nerve in the spinal column, making it impossible to raise his arms above horizontal position, the evidence showing that all functioning parts would return to normal, except the limitation on the upward motion of the arms, he was not entitled to a lump sum award on theory that he sustained a 40 per cent. loss of use of both arms, making it possible to earn, together with compensation, an amount in excess of his earnings prior to the accident, but he should be given an award under Workmen's Compensation Law, § 15, subd. 3, clause designated as "other cases" providing for compensation during continuance of partial disability subject to reconsideration of degree of such impairment by the Commission on its motion or upon application of party in interest.

(For other cases, see Master and Servant, Dec. Dig. § 385[2].)

2. MASTER AND SERVANT—COMPENSATION NOT DEFEATED BY NONACCEPTANCE OF WORK OFFERED.

A claimant with permanent disability impairing his earning power in his occupation will not be denied compensation under Workmen's Compensation Law because of refusal to accept work offered by employer at former wage.

(For other cases, see Master and Servant, Dec. Dig. § 385[17].)

Appeal from State Industrial Commission.

Proceeding under Workmen's Compensation Law by William Francis Knight for compensation for injuries, opposed by Frank L. Ferguson, employer and self-insurer. From an award for claimant by the

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State Industrial Commission, the employer appeals. Award reversed, and matter sent back to Commission, with instructions.

Argued before John M. Kellogg, P. J., and Cochrane, Henry T. Kellogg, Kiley, and Van Kirk, JJ.

Edward P. Lyon, of New York City, for appellant.

Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, of counsel), for State Industrial Commission.

Harry H. Thurlow, of New York City, for respondent.

KILEY, J. On May 26, 1919, the claimant was at work for appellant, who was a contractor, operating at Jamaica, Long Island, N. Y. He was working at carpenter work, and received wages at the rate of 68 cents an hour. On the day aforesaid he was shingling the eaves of a house and fell to the ground below. Such fall fractured the cervical vertebræ, resulting in a permanent bilateral deformity and involved the posterior thorax nerve which supplied the serratus magnus muscle. This description means that fracturing the vertebræ in the back of the neck (spinal column) destroyed the nerve, which is the nerve that contracts the muscles that make possible the raising and lowering of the arms. Claimant can only raise his arms to about a horizontal position. The evidence is sufficient for the finding that claimant received such injury and that its result was as above stated. There was no injury by direct contact with the arms, no physical injury aside from the nerve injury. On suggestion from the Commission and before any formal decision was entered the employer paid to claimant money at different times. Several awards were then made on the basis of reduced earnings. The claimant had recovered sufficiently to do light work, but at reduced wages. On November 12, 1920, the Commission rescinded all previous awards made claimant and made a new award to claimant of $20 per week for 249.6 weeks, "the same being for 40 per cent. loss of use of both arms." At the time such award was made claimant was earning 51 cents an hour or $22.45 a week. This award gives claimant an income of $42.45 or practically 33⅓ per cent. more than he was earning before injury. It may be urged that, if he had suffered a physical injury, in contradistinction to an injury to a nerve in the back of his neck which controls the arm motion, he would in that case be allowed and receive the same compensation as here allowed to him; but under such circumstances his wage-earning capacity generally would have been reduced so that he could not have earned 51 cents an hour after the injury; it would have been much less, and the figure as a basis to compare with the 68 cents per hour, the pre-injury wage, would have been less, and by reason thereof would have come under the other provision of section 15, subd. 3, of the Workmen's Compensation Law (Consol. Laws, c. 67). As it works out now the injury was greatly to his advantage from a financial point of view. He can use his arms to work now as well as ever except in the one capacity of elevation above his head or above a horizontal line. Such result as reached here could not have been within the original conception and final framing of the statute by our lawmakers. In Grammici v. Zinn, 219 N. Y. 322, 114 N. E. 397, the claimant lost the first, second, and third fingers and the first phalange of the fourth finger of the right hand. The Commission finally awarded for the permanent loss of the use of the hand. It was affirmed in the Appellate Division. 173 App. Div. 922, 157 N. Y. Supp. 1127. The Court of Appeals reversed, and held that, because the claimant was incapacitated from following his former occupation or vocation, it did not follow nor tend to prove that the hand or the use of it was lost.

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[1] Here there is no injury to the arm, elbow, hand, or fingers except such as comes from the injured nerve; all is growing stronger, except the nerve, injury to which is permanent. The evidence tends to show that all functioning parts will return to normal, except the limitation on the upward motion of the arms. If that anticipation is realized, then there should be some way to adjust the compensation claimant shall receive as conditions change. It cannot be done under this award. Claimant is asking for a commutation of the award into a lump sum, and should he be indulged in that quest, and finally become able to earn more than before the injury, where would justice to all parties obtain? This award should have been made under the last clause of section 15, subd. 3, which provides that—

"The compensation shall be sixty-six and two-thirds per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability, but subject to reconsideration of the degree of such impairment by the Commission on its own motion or upon application of any party in interest."

I do not find a parallel case; but in addition to the Court of Appeals decisions above cited we have numerous cases where it is held that awards should have been made under the subdivision of section 15 above quoted. Supple v. Erie R. Co., 180 App. Div. 135, 167 N. Y. Supp. 391; Behrens v. Stevens Co., 188 App. Div. 66, 176 N. Y. Supp. 28. If this case does not come under the subdivision of the section above quoted, it is hard to conceive what cases it is intended to cover.

[2] The appellant further urges that he offered claimant work at his former wage which he refused to accept, and therefore the claim should be dismissed. Claimant has a permanent disability, and at present and in his present occupation it impairs his earning power; to hold he must accept any work offered him, or lose the compensation that he is actually entitled to, would be a great injustice; his reason for nonacceptance, while not the most practical, is sufficient. He is entitled to compensation as above indicated, viz. to be computed under the provisions of section 15, subd. 3, last clause of that subdivision, designated as "other cases."

The award should be reversed, and the matter sent back to the Commission, with instruction to make another award in accordance with this opinion. All concur.

SEAVER v. PAYNE, Director General of Railroads.

(New York Supreme Court, Appellate Division, Third Department. November 16, 1921.)

190 New York Supplement 724.

1. MASTER AND SERVANT—EMPLOYMENT IN INTERSTATE COMMERCE MUST BE SHOWN.

To recover under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), it is necessary for the injured employee to establish that he, as well as the railroad company, was engaged at the time of his injury in interstate commerce.

(For other cases, see Master and Servant, Dec. Dig. § 265[1].)

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2. COMMERCE—INJURED SERVANT ENLARGING OLD TURNTABLE HELD NOT ENGAGED IN "INTERSTATE COMMERCE" UNDER FEDERAL EMPLOYERS' LIABILITY ACT.

One assisting in enlarging of pit of an old turntable, for the purpose of installing a much larger turntable, was engaged in new construction and not in interstate commerce under the federal Employers' Liabilty Act (U. S. Comp. St. §§ 8657-8665), especially where the servant's work pertained exclusively to excavating outside of the old turntable, notwithstanding that the old turntable was being used while the new one was being constructed.

(For other cases, see Commerce, Dec. Dig. § 27[8].)

(For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.

Appeal from Trial Term, Franklin County.

Action by George Seaver against John Barton Payne, the Director General of Railroads. From a judgment entered on a verdict of the jury for the plaintiff, and from an order denying his motion to set aside the verdict, the defendant appeals. Judgment and order reversed, and complaint dismissed.

Argued before John M. Kellogg, P. J., and Cochrane, Henry T. Kellogg, and Kiley, JJ.

Cantwell & Cantwell, of Malone (John M. Cantwell, of Malone, and E. W. Lawrence, of Rutland, Vt., of counsel), for appellant.

George J. Moore, of Malone (John M. Stark and Robert W. Upton, both of Concord, N. H., of counsel), for respondent.

COCHRANE, J. [1] The plaintiff has recovered a verdict under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) for injuries received while working at a turntable of the Rutland Railroad Company at Malone, N. Y. He claims to have received the injuries because of the negligence of the said company. The Rutland Railroad Company was engaged in interstate commerce between the states of New York and Vermont. For the plaintiff to sustain his judgment it is necessary for him to establish that he also at the time of his injury was engaged in interstate commerce as an employee of the railroad company.

At the time of the accident there had been and was a turntable in constant use as an instrumentality of interstate commerce. Engines operating in both states were daily driven onto this turntable, which was operated in connection with their ordinary and general use.

The turntable was 70 feet in diameter. At the time of the accident it was being enlarged to 90 feet in diameter. An excavation 10 feet wide and 8 feet deep was being made around the circumference of the old structure. A concrete wall was constructed around the outer edge of this enlarged excavation. The work of excavation and concrete construction was being made in sections. Plaintiff was removing the excavated dirt with a wheelbarrow when he received his injuries. Twelve or thirteen men were employed in the work. It extended over a period exceeding one month. The old table, which weighed about 80 tons, was to be replaced by a new one weighing about 100 tons. Everything was to be removed from the center of the pit. The pit was substantially all that would be left. The old turntable was operated by hand power. The new one was to be operated by electric power.

Did the work being done as above described constitute repairs to the old turntable, or was it the construction of a new one? On the answer to this question depends the plaintiff's right to recover. Pedersen v. Dela-

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ware, L. & W. R. Co., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153. In Raymond v. Chicago, Milwaukee & St. Paul Railway Co., 243 U. S. 43, 37 Sup. Ct. 268, 61 L. Ed. 583, the plaintiff was injured while working in a tunnel which was only partially bored, and it was held that he was not entitled to recover because the tunnel was not yet in use as an instrumentality of interstate commerce.

In New York Central Railroad Co. v. White, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629, it was held as follows:

"The admitted fact that the new station and tracks were designed for use, when finished, in interstate commerce, does not bring the case within the federal act. * * * Decedent's work bore no direct relation to interstate transportation, and had to do solely with construction work, which is clearly distinguishable, as was pointed out in Pedersen v. Delaware, Lackawanna & Western R. R. Co., 229 U. S. 146, 152."

In Kinzell v. Chicago, Milwaukee & St. Paul Railway Co., 250 U. S. 130, 39 Sup. Ct. 412, 63 L. Ed. 893, the plaintiff was injured while engaged in the work of constructing an earthen fill to take the place of a wooden trestle over which interstate trains were passing at the time of the accident. The Supreme Court of Idaho held:

"That constructing a fill to take the place of a trestle which is being used in interstate commerce is new construction and that the fill does not become part of the railroad until it is completed and the track is placed upon it instead of upon the trestle."

The United States Supreme Court reversed the Idaho Supreme Court on the ground that at the time of the accident the fill had proceeded to such an extent that the newly placed earth interfered with the tracks on which interstate trains were passing and that the work of the plaintiff was to keep the tracks free from such obstruction. On that ground it was held that the plaintiff was engaged in interstate commerce, but there was no criticism of the determination of the state court that the construction of the fill to take the place of the trestle was new construction and to that extent was not interstate commerce work.

[2] It seems quite clear, in view of the facts heretofore recited, that the plaintiff was engaged in new construction. In no just or proper sense can it be said that the railroad company was repairing the old turntable. The latter was not merely being renewed or restored. It was not only being materially enlarged, but, as we have seen, the entire structure was undergoing a change for the purpose of establishing its adaptability to the enlarged structure. An electrically operated turntable 90 feet in diameter and weighing 100 tons can hardly be charcterized as repairs to a hand-operated turntable 70 feet in diameter and weighing 80 tons. . The new structure was more than a substitute for the old one. Its functions were materially different. It permitted the use of larger engines and cars. Its purpose was to afford facilities beyond the capacity of the old structure. It did not contemplate the same kind of work which the old structure had performed, but it contemplated a develoment of railroad activities beyond the possibilities of the old structure. The question is practically the same as if the new turntable was being built in another locality. In its essential features this was new construction, and within the authorities the plaintiff was not therefore engaged in interstate commerce. Moreover, his work pertained exclusively to excavating outside of the old turntable and in no aspect of the case did it have anything to do therewith. The fact that the old turntable was being used while the new one was being constructed does not affect the question. The new structure had not yet become an instrumentality of interstate commerce.

The judgment and order should be reversed, and complaint dismissed, with costs. All concur

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SMITH v. MacARTHUR BROS. CO. ET AL.

(New York Supreme Court, Appellate Division, Third Department. November 16, 1921.)

190 New York Supplement, 644.

MASTER AND SERVANT — MOTHER HELD DEPENDENT WITHIN COMPENSATION LAW.

Mother *held* a dependent entitled to compensation for her son's death under the Workmen's Compensation Law, though she and her husband owned a 90-acre farm with two houses upon it, subject to a $300 mortgage, and husband was earning $5 a day, had $300 in the bank, and was receiving $30 a month rent for the farm, and she had a fixed income from the government of $3.50 per week.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

Kiley, J., dissenting.

Appeal from State Industrial Commission.

Proceeding by Jessie Smith under the Workmen's Compensation Law (Consol. Laws, c. 67) to obtain compensation for the death of her son, Franklin C. Smith, opposed by the MacArthur Brothers Company, employer, and the London Guaranty & Accident Company, Limited, insurance carrier. There was an award of compensation, and the employer and insurance carrier appeal. Award affirmed.

Argued before John M. Kellogg, P. J., and Cochrane, Henry T. Kellogg, Kiley, and Van Kirk, JJ.

William Butler, of New York City (Charles Stockdell Gray, of New York City, of counsel), for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

PER CURIAM. Award affirmed.

KILEY, J. (dissenting). It seems to me that appellants, in their first point, state fairly what facts must be established before compensation can be awarded to an alleged dependent, viz.;

(1) "That sums of money have actually been given by deceased to his mother."

(2) "That such sums of money received were actually used for her support."

(3) "That she was in a position where such sums of money were necessary for her support at the time of the accident."

(4) "That she did not have a husband who was able to support her."

I think this position taken by appellants is fairly within the holding in Birmingham v. Westinghouse Electric & Mfg. Co., 180 App. Div. 48, 167 N. Y. Supp. 520, and Frey v. McLoughlin Bros., 187 App. Div. 824, 175 N. Y. Supp. 873. The situation here does not create a condition of dependency as contemplated by the statute. They owned a farm of 90 acres, two houses upon it, with but $300 mortgage against it, when the son was killed. Since then it has been paid down to $150. At the time of the accident, the time when dependency must exist, if at all, the father was earning $5 a day, he had $300 in the bank, was receiving $30 a month rent for the farm, and lived in one of the houses rent free, and his wife had a fixed income from the government of

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$3.50 per week. As Judge Woodward said in 180 App. Div. supra, the law was not intended to create a fund to pay off mortgages, and it can be added that it is not intended to furnish money to be deposited in the bank to draw interest, and not even to pay indebtedness. It impresses me that unless we are going to throw down the bars and let in practically every claim for dependency, we will have to reverse this award. The only question is: What is to be our policy? I will dissent.

STIMAL v. JEWETT & CO. ET AL.

(New York Supreme Court, Appellate Division, Third Department. November 16, 1921.)

190 New York Supplement 889.

1. MASTER AND SERVANT—COMPENSATION AWARD ON PHYSICIAN'S UNSWORN REPORT REVERSIBLE.

An award under Workmen's Compensation Law based on the unsworn report of a physician, received by the Industrial Commission without notice to employer and insurance carrier, outside of a regular hearing, without opportunity for cross-examination, is prejudicial to the employer and insurance carrier, and must be reversed.

(For other cases, see Master and Servant, Dec. Dig. § 405[1].)

2. MASTER AND SERVANT—COMPENSATION CASE REMITTED FOR REHEARING FOR ADDITIONAL FINDINGS.

The reviewing court, on reversing an award under Workmen's Compensation Law, because based on unsworn report of a physician without opportunity to cross-examine him, will not dismiss the claim on the ground that the employee's injury, while being transported in employer's bus to the place of work, did not arise in the course of the employment, in the absence of a finding as to whether the passage in the bus was on the employer's or the employee's time, but will remit the matter for a rehearing.

(For othr cases, see Master and Servant, Dec. Dig. § 417[9].)

Appeal from State Industrial Commission.

Proceedings under the Workmen's Compensation Law (Consol. Laws, c. 67) by William Stimal for compensation for injuries, opposed by Jewett & Co., employer, and the Employers' Mutual Insurance Company of New York, insurance carrier. Award by State Industrial Commission for claimant, and employer and insurance carrier appeal. Reversed, and matter remitted to Commission.

Argued before John M. Kellogg, P. J., and Cochrane, Henry T. Kellogg, Kiley, and Van Kirk, JJ.

Blauvelt & Warren, of New York City (Joseph A. Warren, of New York City, of counsel), for appellants.

Charles D. Newton, Atty. Gen.. (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

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JOHN M. KELLOGG, P. J. [1] On December 13, 1920, the last hearing was had before the Commission, when it announced that it would ask the claimant to appear before Dr. Grant for examination, and the case was continued. Dr. Grant made a report to the Commission January 12, 1921, and it is evident that his report forms the basis of the determination that there was a loss of the use of one-third of the hand. Apparently the report was not submitted at any hearing of which the appellants were notified. Dr. Grant did not appear for examination, and there was no opportunity to cross-examine him. The award therefore stands on the doctor's unsworn statement, which was received outside of any regular hearing. The law contemplates that the employer and the insurance carrier shall be notified of the hearing and participate therein, and the receipt of this report, under the circumstances, was prejudicial to the appellants and calls for a reversal. Jack v. Morrow Mfg. Co., 194 App. Div. 565, 185 N. Y. Supp. 588.

The difficult question is whether the claim should be dismissed or the matter sent back to the Commission for a rehearing. The contention of the appellant is that the injury did not arise in the course of the employment, and if this contention is sustained the claim should be dismissed. If, however, there is a chance that the claim can be sustained, the claimant should have an opportunity to fully present his case to the Commission.

[2] Jewett & Co.'s plant was on the Military Road, some distance from the city. The trolley cars ran by the plant, but did not give satisfactory service, and the employer deemed it for its interest to furnish and operatae its own bus between the city and the works. The bus was furnished solely for the use of the employees and was not a public conveyance. The employer, however, charged each employee using it the same fare he would pay if he used the trolley car. The bus called at various places in the city and picked up the employees who presented themselves there. The claimant was near the garage where the bus was kept, and in the early morning went to the garage and took a place upon the bus. The bus was a little late in starting, on account of some fault in the engine, and as the bus proceeded upon its way, it was found necessary to stop at a garage and have some work done upon it. At the early morning hour the garage was not open. It was a cold morning, about ten degrees below zero. The claimant remained in the bus. The chauffeur and the other employee upon the bus went to the boiler room of the garage for relief from the cold. When they discovered that it would be some time before the bus could proceed, they went to the door and called the claimant into the boiler room to get warm. On entering the room he fell down the steps and received his injury. The claimant, with confidence, relies on Kowalek v. New York Consolidated Railroad Co., 229 N. Y. 490, 128 N. E. 888, as controlling this case. There, the employee in leaving the works rode upon the car of the employer upon a free pass, and it was held that being in a public conveyance he was not there as an employee, but as a passenger, the same as the other passengers in the car, and compensation was denied. The claimant contends that Littler v. George A. Fuller Co., 223 N. Y. 369, 119 N. E. 554, establishes that he was in the course of his employment at the time of the injury. There, the employer, who was building a house about two miles away from the railroad station, found it necessary to run a bus from the station to the house in order to carry his employees, and an employee who received an injury while riding in the bus was held to have received it in the course of the employment, and quotes with confidence from page 371, of 223 N. Y., and page 555 of 119 N. E., the opinion of the court:

"The place of injury was brought within the scope of the employment because Littler, when he was injured, was 'on his way * * * from his duty within the precincts of the compny.' Matter of De Voe v. N. Y. State Railways, 218 N. Y. 318, 320."

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The claimant also relies upon Driscoll v. Henry Gillen & Sons Lighterage, Inc., 226 N. Y. 566, 123 N. E. 863; Krawczyk v. MacNamara, 226 N. Y. 567, 123 N. E. 874; and Sztorc v. James H. Stansbury, Inc., 189 App. Div. 388, 179 N. Y. Supp. 586. If the claimant was in the course of his employment while riding in the bus, the fact that the bus, while being operated by his employer, became unable to run and required services at the garage, did not deprive him at the garage of his position as an employee. Moore v. Lehigh Valley R. Co., 217 N. Y. 627, 111 N. E. 1092. The bus arrived at the plant about 9 o'clock a. m. Claimant was paid for the time he was in the bus and garage. The company, in a statement, declares that the men were paid from the time they rang the clock in the plant, with the addition, "This is subject to only such exceptions as we might voluntarily make." The Commission made no finding whether the passage in the bus was on the employer's time or the employee's time, and it may be important to have a finding upon that subject, and other facts may develop upon a rehearing which may have a direct bearing upon the question in dispute.

We are not now prepared to hold as matter of law that there can be no recovery in this case, and therefore the award is reversed, and the matter remitted to the Commission for its further consideration. All concur.

BOARD OF COM'RS OF OKMULGEE COUNTY v. STATE EX REL. JACKSON ET AL., STATE INDUSTRIAL COMMISSON. (No. 11914.)

(Supreme Court of Oklahoma. Nov. 8, 1921.)

201 Pacific Reporter, 998.

(Syllabus by the Court.)

1. MASTER AND SERVANT — HAULING WATER FOR ROAD ENGINE, HELD "HAZARDOUS OCCUPATION" WITHIN COMPENSATION ACT.

D. was engaged in hauling water for a steam engine used in pulling a road grader in the construction of a public highway. The team driven by D. became frightened at the noise made by the engine and ran away. D. was thrown from the wagon and injured. *Held*, that D., at the time of the injury, was engaged in a "hazardous occupation" as contemplated by the Workman's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

(For other definitions, see Words and Phrases, First and Second Series, Hazardous.)

2. MASTER AND SERVANT — COMPENSATION AWARD CONCLUSIVE IN ABSENCE OF FRAUD IF COMMISSION HAD JURISDICTION.

The award made by the Industrial Commission under the Workman's Compensation Act becomes final and conclusive, unless appealed from as therein provided; and in an action instituted by the Commission as provided in the act to recover the amount of the award so made, the only question to be considered by the trial court in the absence of fraud is whether or not the Commission had jurisdiction in the premises.

(For other cases, see Master and Servant, Dec. Dig. § 416½, New, vol. 11A Key-No. Series.)

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Appeal from District Court, Okmulgee County; Mark L. Bozarth, Judge.

Proceeding by F. Deal before the State Industrial Commission for an award for personal injuries, opposed by the Board of County Commissioners of Okmulgee County, employer, in which an award was made for the applicant, but was not paid, and an action was brought by the State, on the relation of the State Industrial Commission, for the benefit of the applicant, against such Board of County Commissioners. Judgment for plaintiff, and, from an order denying motion for new trial, the Board of County Commissioners appeals. Affirmed.

L. A. Wallace, of Okmulgee, for plaintiff in error.

Hughes & Dannenburg, of Sapulpa, for defendant in error.

PITCHFORD, J. This is an appeal from the district court of Okmulgee county, Okla., complaining of a judgment rendered on the 18th day of May, 1920, in favor of the defendants in error, who were the plaintiffs in the lower court, and against the board of county commissioners of Okmulgee county, defendants in the lower court. For convenience, the parties will hereafter be designated as plaintiffs and defendant.

The action grew out of a personal injury susained by F. Deal while engaged in work on a public highway, in Okmulgee county, and involves the construction of chapter 246, Sees. Laws of 1915. The accident occurred on June 26, 1919, while Deal was acting as a teamster in hauling water for a steam engine used in pulling a road grader in the construction of the highway. The team which Deal was driving became frightened at the steam engine and ran away, which caused him to be thrown from his wagon to the ground, thereby suffering the injuries complained of in the petition. In due time, Deal filed a claim against the county with the State Industrial Commission. Thereafter, on the 18th day of August, 1919, the Industrial Commission made its award upon said claim by which it ordered the county of Okmulgee to pay the claimant compensation computed from the 10th day of July, 1919, at the rate of $10 per week, and until the final termination of his disability, and for the payment of all medical treatment during the first 15 days after the accident. The instant action followed as a result of the failure of the board of county commissioners to pay the claimant the amount awarded him or any part thereof. A jury trial was waived and the cause was tried to the court. The plaintiff recovered a judgment against Okmulgee county in the sum of $5,000 and the cost of the suit. From the order denying its motion for new trial, the defendant prosecutes this appeal.

[1, 2] The defendant contends that work upon the public highway does not come within the terms of hazardous employment as contemplated by the Workman's Compensation Act, and as a consequence would not cover injuries sustained by an employee of the county engaged in the construction or repair of public roads at the time of injury. The act referred to is found in Sess. Laws of Oklahoma 1915, p. 574, section 2 of which reads as follows:

"Compensation provided for in this act shall be payable for injuries sustained by employees engaged in the following hazardous employments, to wit.:

"Factories, cotton gins, mills and workshops where machinery is used; printing, electrotyping, photograving and stereotyping plants where machinery is used: foundries, blast furnaces, mines, wells, gas works, waterworks, reduction works, elevators, dredges, smelters, powder works; laundries operated by power; quarries; engineering works, logging, lumbering, street and interurban railroads not engaged in interstate commerce, buildings being constructed, repaired or demolished, farm building and farm improvements excepted, telegraph, telephone, electric light

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or power plants or lines, steam heating or power plants, and railroads not engaged in interstate commerce. If there be or arise any hazardous occupation or work other than those hereinabove enumerated it shall come under this act."

It is true work on a highway is not specifically mentioned as a hazardous employment in the act, and if we are to be governed only by a strict construction of the language contained in section 2, in all probability we would be forced to hold that the work in which Deal was engaged at the time he received the injury complained of would not be covered by the provisions of the act. But when we consider the purposes to be subserved, and the object of the Legislature in enacting the Workman's Compensation Laws, we are able to appreciate the humanitarian motives prompting the passage of the act. The law as enacted is for the protection of the injured workmen, who in the great majority of cases are dependent upon their daily wage, not only for the support of themselves, but likewise for the support of their families. The act, as we construe the same, is intended to cover all accidental injuries received by employees in any kind of hazardous employments enumerated in section 2, where the work performed by such employee is of a manual or mechanical nature. The act must be construed as a whole, and from the entire act deduce, if we can do so, just what is embraced within its terms.

Section 11 of the act provides as follows:

"In any proceeding for the enforcement of a claim for compensation under this act, it shall be presumed in the absence of substantial evidence to the contrary:

"(1) That the claim comes within the provisions of this act.

"(2) That sufficient notice thereof was given.

"(3) That the injury was not occasioned by the willful intention of the injured employee to bring about the injury of himself or of another.

"(4) That the injury did not result solely from the intoxication of the injured employee while on duty.

"(5) That the injury did not result directly from the willful failure of the injured employee to use a guard or protection against accident furnished for his use pursuant to any statute or by order of the Labor Commissioner."

The term "employer," as used in the act, includes the state, county, city, or any municipality when engaged in any hazardous work within the meaning of the act in which workmen are employed for wages.

Section 13 of the act provides that the award of the Industrial Commission shall be final and conclusive upon all questions within its jurisdiction between the parties, unless appealed from as therein provided.

In the instant case, the county failed to make any defense before the Commission and failed to appeal from the finding or award of the Commission. It therefore follows that the only question for our determination is whether or not the work in which Deal was engaged at the time of his injury is included within the terms of section 2, supra.

It is further provided by the act, if payment of the award is not made, that the amount awarded by the Commission shall constitute a liquidated claim for damages against the employer which may be recovered in an action to be instituted by the Commission in the name of the people of the state; the compensation recovered by the Commission to be paid to the person entitled thereto in accordance with the award.

As we have before stated, the word "highway" or "public road" is not specifically mentioned in section 2, supra; but the act does include any employee engaged in working a quarry which is designated as a hazardous employment. "Quarry" is defined by the act as an opening or cut from which coal is mined, or clay, ore, mineral gypsum, gravel, sand, or rock is cut or taken for manufacturing, building, or construction purposes. "Construction work" is defined by the act as improvements or alteration

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of building, structures. streets, highways. etc. In fact. all work seems to be considered as hazardous work under the act where machinery is is used in the prosecution of the work, the only exception being farm building and farm improvements; but it has been held in numerous decisions in other states that this exception does not obtain where the work on the farm is done in connection with machinery. Raney v. State Industrial Acc. Commission et al., 85 Or. 199. 166 Pac. 523; In re Boer. 65 Ind. App. 408, 117 N. E. 507.

The case relied upon by the defendant for reversal is Board of Commissioners of Kingfisher County v. Grimes et al.. 75 Okla. 219, 182 Pac. 897. In that case, the plaintiff was employed by the county to survey a public road. The injury of which he complained was sustained while going to his work. The claim for recovery was based under the head of "engineering works." as contained in the statute. In delivering the opinion of the court, it was said:

"We are constrained to hold that the term 'engineering works' as used in section 2 of the act refers to establishments or places of business where engineering work is carried on, and does not include or refer to work of an engineer on a public highway."

The Grimes Case, supra, came before this court on direct appeal from the action of the State Industrial Commission, and this court had before it all the evidence concerning the character of the employment in which the employee was engaged at the time of the injury. The decision in the Grimes Case might have been different had the evidence disclosed that the injury was received while the plaintiff was engaged in surveying. and that the injury was occasioned by reason of machinery used in the construction of roads. The compensation provided for injured workmen in the various hazardous employments specifically mentioned in the act is not confined to the employee operating the machinery. but applies to any employee regardless of any direct connection between the nature of the work of such employee and the machinery.

The case of Board of Commissioners of Cleveland County v. Barr et al., 173 Pac. 206, in many respects, is similar to the instant case. Barr received injuries while engaged in doing blasting upon the state highway in Cleveland county, which had been declared a public highway by the board of county commissioners, for which injuries the State Industrial Commission awarded him compensation. From this award, the board of county commissioners appealed. In delivering the opinion, the court said:

"It is provided in section 10, art. 2, of the Workmen's Compensation Act that the decision of the Industrial Commission shall be final as to all questions of fact. Since it is conceded that George T. Barr was engaged in work on a state highway being improved under the directions of of the board of county commissioners of Cleveland county, the only question presented by the appeal is whether the Commission erred, as a matter of law, in holding that the said George T. Barr was an employee of Cleveland county while pursuing the work in which he was engaged at the time of his injuries."

In that case the only question at issue was as to the employment of Barr by the board of county commissioners. The question as to whether or not his being engaged in work on the public highway would be included under section 2 of the act was not raised. It seems to have been conceded that the act did cover work on the public highway.

The act in question, in order to effectuate the legislative intent. should be given a reasonable construction, and we are of the opinion that it is clearly deducible from the entire act that one working on a public highway is engaged in a hazardous occupation where a steam engine is used in connection therewith at the time of the injury, and particularly so where the injury resulted from the use of the engine.

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It is our opinion that the judgment of the trial court should be affirmed, and it is so ordered.

Harrison, C. J., and McNeill, Nicholson, Elting, and Kennamer, JJ., concur.

MARCUM v. HICKLE.

(Supreme Court of Tennessee. October 8, 1921.)

234 Southwestern Reporter 321.

MASTER AND SERVANT—DEPENDENTS OF MORE THAN ONE CLASS MAY TAKE COMPENSATION.

Under Workmen's Compensation Act, § 30, subsecs. 3-18, dependents of more than one class may, in the order named, take compensation up to the point that 50 per cent of the monthly wages of the deceased employee for the statutory period has been exhausted, provided that those of the first class are not entitled to the entire amount.

(For other cases, see Master and Servant, Dec. Dig. § 386[5].)

Error to Circuit Court, Knox County; Von A. Huffaker, Judge.

Suit by S. G. Hickle, administrator, against J. F. Marcum. Judgment for plaintiff, and defendant brings error. Affirmed.

James M. Meek, of Knoxville, for Marcum.

Atchley & Bibb, of Knoxville, for Hickle.

McKinney, J. This suit was instituted by S. G. Hickle, administrator of Ernest Hickle, against J. F. Marcum to recover compensation for the use and benefit of certain dependents, under the Workmen's Compensation Act.

Liability was conceded, and it was admitted that those wholly dependent upon the deceased, at the time of his death, were his father, mother, and two brothers, aged, respectively, 11 ad 14 years. It is further agreed that the deceased, at the time of his death, was earning $15 per week, and that in no event would his administrator be entitled to recover more than 50 per centum thereof, viz., $7.50 per week for a period not to exceed 400 weeks.

The trial court adjudged the father and mother entitled to 35 per centum of said weekly wage, or $5.25 per week during dependency, not to exceed 400 weeks. This adjudication is conceded to be correct.

The trial court further adjudged that the two brothers were entitled to recover 25 per centum of said weekly wage, to wit, $3.75 during dependency, not to exceed 400 weeks, but said latter allowance, when added to the compensation allowed the father and mother, being in excess of 50 per centum of the weekly wage of the deceased, the trial court reduced said allowance to $2.25 per week, so that the aggregate would amount to $7.50 per week, or 50 per centum of the weekly wages which the deceased was earning at the time of his death.

The controversy arises as to that part of the judgment awarding compensation to the two brothers. The insistence of the plaintiff in error is that the act classifies dependents, and that where there are dependents falling within a certain class, they alone take to the exclusion of those falling within subsequent classes. On the other hand, the defendants in

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error insist that dependents are entitled to take compensation in the order in which they are classified until 50 per centum of the monthly wages of the deceased during the time specified in the act shall have been exhausted.

A determination of this question involves the construction of section 30 of the act (chapter 123 of the Acts of 1919), so much thereof as is pertinent to this inquiry being as follows:

"Be it further enacted, that for the purposes of this act, the following described persons shall be conclusively presumed to be wholly dependent: * * *

"(3) Wife, child, husband, mother, father, grandmother, grandfather, sister, brother, mother-in-law, and father-in-law who were wholly supported by the deceased workman at the time of his death and for a reasonable period of time immediately prior thereto shall be considered his actual dependents, and payment of compensation shall be made to them in the order named."

The subsections following, down to 18, provide, in case of death, what each dependent or class of dependents named in subsection 3 shall receive.

Subsections 12 and 13 relate to those who fall within the class of dependents in the instant case, and are as follows:

"(12) If the deceased employee leave no widow or child or husband entitled to any payment hereunder, but should leave a parent or parents, either or both of whom are wholly dependent on the deceased, there shall be paid, if only one parent, twenty-five per centum of the average weekly wages of the deceased to such parent, and if both parents, thirty-five per centum of the average weekly wages of the deceased to such parents. * * *

"(13) If the deceased leave no widow or dependent child or husband or parent entitled to any payment hereunder but leaves a grandparent, brother, sister, mother-in-law, or father-in-law wholly dependent upon him for support, there shall be paid to such dependent, if but one, twenty per centum of the average weekly wages of the deceased, or if more than one, twenty-five per centum of the average weekly wages of the deceased, divided between them or among them share and share alike."

Subsection 18 provides that—

"Actual dependents shall be entitled to take compensation in the order named in subsection (3) above, until fifty per centum of the monthly wages of the deceased during the time specified in this act shall have been exhausted, but the total compensation to be paid to all actual dependents of a deceased employee shall not exceed in the aggregate eleven ($11.00) dollars per week."

Analyzing this last provision of the act, it is apparent that the intention of the Legislature was to appropriate 50 per centum of the monthly wages of deceased to dependents, provided there were sufficient dependents to consume that amount, and provided further that in no event should the aggregate compensation exceed the sum of $11 per week. There is nohing ambiguous in subsection 18, nor is it out of harmony with the other provisions of section 30. Any other interpretation would result in its destruction.

In only one subsection (7) is as much as 50 per centum of the weekly wages of the deceased allowed as compensation. If it were not intended to join dependents named in the various subsections until 50 per centum of the wages of the deceased had been exhausted, then this provision of the act would be meaningless, for the preceding subsections had already stated what the various dependents were entitled to individually or as a class.

In the case under consideration, upon looking to the list of dependents enumerated in subsection 3, we find that the first in order are the father and mother, and the act provides that they are to receive 35 per centum of the weekly wages of the deceased. The two brothers are the next

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dependents appearng in the list, and they are entitled to the remaining 15 per centum; the result being that the dependents, in the order named in subsection. 3, have exhausted 50 per centum of the monthly wages of the deceased as expressly and implicitly provided by the act.

The circuit judge reached this result, and his judgment will be affirmed.

BLACK DIAMOND COLLIERIES v. DEAL.

(Supreme Court of Tennessee. Oct. 27, 1921.)

234 Southwestern Reporter, 322.

MASTER AND SERVANT—COMPENSATION DEPENDENT ON TIMELY NOTICE OF ACCIDENT.

Under Workmen's Compensation Act, § 22, unless the employer has actual knowledge of an accident, the injured employee is not entitled to compensation accruing before written notice to the employer, and unless such notice is given within 30 days of the accident, no compensation shall be payable under the act, unless a reasonable excuse for the failure is made to the satisfaction of the tribunal trying the claim; section 23 relating to form of the notice, merely saving a defect from being a bar to compensation, unless the employer shows he was injured thereby.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

Error to Circuit Court, Anderson County; John Jennings, Jr., Special Judge.

Suit by Tom Deal against the Black Diamond Collieries. Judgment for plaintiff, and defendant brings error. Reversed and dismissed.

Ben H. Testerman, of Knoxville, J. H. Underwood, of Clinton, and Frantz, McConnell & Seymour, of Knoxville, for Black Diamond Collieries.

H. C. Scruggs, J. B. Burnett, and J. H. Wallace, all of Clinton, for Deal.

GREEN, J. This is a proceeding by an employee to recover under our Workmen's Compensation Act (Chapter 123 of the Acts of 1919) for injuries alleged to have been sustained by him while in the service of the plaintiff in error.

The suit was resisted for the reason, among others, that the employee failed to give the employer written notice of the accident as required by the statute.

This suit was brought several months after the employee was injured, and notice was given pending the suit. This was not sufficient.

The act provides as follows:

"Sec. 22. Be it further enacted, that every injured employee or his representative shall, immediately upon the occurrence of an injury or as soon thereafter as is reasonable or practicable, give or cause to be given to the employer written notice of the injury, and the employee shall not be entitled to physician's fees nor to any compensation which may have accrued under the provisions of this act from the date of the accident to the giving of such notice, unless it can be shown that the employer had actual knowledge of the accident; and no compensation shall be payable

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under the provisions of this act unless such written notice is given the employer within thirty days after the occurrence of the accident, unless reasonable excuse for failure to give such notic is made to the satisfaction of the tribunal to which the claim for compensation may be presented.

"Sec. 23. Be it further enacted, that the notice required to be given of the occurrence of an accident to the employer shall state in plain and simple language the name and address of the employee, the time, place and nature and cause of the accident resulting in injury or death, and shall be signed by the claimant or by some person in his behalf, or by any one or more of the claimant's dependents if the accident resulted in death to the employee. But no defect or inaccuracy in the notice shall be a bar to compensation unless the employer can show to the satisfaction of the tribunal in which the matter is pending that he was prejudiced by the failure to give the proper notice and then only to the extent of such prejudice.

"The nctice shall be given personally to the employer or to his agent or agents having charge of the business in working at which the injury was sustained by the employee."

There is very little room for construction of this language. Its meaning is quite plain. Unless the employer has actual knowledge of the accident, the employee shall not be entitled to any compensation which may have accrued prior to written notice to the employer. Unless such written notice is given within 30 days after the occurrence of the accident no compensation shall be payable under the provisions of the act, except a reasonable excuse for failure to give the notice is made to the satisfaction of the tribunal trying the case. Such is the effect of section 22.

Section 23 relates to the form of the notice, but provides that a defective notice shall not be a bar to compensation unless the employer can show that he was thereby prejudiced.

In the case before us, as stated before, no written notice was given to the employer within 30 days after the accident, nor was any excuse offered for such dereliction.

There must be written notice within 30 days, or there must be a satisfactory excuse. Otherwise compensation cannot be enforced. To hold otherwise would be to disregard the provisions of the act.

It results that the lower court erred in rendering judgment in this case, and this judgment must be reversed, and the suit dismissed.

LUMBERMEN'S RECIPROCAL ASS'N v. WARNER ET UX.
(No. 644.)

(Court of Civil Appeals of Texas. Beaumont. Oct. 14, 1921. Rehearing Denied Nov. 9, 1921.)

234 Southwestern Reporter, 545.

1. MASTER AND SERVANT—"DEPENDENT" PARENTS WITHIN COMPENSATION ACT DEFINED.

In order to be a "dependent" parent within the Workmen's Compensation Act, it is not necessary for an old and crippled parent to exhaust all the resources of his life's work and face a dependent old age.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

(For other definitions, see Words and Phrases, First and Second Series, Dependent.)

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2. MASTER AND SERVANT—DEPENDENCY WITHIN COMPENSATION ACT HELD FOR JURY.

Whether parents worth about $12,000 were dependents of unmarried son under Workmen's Compensation Act *held* for the jury.

(For other cases, see Master and Servant, Dec. Dig. § 417[5].)

3. MASTER AND SERVANT—CHARGE ON BURDEN OF PROOF AS TO DEPENDENCY WITHIN COMPENSATION ACT HELD PROPER.

In proceeding by parents under Workmen's Compensation Act, an instruction that the burden of proof was on them to show by a preponderance of evidence that they were dependent wholly or in part on the labor of their deceased son *held* to clearly place the burden of proof on them to establish their case by a preponderance of the evidence.

(For other cases, see Master and Servant, Dec. Dig. § 417[5].)

4. MASTER AND SERVANT — CHARGE HELD NOT ERRONEOUS IN FAILING TO DEFINE "DEPENDENT" WITHIN COMPENSATION ACT.

In a proceeding by parents under the Workmen's Compensation Act to obtain compensation for death of a son, court did not err in failing to define "dependent" as used in a special issue submitting the question whether they were taking into consideration their conditions and circumstances, dependent wholly or in part on his labor for support.

(For other cases, see Master and Servant, Dec. Dig. § 417[5].)

5. MASTER AND SERVANT—EVIDENCE OF AVERAGE DAILY WAGE AS BASIS OF COMPENSATION HELD SUFFICIENT.

In a proceeding to obtain compensation for death of son under the Workmen's Compensation Act, testimony that the deceased at the time of his death was receiving $2.50 per day as daily wages was sufficient evidence upon which to base a finding that $2.50 was the average daily wages of the employees of the same class, there being no suggestion in the record that deceased was a favorite of the employer.

(For other cases, see Master and Servant, Dec. Dig. § 405[6].)

6. MASTER AND SERVANT—CHARGE HELD NOT ERRONEOUS AS ASSUMING COMPENSATION CLAIMANT'S DECEASED SON WORKED FOR YEAR.

A special issue in a compensation case "What was the average daily wage which was earned by the employees of the same class as deceased, working substantially the whole of the preceding year at the same or neighboring place," etc., *held* not subject to the criticism that it assumed and advised the jury that deceased had worked for defendant employer substantially the whole of the preceding year.

(For other cases, see Master and Servant, Dec. Dig. § 417[5].)

7. MASTER AND SERVANT—CHARGE AS TO COMPUTATION OF AVERAGE DAILY WAGE IN COMPENSATION CASE HELD PROPER.

In proceeding to obtain compensation under the Workmen's Compensation Act for death of son, court did not err in charging the jury that, in case they were unable to ascertain average daily wages of deceased, they could compute it in any manner that might seem just and fair to the parties, in view of part 4, § 1, subd. 3, of the Act.

(For other cases, see Master and Servant, Dec. Dig. § 417[5].)

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8. MASTER AND SERVANT—ERROR IN ATTORNEY'S AGREEMENT IN COMPENSATION CASE CURED BY CHARGE.

If it was error for attorney to tell jury in proceeding under the Workmen's Compensation Act "that, under the Compensation Law, where a person was killed, that his dependents were entitled to recover compensation for his death," it was cured by a subsequent instruction to disregard such argument.

(For other cases, see Master and Servant, Dec. Dig. § 417[5].)

9. MASTER AND SERVANT — CRIMINAL RECORD OF DECEASED SON OF COMPENSATION CLAIMANTS PROPERLY EXCLUDED.

In proceeding to obtain compensation for death of son, where dependency was at issue, criminal record of deceased was properly excluded from the jury where it was introduced to show that parents had paid fines and attorney's fees.

(For other cases, see Master and Servant, Dec. Dig. § 404.)

10. MASTER AND SERVANT — EXCLUSION OF EVIDENCE IN COMPENSATION CASE HELD NOT PREJUDICIAL.

In proceeding to obtain compensation for death of son, insurer, appealing from a judgment sustaining the award, cannot complain of exclusion of evidence that claimants received $2,000 insurance after the death of their son, in the absence of a showing that this testimony was the only testimony offered raising the issue that dependency had ceased, and there being no request to submit such an issue to the jury.

(For other cases, see Master and Servant, Dec. Dig. § 418[5].)

11. MASTER AND SERVANT — JUDGMENT PROVIDING FOR EXECUTION FOR WEEKLY COMPENSATION HELD PROPER.

The district court sustaining an award for compensation for death of servant did not err in providing in the judgment for issuance of execution upon the weekly installments of compensation provided for therein.

(For other cases, see Master and Servant, Dec. Dig. § 417[9].)

12. MASTER AND SERVANT — PERMITTING JURY TO COMPUTE AVERAGE WEEKLY WAGE IN COMPENSATION CASE HELD NOT ERROR.

In proceeding under Workmen's Compensation Act, the district court did not err in permitting jury to compute the average weekly wage of the deceased servant where it made the finding of the jury its own by incorporating it in the judgment, assuming that the determination of the weekly wage is only an administrative act.

(For other cases, see Master and Servant, Dec. Dig. § 417[5].)

Appeal from District Court, Angelina County; L. D. Guinn, Judge.

Proceeding by G. R. Warner and wife under the Workmen's Compensation Act, to obtain compensation for the death of a son, Richard Warner, opposed by the Foster Lumber Company, employer, and the Lumbermen's Reciprocal Association, the insurer. From a judgment of the district court sustaining award of compensation, the insurer appeals. Affirmed.

Andrews, Streetman, Logue & Mobley, of Houston, for appellant.

I. D. Fairchilds and Mantooth & Collins, all of Lufkin, for appellee.

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WALKER, J. This is an appeal by Lumbermen's Reciprocal Association from a judgment rendered against it in favor of appellee, sustaining an award of the Industrial Accident Board in their favor. Richard Warner was the son of G. R. Warner and wife, and at the time of his death was in the employment of the Foster Lumber Company, which carried a policy of industrial insurance with appellant. It is conceded that Richard Warner was insured under the provisions of this policy, and was killed while in the due course of his employment. At the time of his death he was about 22 years old, a single man, and made his home with his parents, G. R. Warner and wife. The case was submitted to the jury on the following charge:

"This case will be submitted to you on special issues, and you will answer such special issues as may be submitted you by the court.

"Special issue No. 1:

"Were the defendants, G. R. Warner and Mrs. Susan C. Warner, as parents of Richard Warner, deceased, taking into consideration their conditions and circumstances in life, dependent wholly or in part upon the labor of the deceased, Richard Warner, for support at the time of the accident which resulted in his death? You will answer this 'Yes' or 'No' as you may determine from the evidence."

(To this question the jury answered: "Yes.")

"Special issue No. 2:

"What was the average daily wage which was earned by an employee of the same class as the deceased, Richard Warner, working substantially the whole of the immediate preceding year in the same or a neighboring place as that which the said Richard Warner was working at the time of his death and some time prior thereto? You will answer this by stating the amount per day, in dollars and cents.

(To this question the jury answered: "$2.50 per day.")

"You are instructed that the burden is upon the defendants to show by a preponderance of the evidence that they were dependent wholly or in part upon the labor of Richard Warner, and if the defendants have so shown by a preponderance of the evidence you will answer special issue No. 1 'Yes'; but, if they have failed to show by a preponderance of the evidence that they were dependent wholly or in part upon the labor of Richard Warner, you will answer special issue No. 1 'No.'

"You are charged that in passing upon special issue No. 1 that a gift or gifts from Richard Warner to his mother and father would not, of itself, show that they were dependent upon him; but you will look to all of the evidence in the case in passing upon the question before you. You are the sole and exclusive judges of the weight of the evidence and credibility of the witness, but the law you will receive from the court as contained in this charge and be governed thereby."

Court's charge No. 2, requested by plaintiff, and given to the jury:

"You will disregard in your deliberation the remarks of counsel for the defendants telling you in substance and effect that defendants, under the Compensation Law, are entitled to recover."

Special charge No. 1, requested by defendant and given to the jury:

"You are charged that, in case you are unable to ascertain the average daily wage which was earned by Richard Warner, deceased, at the time of his death by ascertaining the average daily wage which was earned by an employee of the same class as the deceased, Richard Warner, working substantially the whole of the immediate preceding year in the same or neighboring place as that which the said Richard Warner was working at the time of his death, and some time prior thereto, then you will compute the average daily wage in any manner that may seem just and fair to the parties to this suit."

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Appellant asked for a peremptory instruction in its favor, and also excepted to the giving of issue No. 1, on the ground that the undisputed facts showed that the father and mother were not dependent, within the meaning of article 5246—15, Complete Texas Statutes 1920. As bearing on this issue, this article reads:

"The compensation provided for in the foregoing section of this act shall be for the sole and exclusive benefit of the surviving husband, * * * dependent parents," etc.

At the time of the death of their son, G. R. Warner and wife owned the following property:

Real property:

Abst. No.	Original Grantee.	No. Acres.	Value.	
39	Thos. Quevade	58..	$1,450 00	
39	Thos. Quevade	22..	330 00	
38	J. A. Prado	116..	1,740 00	"at least."
40	J. L. Quinalty	5		
	"house worth $1,200; worth great deal more than"		1,500 00	
				$5,020 00

Personal property:

	Value.	
Angelina county:		
3 horses	$ 300 00	
Dog	50 00	
Automobile	1,040 00	
20 head cattle, rendered at	200 00	
150 head hogs, rendered at	300 00	
Liberty county:		
35 or 40 head cattle (give same value per head as Angelina county cattle)	400 00	
150 head hogs (give same value per head as Angelina county hogs)	300 00	
		$2,590 00
		$7,610 00
Bank account, around		300 00
		$7,910 00

We believe the following statement from appellees' brief reflects the facts on which they rely to establish dependency within the meaning of the quoted section of the Workmen's Compensation Act, viz.:

"The evidence on the proposition of dependency shows:

"That G. R. Warner and wife, Susan Warner, father and mother of deceased Richard Warner, were 60 and 55 years old respectively: that the father had been ruptured four years previous, and had not been able to do manual labor as before his injury; that the Warner family now consists of Mr. Warner and wife; that the deceased, Richard Warner, was 22 years old, and still single; that he had lived at home all of his life, as one of the family, only when he would be away occasionally at work, but that he was never away more than a month at a time; that when the son, Richard Warner, was at home he worked on the farm and helped his father with the stock, and did anything that was to be done around the place, and also helped his mother a great deal, doing anything from the washtub to dish-washing, milking, cleaning the yard off, cooking, or anything else; that Richard Warner had been with his parents all of his life, and from the time he was large enough, he had been

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working; that Richard Warner had always assisted his father and mother in any sort of work around the place; that he had given his father money at various times; that Richard Warner had contributed to his mother from time to time, giving her $8, $10, or $15, $45 being largest amount; that Richard Warner had only been away from home 8 or 10 days when he was killed; that when he left home this time he said, 'I am coming back in April and I am going to stay at home;' that Richard Warner's services were worth at the time $2.50 or $3 a day; that when the father had to hire hands to do the work that Richard did he had to pay from $2.25 to $2.50 and board; and that the son was worth more to the father than any man he could hire, because he knew more about the business.

"Mrs. Warner, mother of deceased, testified that during his lifetime he lived on the farm with his father and mother; that son lived with them practically all the days of his life; that Richard Warner usually did anything in the way of work there was to be done about the place; he worked in the field, fed the stock, milk the cows; he washed the dishes, and 'I never washed without him helping when he was at home; that at the time of his death he was the only child staying at home; that the son would buy parts for the automobile, and that he would keep it up; that Richard Warner contributed to her in other ways; he gave her from $8 to $10 to $15 at different times, and that during one six weeks, he gave her $45, and he told her to use it for anything that she needed it for.

"Mrs. Warner further testified: As to whether he was a constant worker during the time he was at work, he was as good a worker as any boy as she ever had been about; that she had raised two boys and had seen lots more of them raised, and he (Richard Warner) was as constant a worker as any she had ever seen; that he was not a lazy child, and never had been a lazy child; that she is 55 years old, and Mr. Warner is 60 years old, and, of course, we are both declining in years, as everybody does at that age; that among other things around the place that her son (Richard Warner) would do was such as cutting wood and milking cows."

[1, 2] The construction of this article, as it relates to dependent parents, was before the San Antonio Court of Civil Appeals in Southern Surety Co. v. Hibbs, 221 S. W. 303. We have given that case our most careful consideration, and approve the conclusion reached by Judge Fly, not only as applied to the facts of that particular case, but also in his statement of the law. As said by Judge Fly:

"The question of dependency is one of fact rather than a question of law, and each case must rest on its own facts."

Were G. P. Warner and wife really dependent on their deceased son? He contributed money to their support, worked for them as a farm hand, cooked, washed clothes, and cleaned house for his mother. He did many other things for their comfort and support. True, by using the funds they had accumulated to care for them in their fast-approaching old age, they could have hired these things done by others, but as a matter of fact they did not do this, but relied on their son to do these things for them. The law, as written in this act, does not require an old and crippled parent to exhaust all the resources of his life's work and face a dependent old age, in order to come within its terms. This point is made plain by the two cases cited by Judge Fly in the Hibbs Case, supra, from the Supreme Court of Georgia, Railway Co. v. Glover, 92 Ga. 132, 18 S. E. 406, and Fuller v. Inman, 10 Ga. App. 680, 74 S. E. 291. Hence, we conclude that the issue of dependency was raised by this record, and that the answer of the jury to special issue No. 1 must be sustained. As directly sustaining us in this conclusion, see the following additional authorities: Fennimore v. Pittsburg-Scammon Coal Co., 100 Kan. 372, 164 Pac. 265; Miller v. Public Service R. Co., 84 N. J. Law, 174, 85 Atl.

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1030; Garcia v. Industrial Accident Com. of Cal. 171 Cal. 57, 151 Pac. 741.

[3] Appellant complains of the court's charge on the burden of proof. It does not seem to us that the jury could have been misled by this charge. We think it clearly places the burden on defendants to establish their case by a preponderance of the evidence, and applied directly to issue No. 1.

[4] The court did not err in failing to define the word "dependent," as used in issue No. 1. This question was directly presented to Judge Fly in the Hibbs Case, supra, and in reply thereto he said:

"The second assignment of error complains of the refusal of the trial judge to define the word 'dependent' for the jury. The court asked the jury: 'Were the defendants, W. M. Hibbs and Carrie Hibbs, as parents of J. D. Hibbs, deceased, taking into consideration their condition and circumstances in life, dependent wholly or in part upon the labor of the deceased, J. D. Hibbs, for support at the time of the accident which resulted in his death?' That question was clear and as open to the comprehension of an average jury as any number of definitions would have made it. The Legislature evidently did not deem it necessary to define a word so generally comprehended, for no definition of 'dependent' is given in the statute."

As the evidence in this case does not raise the issue that Richard Warner "had left his parents and gone to work for himself, with the intention of appropriating to his own use the wages earned by him, and that he would not thereafter have contributed anything to his parents," the court did not err in refusing to submit it to the jury.

[5-7] Due exception was taken to the submission of special issue No. 2, on the ground that—

"The record is devoid of any evidence as to the average daily wages earned by the employees of the same class as deceased, working substantially the whole of the immediately preceding year at the same or neighboring place at which the said Richard Warner was working at the time of his death, and for some time prior thereto."

We cannot agree with this proposition. There is evidence sufficient to take this issue to the jury. The record shows that Richard Warner worked for the Foster Lumber Company 9 or 10 days before his death, and on the trial it was agreed:

"That the deceased, Richard Warner, at the time of his death, was receiving $2.50 per day as daily wages."

There is no suggestion in this record that Richard Warner was a favorite of the Foster Lumber Comany, or that they paid him over their schedule of wages. We believe that these facts are sufficient to raise the issue thus submitted to the jury. This charge is not subject to the criticism that it assumed and advised the jury that Richard Warner had worked for the Foster Lumber Company substantially the whole of the preceding year. Defendants' special charge No. 1 was properly submitted to the jury. The statute thus defines "average weekly wages":

"1. If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same employer or not, substantially the whole of the year immediately preceding the injury, his average annual wages shall consist of three hundred times the average daily wage or salary which he shall have earned in such employment during the days when so employed.

"2. If the injured employee shall not have worked in such employment during substantially the whole of the year, his average annual wages shall consist of three hundred times the average daily wage or salary which an employee of the same class working substantially the whole of

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such immediately preceding year in the same or in a similar employment in the same or a neighboring place, shall have earned in such employment during the days when so employed.

"3. When by reason of the shortness of the time of the employment of the employee, or other employee engaged in the same class of work in the manner and for the length of time specified in the above subsections 1 and 2, or other good and sufficient reasons, it is impracticable to compute the average weekly wages as above defined, it shall be computed by the board in any manner which may seem just and fair to both parties." Article 5246-82.

We believe the submission of this charge was authorized under the third section above quoted. In charging the jury, it is the duty of the court to present all issues raised by the facts. Clearly, the statute does not mean that the record must show, as claimed by appellant, that the average weekly wage cannot be established under sections 1 and 2 before the court would be authorized to submit section 3, for, after naming these first sections, the article further provides: "Or other good and sufficient reasons."

[8] In testifying about the award made by the Industrial Accident Board to the defendants, Mr. Fairchild told the jury nothing that had not been pleaded by plaintiff. Nor was reversible error shown by the argument of Mr. Fairchild to the jury, in which he told them:

"That under the compensation law, where a person was killed, that his dependents were entitled to recover compensation for his death."

This argument was called to the court's attention when made, and excepted to on the ground that it "in effect told the jury that an answer in the affirmative to special issue No. 1 entitled defendants to recovery." At the time this exception was taken, the court did not stop Mr. Fairchild, nor reprimand him, but, as shown by the charge above given, he did instruct them to disregard the argument. If this argument was error, the error was cured by the charge.

[9, 10] The criminal record of Richard Warner was properly excluded from the jury. No legal liability rested on his parents to pay his fines and fee his lawyers. If they did this voluntarily, it could not raise an issue against dependency; rather, it seems to us, it would strengthen defendants' case and justify them in depending on their son to do things for them, and accept favors at his hands which otherwise they might not have done. We believe the court correctly excluded testimony showing that G. P. Warner and wife, after the death of their son, came into possession of $2,000 "insurance" money. The bill of exception does not show the source of this insurance, if it was an addition to show this. Appellant says that this testimony was admissible to show that dependency, if found at the death of Richard Warner, had ceased. Their proposition is that—

"The question of dependency may be determined at any time during the period during which compensation runs."

If this is a sound proposition—which we do not determine—we say that the burden must rest upon appellant to show that dependency once established—and that issue was presented by the first question submitted to the jury—has ceased. That burden was not met by showing that defendants had received $2,000 insurance money without showing from what source it was received. We would add further that no issue was submitted to the jury making this testimony material. Question No. 1 limited dependency to the time of the death of Richard Warner. No question was asked, nor any requested, on the issue of determination of dependency, and appellant makes no showing that this excluded testimony was the only testimony offered raising such issue. If there was other testimony raising this issue, appellant should have requested its submission, and, having refused to ask its submission, he cannot complain of the ex-

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clusion of testimony tending to establish such an issue, without showing that the excluded testimony was all the evidence he had to offer, and its exclusion took the issue from the jury.

[11] The court did not err in "providing in the judgment for issuance of execution upon the weekly installments of compensation provided for therein." U. S. Fid. & Guaranty Co. v. Parker, 217 S. W. 195; U. S. Fid. Co. v. Parsons, 226 S. W. 420; Am. Ind. Co. v. Hubbard, 196 S. W. 1012; General Accident Fire & Life Assur. Corp. v. Evans, 201 S. W. 705.

[12] Appellant advances the proposition that the court committed error in permitting the jury to compute the average weekly wage, on the ground that such compensation is "an administrative feature of the act to be administered by the Industrial Accident Board or court, and not by a jury." It is not necessary for us to determine this question. Clearly, the court did not err in submitting such an issue to the jury. If the matter finally rested with the court, he made such finding his own by incorporating it in the judgment. Even if the determining of the weekly wage is an administrative act, we think the court should be commended, rather than criticized, in seeking the advice of the jury on such issue, especially when the general issue has gone to the jury.

Having reviewed all apellant's assignments of error, and finding no error therein, the judgment of the trial court is in all things affirmed.

PICKERING v. INDUSTRIAL COMMISSION OF UTAH. (No. 3708.)

(Supreme Court of Utah. Nov. 7, 1921.)

201 Pacific Reporter 1029.

1. MASTER AND SERVANT—COMPENSATION RECOVERABLE FOR INJURIES OCCURRING IN ANOTHER STATE.

Under the Industrial Commission Act (Comp. Laws 1917, § 3126) which provides that a workman hired within the state, who receives injury in employment outside of the state, is entitled to compensation, a resident of the state who was employed by a copartnership engaged in the contracting business within the state, but was thereafter sent by them to take charge of work in another state, is entitled to compensation for injuries received in the course of his employment in the other state, though the employer had taken out insurance against such injuries under the Compensation Act of that state.

(For other cases, see Master and Servant, Dec. Dig. § 369.)

Proceedings under the Workmen's Compensation Act (Comp. Laws 1917, §§ 3061-3165), by L. B. Pickering, as employee, to recover compensation for injuries while in the employ of Pickering Bros., a copartnership. From a decision of the Industrial Commission denying compensation, the employee brings the proceedings before the court for review. Decision vacated.

Pierce, Critchlow & Marr, of Salt Lake City, for plaintiff.

H. H. Cluff, Atty. Gen., and J. Robert Robinson, Asst. Atty. Gen., for defendant.

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CORFMAN, C. J. Plaintiff commenced these proceedings May 18, 1921, as claimant before the defendant, Industrial Commission of Utah, to obtain compensation under the provisions of chapter 100, Laws of Utah 1917, as amended by chapter 53, Laws of Utah 1919, commonly known as our Industrial Commission Act. Compensation was denied plaintiff by the Commission, and he has brought the proceedings here for review in the usual way as provided that he may do under the provisions of said act.

It appears that the plaintiff, a resident of Salt Lake City, Utah, was, some time prior to January 1, 1919, employed as an engineer and superintendent by Pickering Bros., a copartnership engaged in a general contracting business. The Pickering brothers were also residents of Salt Lake City, where they employed the plaintiff, and where they at all times maintained their place of business. Up until the year 1921 they took no contracts in outside states, but confined their operations exclusively in the performance of construction work awarded them in the carrying out of Utah projects, in which work the plaintiff had been continuously engaged in the ordinary duties of an engineer and superintendent until about March 1, 1921, when Pickering Bros. took a contract for the construction of a public highway in the state of Colorado and placed the plaintiff in charge of said project as superintendent of the work to be performed. While engaged in these duties, he became disabled in Colorado by reason of an accident arising out of and in the course of his said employment, for which he claims compensation. It further appears that Pickering Bros. carried compensation insurance in the Utah state insurance fund and also under the provisions of the Colorado Compensation Law for the protection of their employees while operating in said state.

Upon the foregoing facts, which are not disputed, our Commission by a majority decision refused to make an award.

After plaintiff applied for and was denied a rehearing, the case was brought here for review.

The majority of the Commission seem to have taken the position, as reflected by their findings and decision, that to allow the plaintiff compensation under the facts and attending circumstances stated would be giving the provisions of our act an extraterritorial effect not contemplated by our Legislature. In part the decision reads:

"The place of employment is not controlling in the question of jurisdiction, neither is the place of residence of the applicant, nor the place of the accident. The controlling element is to be found in the industries being developed. The jurisdiction in such cases must be the jurisdiction of the industry that is being promoted. * * * In this case it is quite clear that Pickering Bros. went beyond the jurisdiction of this Commission and engaged employment not even remotely connected with Utah industry, that L. B. Pickering [plaintiff] was to initiate and carry to conclusion an enterprise exclusively within the state of Colorado and that the employees engaged in this particular employment were covered by the workmen's compensation insurance in the Southern Surety Company (Colorado), * * * and for this reason the relief sought is hereby denied."

[1] Our Industrial Commission Act, section 3126, Comp. Laws Utah 1917, without qualification, provides:

"If a workman who has been hired in this state receives personal injury by accident arising out of and in the course of such employment, he shall be entitled to compensation according to the law of this state, * * * even though such injury was received outside of this state."

Under the admitted facts in this case, it would seem that the plaintiff here has met all the requirements of the foregoing provision of our statute. Although he received an injury outside of this state, he was hired in this state. Not only was he hired in this state, but he was a resident of Utah, employed in a business or enterprise being conducted in Utah and

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by Utah residents. The plain and express wording of our statute permits of no other construction or interpretation than that under the showing here made by the applicant, it was intended by our Legislature that the beneficent purposes of our act should be given extraterritorial effect and compensation allowed.

It would appear from the expressions made in the majority opinion that the Commission has not only disregarded the plain provisions of our statute in refusing to make an award, but that it has also misconceived the very purposes of the act, viz., to protect the employee and those dependent upon him, so that in case of accident and injury they may not become subjects of public charity. Scranton Leasing Co. v. Industrial Commission of Utah, 51 Utah, 368, 170 Pac. 976; Chandler v. Industrial Commission of Utah et al., 55 Utah,, 213, 184 Pac. 1020, 8 A. L. R. 930.

[2] The constitutionality or validity of the statute is not here questioned. As a court we are not concerned with the wisdom of the Legislature in giving its provisions extraterritorial effeect. That it did do in plain and unmistakable terms.

Under the facts and circumstances disclosed by the record in this case, we are of the opinion that the plaintiff is entitled to compensation, as in the act provided, and that the Commission, in not making an award, misconceived its jurisdiction.

It is therefore ordered that the decision of the Commission denying the plaintiff compensation be, and the same is hereby, vacated and set aside Plaintiff to recover costs.

Weber, Gideon, Thurman, and Prick, JJ., concur.

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UTAH FUEL CO. v. INDUSTRIAL COMMISSION OF UTAH.
(No. 2716.)

(Supreme Court of Utah. Nov. 7, 1921.)

201 Pacific Reporter, 1034.

1. MASTER AND SERVANT—COMPENSATION AWARD AGAINST EMPLOYER APPEARING WITHOUT FORMAL APPLICATION AND NOTICE HELD VALID.

Though the proceedings in a workmen's compensation proceeding were irregular where no application for compensation was filed with the Commission, and the only notice served on the employer respected the amount of the employee's earnings, yet, where the employer at the hearing conceded that the relation of employer and employee existed, and that the employee was injured in its mine in the course of his employment, and was entitled to some compensation, the Commission had jurisdiction to make an award.*

(For other cases, see Master and Servant, Dec. Dig. § 398.)

2. MASTER AND SERVANT—"AVERAGE WEEKLY WAGE" OF COMPENSATION CLAIMANT DEFINED.

Where employment in a mine was irregular and intermittent, and varied at different seasons of the year, but fairly averaged 222 days each year, and employees desiring to continue in the employment were required to be where they could be called when wanted, an employee's weekly wages should be computed for the purpose of determining the compensation for injuries by multiplying his daily wages by 222 and dividing by 52.†

(For other cases, see Master and Servant, Dec. Dig. § 385[1].)

Proceedings under the Industrial Commission Act, for compensation for injuries to Clyde Parry, opposed by the Utah Fuel Company, employer. Compensation was awarded by the Industrial Commission, and the employer obtained a writ of review. Application for writ of review dismissed.

Ferdinand Ericksen and H. J. Binch, both of Salt Lake City, for plaintiff.

H. H. Cluff, Atty. Gen., and J. Robert Robinson, Asst. Atty Gen., for defendant.

FRICK, J. The plaintiff owns and operates a coal mine in this state. One Clyde Parry, on the 25th day of March, 1921, while employed by the plaintiff in its coal mine, and in the course of his employment, sustained personal injuries by reason of which he was prevented from continuing his employment.

The plaintiff and said Parry both were subject to the provisions of our Industrial Commission Act (Comp. St. 1917, § 3061 et seq.), the plaintiff being what is called a self-insurer under the act.

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*North Beck Min. Co. v. Industrial Commission, 200 Pac. 111.

†Distinguishing State Road Commission v. Industrial Commission, 190 Pac. 544.

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On the 22d day of June, 1921, the Commission, by some means not disclosed by the record ,having taken jurisdiction of Parry's case without a formal application on his part, served notice upon the plaintiff that a hearing would be had on the 6th day of July, 1921, respecting the injuries sustained by said Parry to determine the amount of his earnings. The plaintiff, through its counsel, appeared at the hearing aforesaid, and, upon the evidence produced by it and other evidence, the Commission made an award to said Parry of $16 per week, beginning on the 29th day of March, 1921, and ordered that the plaint f pay the amount awarded as aforesaid to said Parry during the continuance of his inability to work.

The plaintiff, in due time, filed its application for a rehearing as provided by said act, and, the hearing having been denied, the plaintiff made application to this court for a writ of review which was issued pursuant to the provisions of said act.

The Attorney General, as counsel for the Commission, and said Parry, filed a general demurrer to plaintiff's application, and the cause was submitted to this court upon the demurrer.

The plaintiff, in its application, alleges that the Commission exceeded its powers or jurisdiction in making said award in two particulars: (1) That, in view that no application for compensation was made to the Commission by said Parry either in person or by some one on his behalf, the Commission did no acquire jurisdiction of the case, and hence it exceeded its jursdiction in making said award; and (2) that the award of the Commission is without support in the evidence, and hence should not prevail.

[1] In regard to the first ground stated above it is only fair to counsel for plaintiff to state that at the hearing they frankly stated that they do not seriously contend that the Commission was wholly without jurisdiction because no formal application was made by said Parry, but they insist that the proceedings were grossly irregular in that no application of any kind was made. No doubt the Commission should insist that every applicant comply with its rules by which he is required to file a written application. Such an application should be filed in ever case in which at least the jurisdictional facts should be stated. As pointed out by this court, however, in the case of North Beck Min. Co. v. Industrial Commission, 200 Pac. 111, the proceedings before the Commission are very informal and in some respects "sui generis." Nor does the act require any particular thing to be done by an applicant in order to confer jurisdiction upon the Commission where both the employer and the employee are subject to the provisions of the act. It is necessary, however, in each case, that due notice be given to the employer that an application for compensation is made by some person who asserts that he has suffered injury, that he sustained the relation of employee to such employer at the time of the injury, and that the injury arose through an accident which occurred in the course of his employment. When that is done the employer is given an opportunity to defend against the claim if for any reason it should not be well founded, and if it be well founded he may, nevertheless, be heard upon the question of the amount of compensation that should be awarded. As before stated, however, in this case notice was given to the plaintiff that a hearing would be had respecting the amount of Parry's earnings, at which hearing plaintiff appeared, and in which it took part without objection. If it be conceded, therefore, as it must be, that in view that no application of any kind for compensation was filed with the Commission, and that the only notice that was served on plaintiff was with respect to the amount of the earnings of Parry, and therefore the proceedings were very irregular, yet, in view that at the hearing aforesaid plaintiff conceded that the relation of employer and employee existed between it and the said Parry at the time he

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was injured, that he was injured in its mine in the course of employment, and that he was entitled to some compensation, the Commission clearly had jurisdiction to make an award in favor of said Parry.

The first objection therefore cannot be sustained.

[2] In recurring to the second ground of objection, namely, that there is no evidence in support of the award, it becomes necessary to state as briefly as possible the controlling facts, practically all of which appear from plaintiff's admission or from the testimony of its employees. It was made to appear that at the time of the injury Parry was employed as a driver in plaintiff's coal mine; that as such driver he earned $7.95 per day; that he worked part of the time as a driver and part of the time as a coal miner; that when he was employed as a miner he was paid by the ton; that he went to work for plaintiff on the 8th day of February, 1921, and continued in its employ until injured as before stated; that during the month of February he earned $63.50 and during the Month of March up to the time of the injury $58.25, making a total of $121.75 during February and March; that during the entire period aforesaid Parry worked 46 days, or $6^4/_7$ weeks; that in view of the foregoing conditions Parry's average weekly wage during the time he worked amounted to $18.55 per week; that under the provisions of the act he would be entitled to 60 per cent of that amount, which would amount to $11.13 per week and no more.

The Commission, however, refused to limit Parry's compensation as contended for by plaintiff, and, as before stated, awarded him compensation at the rate of $16 per week, the maximum allowance under the act. The Commission arrived at its conclusion as follows: It determined Parry's daily earnings at the time of the injury to be $7.95 and allowed him 300 working days in the year, which gave his yearly earnings to be $2,385. In order to arrive at his weekly average the Commission divided the annual earnings by 52, the number of weeks in a year, which made his weekly average somewhat in excess of $45, 60 per cent of which would exceed $16 per week, the maximum allowed by the act, and hence the Commission awarded him the maximum amount as before stated.

It is strenuously insisted that the amount allowed by the Commission is contrary to both the law and the evidence. The evidence on the part of the plaintiff showed that, in view that the demand for coal was irregular and intermittent, the mine could not be operated every day in the year, and that there were many weeks during the year when the mine could only be operated for a few days in each week, some weeks more, some less. It was made to appear, however, that during four winter months the demand for coal was more uniform and during which period the mine was worked practically every day; that during the spring and fall months it could be operated only from 3 to 5 days per week, while during the summer months the operation was even less than that, so that the yearly average that the mine was worked was 222 days. It was also shown that that average was a fair yearly average for a number of years, and that the operation of other coal mines in this state was practically in the same condition, some perhaps operating some days in excess of plaintiff's average while others operated a few days less during the year. The evidence is clear, however, that the average number of days that plaintiff's mine was being operated during the year was practically a permanent condition, so that it can well be assumed that the average number of days plaintiff's mine was operated in each year was 222 days, as before stated. We are confronted, therefore, with a condition where the employment is necessarily irregular and intermittent.

Plaintiff's evidence is to the effect that its employees must remain in attendance at the mine if they desire to continue in its employ; that is, if a miner or other employee should fail to report for work on a day the mine is to be operated, and that should occur for a number of days, he

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would be stricken from the rolls and would thus lose his job. The employees must therefore be in attendance at the mine so that, when notice is given that the mine will be operated (which is done by the blowing of a whistle in the evening preceding the day the mine wil be operated), they may report for work on the following morning. It is clear, therefore, that although plaintiff's employees, by reason of conditions over which it has no control, cannot be continuously employed. yet they must be where they can be called at any time when they may be wanted if they desire to continue in the employment. Under such circumstances it must be apparent to all that plaintiff's method of arriving at the average weekly earnings is necessarily faulty, while, upon the other hand, it is, we think, equally clear that the Commission's method of arriving at the average weekly wage is likewise unsound.

In view of the circumstances, therefore, the question is: What is the proper weekly average and how shall it be ascertained?

We shall assume that Parry's daily wage at the time of the injury was $7.95, because both the plaintiff and the Commission have assumed that to have been his wage, although, under the evidence, his earnings when engaged as a miner were somewhat less. The difference, however, was not sufficient to have reduced the weekly allowance, and hence it is of no significance in this case. As before stated, the yearly average number of days the mine was operated was 222. Plaintiff thus operated its mine 222 days in each year, and its employees knew that that was the number of days that they would be given an opportunity to earn the wages paid by plaintiff in operating its mine, and voluntarily accepted those conditions. That being so, Parry had the opportunity to work 222 days in the year. His daily wages must thus be multiplied by 222, which will give the amount of his yearly earnings. If, therefore, we multiply 222 by $7.95, his daily wage, his earnings would have amounted to $1,764.90 during the year. If we divide that amount by 52, the number of weeks in a year, it will give us a weekly average of somewhat in excess of $33. Sixty per cent of $33 is in excess of $16 per week, the amount allowed by the Commission. The award is therefore not excessive, as contended for by plaintiff.

The only question is whether the basis for the foregoing computation is the correct one. As we have pointed out, the basis contended for by plaintiff cannot be correct. Neither can the one adopted by the Commission be successfully defended under the circumstancs of this case. The basis assumed by plaintiff is not just in that the period of employment is too restricted while the basis adopted by the Commission is unfair because it assumes that Parry could have worked 300 days in the year while under the undisputed evidence he could only have worked 222 days. Under the plaintiff's theory Parry's average weekly wage was too low, while under the Commission's theory it was too high, since it assumed that Parry would earn wages during 300 days, which he could not do. Nor, in view of the circumstances, is there any other method of arriving at the average weekly wage which is just and fair to both employer and employee than the one adopted by us. If, for example, the four winter months during which the mine was operated practically continuously were taken as a basis to ascertain the average weekly wage of the employee, the basis would be too favorable to such employee, while if the summer months were taken as the basis, when the mine was operated less, but during which time the employee must nevertheless be in attendance if he desires to continue in his employment, the basis would be too favorable to the employer. We are persuaded, therefore, that the only method to ascertain the true weekly average is the one we have adopted.

While neither plaintiff's counsel nor the Attorney General has found any American cases which are directly in point, and while we have found

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none, yet the Attorney General has called our attention to several English cases where, under circumstances similar to this case, the method adopted by us was approved and applied. See Perry v. Wright, [1908] 1 K. B. 441; White v. Wiseman, [1912] 3 K. B. 352; Anslow v. Cannock-Chase Colliery Co., [1909] Appeal Cases, 431, 5 Butterworth's Workmen's Compensation Cases, 634. We shall not pause here to review those cases nor quote from them. It must suffice to say that they clearly sustain the theory upon which we have proceeded in this case.

Plaintiff's counsel, however, insist that this court is committed to the doctrine contended for by them by what was said in the case of State Road Commission v. Industrial Commission, 190 Pac. 544. A mere cursory reading of the opinion in that case will disclose that it has no application here. That was a case where the employment in its very nature was merely occasional, and where the employee could devote his time to other remunerative employment. The employment in that case was not even what is known as seasonal employment. While the employment in this case somewhat partakes of the nature of a seasonal employment, yet it is not such in fact. It is merely an intermittent or irregular employment which continues in that way more or less throughout the entire year. The whole year must therefore be considered in order to arrive at a fair average of the employee's earnings. If the employee is injured and is thus prevented from earning wages, he loses precisely what he could have earned, and is entitled to 60 per cent. of his earnings unless the 60 per cent. exceeds the maximum allowed by the act.

In this case, therefore, although the Commission's method of arriving at the average weekly wage was clearly unsupported by the evidence, yet, in view that the evidence as clearly supported the amount that was actually allowed, the award is not excessive, and must therefore stand.

The application must therefore be dismissed, with costs.

Corfman, C. J., and Weber, Gideon, and Thurman, JJ., concur.

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SMITH v. STATE HIGHWAY COMMISSION OF VIRGINIA ET AL.

(Supreme Court of Appeals of Virginia. Nov. 21, 1921.)

109 Southeastern Reporter, 312.

1. MASTER AND SERVANT—STATE HIGHWAY COMMISSION IS NOT "EMPLOYER" WITHIN COMPENSATION ACT.

The State Highway Commission of Virginia is not the employer of those working under it within Workmen's Compensation Act, §§ 2a, 8, providing that employers shall include the state, any municipal corporation within the state, or any political division thereof.

(For other cases, see Master and Servant, Dec. Dig. § 364.)

(For other definitions, see Words and Phrases, First and Second Series, Employer.

2. MASTER AND SERVANT—STATE LIABLE FOR COMPENSATION AS EMPLOYER OF HIGHWAY COMMISSION'S EMPLOYEE.

Within Workmen's Compensation Act, § 2a, defining employers, the state is the employer of those working for the State Highway Commission.

(For other cases, see Master and Servant, Dec. Dig. § 364.)

Certified from Industrial Commission.

Claim by Grace Lillard Smith before the Industrial Commission against the State Highway Commission of Virginia and the Commonwealth of Virginia to recover compensation for the death of claimant's husband employed by the Highway Commission. On questions of law certified by the Industrial Commission. Claimant held entitled to compensation from the Commonwealth, but not from the State Highway Commission.

PER CURIAM.. This case is before us upon the following certificate:

"The Industrial Commission of Virginia, pursuant to the provisions of section 61 of the Workmen's Compensation Act (Acts 1918, p. 637) beg leave to certify to this honorable court for its decision and determination a question of law arising in the above-entitled proceedings, now pending before said Industrial Commission of Virginia.

"The claimant, Grace Lillard Smith, in her own right and in behalf of her infant child, had filed her application for hearing before the Industrial Commission of Virginia, setting up the claim of herself and infant child as dependents of her husband, William Oscar Smith, a quarry foreman in the direct employment of the State Highway Commission of Virginia, who died as result of an injury which arose out of and in the course of his employment with the said State Highway Commission, on the 30th day of June, 1920.

"In said application claimant asks that the compensation be paid as provided by the statute, either by the State Highway Commission of Virginia or the Commonwealth of Virginia, as liability under the statute may be determined.

"The State Highway Commission of Virginia now comes by counsel, and moves the Industrial Commission of Virginia to dismiss the above-entitled proceedings as to the said State Highway Commission and make the commonwealth of Virginia party defendant, stating that if any claim

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at all can be asserted in the above-entitled proceedings it must be asserted against the commonwealth of Virginia, section 2 (a) Workmen's Compensation Act of Virginia (Acts 1918, p. 637), whereupon the commonwealth of Virginia, by consent of the Attorney General of Virginia, was made a party defendant to the above-entitled proceedings.

"The question of law which is here respectfully certified to this honorable court for its decision and determination is:

"Was the State Highway Commission the employer of William Oscar Smith, at the time of his death, and therefore the proper party defendant, and is it, as such, liable to pay compensation to the claimants in the act provided? or,

"Was the commonwealth of Virginia the employer at said time and, as such, liable to pay said compensation; if so, in what manner and against what funds should the Industrial Commission of Virginia direct an award for the payment of compensation to the claimants in the above-entitled proceedings?"

[1] 1. Taking up the two questions thus submitted to us in their order, we answer that the State Highway Commission was not the employer of William Oscar Smith within the contemplation of the Workmen's Compensation Act, because the commission does not fall within the definition of an employer contained in section 2 thereof. The act provides (section 2a) that—

"'Employers' shall include the state and any municipal corporation within the state or any political division thereof, and any individual, firm, association or corporation, or the receiver or trustee of the same, or the legal representative of a deceased employer, using the service of another for pay."

A counterpart of this provision is found in section 8 of the act as follows:

"Neither the state, nor any municipal corporation within the state nor any political subdivision thereof, nor any employee of the state or of any such corporation or subdivision shall have the right to reject the provisions of this act relative to payment and acceptance of compensation; and the provisions of sections 5, 6, 16, 17 and 18 shall not apply to them."

It is clear that the State Highway Commission is neither a municipal corporation nor a political division thereof, nor is it an individual, firm, association, or corporation, receiver or trustee of the same, or the legal representative of a deceased employer.

Not falling within the terms of the definition to be found in the act, we have no hesitancy in saying that the State Highway Commission cannot be regarded as the employer of the deceased.

[2] 2. (a) We think it is equally clear, however that the deceased was an employee of the state, that if there be nothing in the facts of the case concerning the circumstances of the accident which would defeat the right of his estate to compensation for his death, the state is liable for the compensation allowed.

The definition above quoted brings the state within the operation of the act, and the act, and the organization and duties of the State Highway Commission make those employed by it employees of the state. It is manifest, for example, that if an employee of the State Corporation Commission, or of the Industrial Commission of Virginia, should be injured by accidental means, he would be entitled to the benefit of the provisions of the act, but the proceeding could not be against either commission, and would have to be brought against the state.

[3] (b) As to the manner in which and the funds from which the compensation awarded by the Industrial Commission in such a case should

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be paid, no order can be made directing the payment, but the same must be provided for by special appropriation to be made by the Legislature.

While it is true that the Compensation Act contemplates employees of the state, and expressly provides that they shall have the benefit of the same, no provision has yet been made for the payment of claims against the state, and section 2582 of the Code provides that no judgment or decree, unless otherwise provided, shall be paid without a special appropriation by law. Neither the court nor the Industrial Commission can require the Legislature to make an appropriation for cases of this character, but it is not to be doubted for a moment that such appropriation will be made in every case in which an order against it is made by the commission. The state will not provide that its employees shall have the right to claim compensation under the Workmen's Act, and then decline to give them any means whereby they may collect the compensation allowed them thereunder.

We have been referred to the case of Woodcock v. Board of Education, decided by the Supreme Court of Utah January 13, 1920, and reported in 55 Utah, 458, 187 Pac. 181, 10 A. L. R. 181. In that case a schoolteacher had presented her claim for injuries sustained in her usual duties, and the Industrial Commission made an award in her favor against the board of education of Salt Lake City. The board resisted the payment of the award on the ground that there were no funds in their hands applicable to such allowances, and the court held that the judgment should be paid from the funds provided for the support and maintenance of schools. The case has no application here, because the Utah statute expressly made each school district as "employer," and as such liable for the compensation.

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PARHAM v. STANDARD OIL CO. OF LOUISIANA.

(United States District Court, N. D. Mississippi, E. D. September 17, 1921.)

275 Federal Reporter, 1007.

1. MASTER AND SERVANT — LOUISIANA COMPENSATION ACT CONSTITUTIONAL.

The Workmen's Compensation Law of Louisiana is constitutional.

(For other cases, see Master and Servant, Dec. Dig. § 347.)

2. MASTER AND SERVANT — LOUISIANA COMPENSATION ACT EFFECTIVE AGAINST EMPLOYEE, IN ABSENCE OF EXPRESS STIPULATION.

The Workmen's Compensation Act of Louisiana becomes effective by operation of a legal presumption under section 3 as against an employee who begins work without expressly stipulating against the provisions of the act, and can thereafter be terminated only by written notice given not less than 30 days prior to the accident to either party, under paragraph 4.

(For other cases, see Master and Servant, Dec. Dig. § 358.)

3. MASTER AND SERVANT—ELECTION BY MINOR'S FATHER AFTER ACCIDENT HELD IN TIME, UNDER LOUISIANA COMPENSATION ACT.

Where employee was under the age of 18 years and was without a curator or tutor. and where neither the father, mother. nor the court terminated the operation of the Workmen's Compensation Act of Louisiana as to the employee, on the employee's behalf. prior to the accident. under section 3. par. 6, the father may, even after the injury, elect. on the employee's behalf, to make the act inoperative as to such employee. under section 16, providing that. in case injured employee is a minor at the time when the right to terminate the operation of the act accrues to him, no limitation of time shall run so long as he has no curator or tutor; section 3. par. 4, requiring written notice to terminate operation of the act not less than 30 days prior to accident. being inapplicable in such case.

(For other cases. see Master and Servant, Dec. Dig. § 359.)

4. MASTER AND SERVANT—SUIT BY MINOR'S FATHER HELD AN ELECTION UNDER LOUISIANA COMPENSATION ACT.

Father of injured employee under 18 years of age, who was without tutor or curator, by filing suit against employer, exercised the right on behalf of the employee to terminate the operation of the Workmen's Compensation Act of Louisiana. written notice provided for in section 3 being unnecessary. since the law does not require the doing of an idle or useless thing.

(For other cases, see Master and Servant. Dec. Dig. § 358.)

At law. Action by Roy P. Parham against the Standard Oil Company of Louisiana. On demurrer to complaint. Demurrer overruled.

W. D. & J. R. Anderson. of Tupelo, Miss.. for plaintiff.

Green & Green. of Jackson, Miss., and Leftwich & Tubb, of Aberdeen. Miss.. for defendant.

HOLMES. D. J. [1] The Workmen's Compensation Law of the state of Louisiana (Act No. 20 of 1914, as amended by Act No. 243 of 1916

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and Act No. 38 of 1918) is constitutional. Paragraph 3 of section 3 of this law is broad and sweeping enough in its terms to embrace a minor under the age of 18 years, and consequently the plaintiff in this case, who entered the employment of the defendant without expressly stipulating against the application of said section 3, is bound by its provisions unless he relieves himself from the presumption of section 3 as provided by paragraphs 4 and 6. Admittedly no such election to terminate the provisions of paragraph 3 was exercised by the plaintiff in the manner provided by paragraph 6 prior to the injury. Paragraph 4 of section 3 provides that any agreement or election for the operation of the provisions of the act may be terminated by either party to the contract of hiring giving written notice to the other party not less than 30 days prior to the accident that the provisions of the act shall not apply.

[2] It seems very clear, under said paragraph 3, that when an employee begins work without expressly stipulating against the provisions of the act, it becomes effective by operation of a legal presumption. After the act takes effect as to any employment, it can only be terminated by "written notice given not less than 30 days prior to the accident to the other party." Of course the act cannot be "terminated" unless its operation has previously begun. The right to terminate the operation of the act is "a right, privilege or election" which accrues to the employee under the act, but by paragraph 4 of section 3 this termination must take place by written notice not less than 30 days prior to the accident. This is a limitation of time provided in the act within which the right to terminate the operation of the act shall expire. It applies to all persons over the age of 18 years mentally competent to act for themselves and to all minors and persons non compos mentis who have a curator or tutor, but, under section 16, "in case an injured employee is mentally incompetent or a minor" at the time when the right to terminate the operation of the act accrues to him, "no limitation of time" shall run so long as such incompetent has no curator or tutor.

The plaintiff in this case is an injured employee and a minor under the age of 18 years without a curator or tutor. It is, therefore, difficult to see why, under said paragraph 6, his father cannot elect, even after the injury, to terminate the provisions of the act with reference to his injury when section 16 provides that in case an injured employee is a minor at the time when any right, privilege, or election accrues to him under the act, his duly qualified curator or tutor may, in his behalf, claim and exercise such right, privilege, or election, and that "no limitation of time" shall run so long as such minor has no curator or tutor. The only limitation of time on the right to terminate is that provided in said paragraph 4. It is worthy of comment that notice to terminate an agreement to work under the act requires 30 days' time prior to the accident under paragraph 4, but an employee who has given notice to his employer, or an employer who has given notice to his employee, that he elects not to be subject to the provisions of the act, may waive such election, under paragraph 5, "by a notice in writing *which shall take effect immediately.*"

This shows an intention on the part of the lawmakers to facilitate the operation of the act. In the first place, under said paragraph 3, in the incipiency of the employment, the burden of preventing the act from operating is placed upon the party objecting to its provisions, and inaction on the part of both gives effect to the act. In the second place, when the act has once taken effect by any agreement or election, express or implied, it requires written notice not less than 30 days prior to the accident to the other party that the provisions of the act shall no longer apply. But, on the other hand, under said paragraph 5, when one of the parties has elected not to be under the act, he may

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waive such election by a notice in writing which shall take effect immediately. In other words, under paragraph 5. such waiver of an election not to come under the act might take place even after the injury and would take effect immediately. Thus the operation of the act is favored by making its provisions optional at all times, unless some of the parties to the employment give written notice either at the time of the contract of hiring or not less than 30 days prior to the accident that the act shall not apply, but the right to terminate the operation of the act after the accident has occurred is saved only in favor of injured employees who are mentally incompetent or minors without curators or tutors.

The language of section 16, standing alone, might include a minor over the age of 18 years, but paragraph 6 of section 3 clearly shows an intention to emancipate such a minor in so far as his right of election or termination or waiver is authorized by the act.

[3, 4] I conclude, therefore, that as neither the father, mother nor the court had exercised on behalf of the plaintiff the right of termination under paragraph 6 prior to the accident, and as the plaintiff neither has nor had any tutor, that the father may exercise this right after the accident, and that by filing suit he has exercised it and rendered unnecessary giving written notice, as the law never requires the doing of an idle or useless thing.

The demurrer will be overruled.

FEDERAL MUTUAL LIABILITY INS. CO. v. INDUSTRIAL ACCIDENT COMMISSION ET AL. (S. F. 9919.)

(Supreme Court of California. Dec. 5, 1921.)

202 Pacific Reporter, 664.

1. MASTER AND SERVANT—MINOR COMPENSATION CLAIMANT SHOWN TO BE MEMBER OF DECEASED EMPLOYEE'S FAMILY.

In a proceeding for compensation under the Workmen's Compensation, Insurance, and Safety Act for the death of an employee, evidence *held* to show that claimant, the child of an undivorced woman living with deceased as his wife, was a member of deceased's family in good faith and wholly supported by him, so as to justify an award.

(For other cases, see Master and Servant, Dec. Dig. § 405[5].)

2. MASTER AND SERVANT—CHILD'S RIGHT TO COMPENSATION FOR DEATH NOT DEPENDENT ON LEGAL LIABILITY FOR SUPPORT.

Notwithstanding Civ. Code, §§ 205, 206, making a father legally liable for the support of a minor child, a child who received her support wholly from another man, with whom her undivorced mother was living, and was a member of his family in good faith at his death in his employment, is within Workmen's Compensation Act, § 14; the benefit of the act not depending on legal liability for support.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

Shaw, C. J., dissenting.

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Certiorari to review an order of the Industrial Accident Commission.

Proceeding by Bertha Fern Gnash for compensation under the Workmen's Compensation Act for the death of one William G. Thompson, opposed by W. C. Crowell, employer, and the Federal Mutual Liability Insurance Company, insurer. An order awarding compensation was made by the Industrial Accident Commission, and the insurer brings certiorari. Award affirmed.

Cooley, Crowley & Lachmund, of San Francisco, for petitioner.
A. E. Graupner, of San Francisco, for respondents.

LAWLOR, J. This is a proceeding in certiorari upon a petition by the Federal Mutual Liability Insurance Company to review the action of the Industrial Accident Commission in granting an award to one Bertha Fern Gnash as compensation for the death of one William G. Thompson.

Cassander K. Gnash and George Gnash, parents of Bertha Fern Gnash, the claimant, were married in Kansas in 1896 and later moved to California. The record shows that Gnash was a poor provider and that the members of his family were compelled to support themselves to a large extent. He was in the habit of going away and leaving them for weeks at a time, and finally left them permanently. After that Mrs. Gnash supported herself by various kinds of work until October, 1917, when she went to Yermo to do housework and cooking for the deceased, William G. Thompson, on his ranch. She took Bertha Gnash, then six years old, with her. Later the three moved to a mine near Baxter, and at about that time, according to the testimony, the relationship between Thompson and Mrs. Gnash changed. He stopped giving her wages and began paying the expenses of herself and Bertha. Mrs. Gnash continued to do the housework and cooking. In May, 1918, Mrs. Gnash, with Thompson's co-operation, started proceedings to secure a divorce from Gnash, which suit was never determined. From that time Thompson and Mrs. Gnash lived together openly as husband and wife. Mrs. Gnash used the name "Mrs. Thompson," and Bertha was called "Bertha Thompson." Thompson supported them entirely, giving the money to Mrs. Gnash, who bought what she wanted for Bertha. In February, 1920, they were living in Redlands, and Thompson was working for one W. C. Crowell as a carpenter. On February 19, 1920, he fell off a scaffold, sustaining injuries from which he died. Mrs. Gnash petitioned for compensation under the Workmen's Compensation, Insurance, and Safety Act (Acts 1917, p. 831). It was stipulated that the injuries which caused Thompson's death arose out of and in the course of his employment; that his average earnings were $4.50 per day; that he was working six days per week; that any benefits to be awarded should be computed upon that basis; and that W. C. Crowell, the employer, was insured against risks under the Compensation Act by the petitioner, Federal Mutual Liability Insurance Company.

Upon the hearing Mrs. Gnash testified she was Thompson's wife and that Gnash was dead. She gave the date of her marriage to Thompson as November 28, 1917, and described a judge who, she said, performed the ceremony. After the hearing she confessed to the referee that her relationship with Thompson was meretricious. The referee, in an affidavit signed by himself, forwarded the information to the Industrial Accident Commission, and Mrs. Gnash abandoned all claim against petitioner on her own behalf. Bertha Gnash was awarded compensation in the sum of $4,889.98; the Commission finding that she was "a member of his [Thompson's] family in good faith and wholly supported by him." A rehearing was had upon application of the petitioner. At the rehearing Mrs. Gnash testified that she had not been married to Thompson, and

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described the relationship as she had confessed it to the referee to have been. The Industrial Accident Commission affirmed its former finding that Bertha Gnash was a member of decedent's family and entitled to compensation. The award was affirmed, except that it was reduced to $4,001.40, the correct sum when computed at the stipulated rate of $4.50 per day. Petitioner thereupon brought this proceeding.

[1] 1. In support of the contention that the award should be annulled, petitioner advances two arguments. The first of these is that—

"Mrs. Gnash was an employee of Thompson in domestic service, and therefore neither she nor Bertha Fern Gnash was a member of his 'family or household,' within the meaning of the Compensation Act. * * * Mrs. Gnash went to work as a cook, and that fact being established, and no criminal or unlawful act being proved, it is presumed that this relationship of employer and employee continued between Thompson and Mrs. Gnash until his death."

It is insisted that the record refutes any claim that the relation of employer and employee was terminated; that Mrs. Gnash testified she went to the mine to work for Thompson as a cook; that Mrs. Gnash's married daughter, Mrs. Grace Hart, testified that Mrs. Gnash did Thompson's work for him and in return received her own support and that of Bertha Gnash; that the change in method of payment, or the fact of cohabitation between Thompson and Mrs. Gnash, did not alter the relation of employer and employee. Respondents assert that—

"The facts of the case, however, show that there came a time in the relationship between the employee [Thompson] and Mrs. Gnash when she ceased to be his employee and he ceased to be her employer, and when they began to cohabit. When the period of cohabitation began, wages ceased, and the employee commenced to support Mrs. Gnash and her child as members of his household and on a distinctly different relationship from that which existed at the time that Mrs. Gnash first went to the en[illegible]. * * * After they reached the mine, a different relationship commenced. There they began to cohabit, and the employee paid the expenses for the woman and the child, apparently without regard to the amount thereof. * * * In spite of the contentions of petitioner, the record distinctly shows beyond all doubt that Thompson and Mrs. Gnash lived together as man and wife, and that he supported Mrs. Gnash and her child as he would his own wife and daughter."

In our opinion the evidence sustains respondent's contention and the implied findings of the Industrial Accident Commission that at the time of decedent's death his relations with Mrs. Gnash were not those of an employer. It is true that Mrs. Gnash testified she went to the mine as a cook, and that her daughter testified Mrs. Gnash received her support from Thompson in return for her services. However, we think the evidence shows there was more of a change in their relationship than might be implied from the fact that Thompson stopped paying Mrs. Gnash wages, or, indeed, from the fact of the meretricious relationship. Mrs. Gnash testified:

"No, he never paid me wages after I went to the mining camp.

"Q. Out on the desert? A. Yes.

"Q. Did he pay the expenses? A. He paid the expenses.

"Q. To whom? A. To myself and my little girl. * * *

"Q. When did you first become known and call yourself Thompson? A. After we visited the lawyer's office to file the divorce suit. * * *

"Q. You never were married to Mr. Thompson? A. No.

"Q. Was he agreeable to having you use his name, Thompson? A. He asked me to on account of gossiping tongues.

"Q. What did Bertha call him; how did she address him?" And, addressing the child, she asked. "A. Daddy, didn't you?" Bertha Fern Gnash nods head affirmatively. * * *

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"Q. Where was Guy Gnash living during 1919 and the first part of 1920? A. With Mr. Thompson and I.

"Q. Wherever you were? A. We were in Elsinore.

"Q. In Elsinore and Redlands? A. Yes.

"Q. He was living with you as one of the family? A. Yes. * * * No; it was after he was married; he and his wife lived here with us, on 115 Church, for a little while * * *

"Q. Was he living at home? A. Yes.

"Q. With you? A. Yes.

"Did you charge him board and lodging? A. Yes, surely; he paid his way."

Mrs Gnash stated that her son did not contribute to her support or Bertha Gnash's "after Mr. Thompson started keeping us, supporting us, because it was not necessary." She further testified:

"Q. Did you and Mr. Thompson have any plans, any expectations of getting married? A. We surely did.

"Q. Had you discussed that with him? A. Yes.

"Q. And what did you intend to do? A. We intended to get married as soon as Mr. Maloney, after the suit was filed, but we just neglected sending in the rest of the money; in fact we bought some property which tied us up."

Guy Gnash, Mrs. Gnash's adult son, testified he met Thompson in 1917 on a train.

"Q. Was your mother then living with him? A. No, sir.

"Q. Was she working for him? A. Yes; I believe she was working for him. Yes; she was working for him. * * *

"Q. Was that the time [when they were at Afton] when your mother began living with Mr. Thompson? A. No. I don't think so.

"Q. When did she begin living with him? A. I think that's when they went to Elsinore

"Q. She was working for him in Afton? A. She was working for him in Afton."

It thus appears that in the latter part of their association Thompson paid the expenses and supported Mrs. Gnash and Bertha Gnash. that it was at his request they assumed his name; that he was assisting Mrs. Gnash to secure a divorce; that he intended to marry her when the divorce was obtained; that they bought property together; that Mrs. Gnash's son lived "at home" with them as "one of the family"; and that the difference in the relationship between them while Mrs. Gnash was "working for" Thompson and while she was "living with him" was clearly recognized by Mrs. Gnash's son. It is idle to assume that when he spoke of his mother as "living with" Thompson he meant anything else than what the words import. In our opinion these facts show that at the time of Thompson's death Mrs. Gnash was a member of his household and supported as such and that the money Thompson gave her was not paid as wages, but was given for herself and Bertha Gnash, as if spent by the head of a family for those in the household.

Moore Shipbuilding Corporation v. Industrial Accident Commission, 196 Pac. 257, 13 A. L. R. 676, was a case in which the facts were similar to those in the case at bar. There a woman was living with an employee who was killed, and with them lived the claimant, the woman's young daughter. In that case the court said:

"Again, the word 'household' is variously used to designate people, generally, who live together in the same house, including the family servants, and boarders; or it may be used as including only members of the family relation. It is probable that the two terms are coupled together in this statute to indicate that they are used synonymously, the 'family' to include only those of the household who are thus intimately assoc

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iated, the 'household' to exclude those of the family not living in the home. There can be no doubt that Bauer, Mrs. Miller, and the little girl constituted a family or household. They were living together in all the interdependency * * * of man and wife and their legitimate offspring. The only thing to exclude Mrs. Miller from the benefit of this relation was lack of good faith."

We think the facts of the case at bar, as already brought out, show that the three people were living together as a family and were members of one household; since it is held in Moore Shipbuilding Corporation v. Industrial Accident Commission, supra, that people living together in such a relationship may constitute a household.

[2] 2. Petitioner's next contention is that Bertha Fern Gnash, being a legal dependent of her father, George Gnash, could not legally be a total dependent of the deceased, Will Thompson. This claim is based upon the fact that sections 205 and 206 of the Civil Code make a father legally liable for the support of a minor child, and that section 14, subdivision a, of the Compensation Act, raises a conclusive presumption that a child under the age of 18 is wholly dependent "upon the parent with whom he or they are living at the time of the death of such parent or for whose maintenance such parent was legally liable at the time of death."

Even if George Gnash is legally liable for the support of Bertha Gnash, we are not prepared to hold that this precludes her from becoming wholly a dependent on Thompson within the meaning of the Compensation Act. Section 14 of that act provides that—

"(a) The following shall be conclusively presumed to be wholly dependent for support upon a deceased employee: (1) A wife upon a husband with whom she was living at the time of his death, or for whose support such husband was legally liable at the time of his death. (2) A child or children under the age of eighteen years or over said age, but physically or mentally incapacitated from earning, upon the parent with whom he or they are living at the time of the death of such parent or for whose maintenance such parent was legally liable at the time of death, there being no surviving dependent parent.

"(b) In all other cases, questions of entire or partial dependency and questions as to who constitute dependents and the extent of their dependency shall be determined in accordance with the fact, as the fact may be at the time of the injury of the employee.

"(c) No person shall be considered a dependent of any deceased employee unless in good faith a member of the family or household of such employee. * * *"

It will be noted that subdivision (a) does not provide generally, as contended by petitioner, that a child is conclusively presumed to be dependent on the parent who is legally liable for his support. That subdivision provides that when a child's parent is killed, and no dependent parent survives, the child is presumed to have been dependent on the deceased parent. Such a situation is not presented here, for, even if it had been Bertha Gnash's father who was killed still she had a dependent parent surviving—Mrs. Gnash (Civ. Code, §§ 155, 174, 175)—who admittedly has no claim under the Compensation Act because of Thompson's death. The case, therefore, falls within subdivision (b), which provides that in all other cases dependency shall be determined in accordance with the fact as it may exist at the time of the injury.

In Moore Shipbuilding Corporation v. Industrial Accident Commission, supra, there was a finding that Mrs. Miller's husband, the claimant's father, was dead. An examination of the record shows that this finding was made in the first hearing of the cause, in spite of the testimony of Mrs. Miller to the effect that at the time she was living with Bauer she knew she was then the wife of another man. Upon the rehearing, how-

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ever, which was a hearing de novo, there was no such finding. In that case the effect of Miller's legal liability for the claimant's support was not discussed. However, the fact that Bauer was not legally liable for her support was considered, and the court said:

"The need of relief from the deprivation caused by the death of the employee and the questions of public policy involved rest upon the fact that the employee has in good faith taken into his home and assumed the support of one without other means of subsistence. The hardship to the individual dependent, and the incidental burden to the insurer or to society from the death of a breadwinner are no different whether the maintenance of the dependent has been voluntarily and gratuitously assumed, or legally imposed.

"As has been pointed out, the benefits of this law are not provided as an indemnity for negligent acts committed or as compensation for legal damages sustained, but is an economic insurance measure to prevent a sudden break in the contribution of the worker to society by his accidental death in the course of his employment. From this economic standpoint it makes no difference whether the workman's earnings are being distributed to those whose support he has voluntarily assumed, or to those who are legally entitled to such support. In either case they are the reliance of dependent members of society. The only difficulty is that where there is no legal dependent it is harder to determine that the contribution of support has been made so as to constitute the recipient a dependent in good faith. * * *

"There are three vital conditions required to establish dependency in this case under the Compensation Act: First, was Ida Miller actually dependent upon the decedent for her support; second, was she a member of his family or household; third, was the relation or connection sustained in good faith?"

It is clear both from the wording of the act and from that case that the benefit of the statute does not depend upon legal liability for support. As pointed out, there is no presumption that because Gnash was legally liable for Bertha Gnash's support she was wholly dependent upon him, within the meaning of the Compensation Act, and if she were in fact a dependent of Thompson, the effect of his death upon her is the same whether she had a father who was legally liable for her support or not. If she was in fact a dependent of Thompson, and was in good faith a member of his household, she is entitled to compensation, whether or not her father was living.

It was found by the Industrial Accident Commission that—

"Applicant Bertha Fern Gnash was at the time of the death of the employee in good faith a member of his household, and was totally dependent upon him for support at said time, within the terms of the Workmen's Compensation, Insurance, and Safety Act of 1917."

As we have shown, Mrs. Gnash was not an employee of Thompson at the time of his death, and the money paid for Bertha Gnash's support was not paid to Mrs. Gnash as wages. Concerning Bertha's position in Thompson's household, Mrs. Gnash testified:

"Have they [Mrs. Hart and her husband] made any gifts of money, clothes, or anything else to Bertha? A. Some clothes for Bertha since Mr. Thompson was killed.

"Q. Before Mr. Thompson was killed? A. No; not before; Mr. Thompson supported her. * * *

"Q. Did Mr. Thompson display any special affection for Bertha? A. Well, no; nothing more than a father, of course; he showed her more fatherly love than her own did, a whole lot, or ever did, as far as supporting her. * * *

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"Q. Where did you get the money and the funds that you used to buy the clothing for Bertha and yourself since you were living with Mr. Thompson? A. From Mr. Thompson.

"Q. Did he understand that his money was being used to support Bertha that way? A. Yes.

"Q. To buy her clothing? A. Most assuredly.

"Q. Did he ever buy any school books? A. No, because books were furnished; he did not have to buy school books."

Bertha Gnash testified:

"Q. Do you know where you got your dresses and clothes that you wore; where did they come from? A. My father Mr. Thompson.

"Q. What did you call Mr. Thompson? A. Father.

"Q. What is your name? A. Bertha Fern Thompson.

"Q. Was Mr. Thompson good to you? A. Yes."

Mrs. Grace Hart testified:

"Q. Do you know whether or not she [Bertha Gnash] has recognized Mr. Thompson, the deceased, as her father? A. Yes.

"Q. Did she look upon him as her father? A. She did.

"Q. Do you know whether she ever knew the difference? A. She never. * * *

"Q. Do you happen to know whether Mr. Gnash contributed anything to your mother for her support or for the support of Bertha since he has been away? A. No.

"Q. He has not? A. He has not."

Guy Gnash testified further:

"Q. Did you have occasion to observe how Mr. Thompson provided for your mother? A. He provided well for her.

"Q. Who else lived with them? A. Bertha Fern.

"Q. Did he provide for her? A. He did.

"Q. Did she consider him her father; did she treat him as though she thought he was her father? A. Yes; she did.

"Q. What did she call him; what was her term? A. Sometimes she called him 'Dad.' * * *

"Q. You knew that your sister Bertha was called Bertha Fern Thompson? A. Yes."

This evidence shows clearly that Thompson treated Bertha as if she were his own child and that he provided for her as a father might. It is ample to support the finding of the Industrial Accident Commission that Bertha Fern Gnash was wholly dependent on Thompson and was a member of his household. There can be no question but that she regarded him as a father and that she was in good faith a member of his household.

Petitioner has cited Farrington v. Lachman and Jacobi, 1 I. A. C. (Part I) 116, a case wherein a father, whose children were being cared for by another, was killed, and the children were allowed compensation. It appears the mother of the children had died before the father. There being no surviving dependent parent, the case fell squarely within subdivision (a) of section 14 of the Compensation Act, and the children were to be conclusively presumed wholly dependent upon the father. Wilcut v. Cudahy Packing Company, 4 I. A. C. 308, a case of a deserted wife, also came within subdivision (a) of section 14, and in Aldinger v. Ransome Concrete Co., 1 I. A. C. (Part I) 151, the Commission found the applicant's mother to have been, as a fact, an employee of the deceased, with whom she was living, and that the mother and not the deceased supported the child. In the case at bar the claimant's mother was not an employee of the decedent, but, as we have pointed out, was a member of his household.

The award is affirmed.

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We concur: Sloane, J.; Shurtleff, J.; Wilbur, J.; Lennon, J.; Waste, J.

SHAW, C. J. I dissent. I do not believe that persons living together in the relation shown in this case can justly or properly be considered as constituting a lawful family or household, within the meaning of the Workmen's Compensation, Insurance, and Safety Act. This court has heretofore decided that such persons may be a lawful household, but I did not concur therein. On such a question of ordinary morality I cannot defer to or follow that decision.

WILLIAMS v. SOUTHERN PAC. CO. (Civ. 2302.)

(District Court of Appeal, Third District, California. Oct. 17, 1921. On Petition for Modification, Nov. 16, 1921. Hearing Denied by Supreme Court Dec. 15, 1921.)

202 Pacific Reporter, 356.

2. MASTER AND SERVANT — COMPENSATION AWARD NO BAR TO ACTION UNDER FEDERAL EMPLOYERS' LIABILITY ACT BY DIFFERENT PARTIES.

An award in a workmen's compensation proceeding instituted by the wife of a deceased employee in her individual capacity is not a bar to the whole cause of action in an action under the federal Employers' Liability Act, brought by her as administratrix for the benefit of herself and an adult daughter; the plaintiffs in the two proceedings not being the same.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

3. MASTER AND SERVANT — FINDING OF EMPLOYMENT IN INTRASTATE COMMERCE CONCLUSIVE ON PARTIES TO COMPENSATION AWARD.

An award in a workmen's compensation proceeding, based on a finding of the Industrial Commission that the deceased employee was employed in intrastate commerce, is conclusive of such fact as between the same parties or their privies, so long as the judgment remains unmodified.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

6. MASTER AND SERVANT—COMPENSATION AWARD CONCLUSIVE OF CLAIMANT'S INDIVIDUAL RIGHTS WHEN SUING AS ADMINISTRATRIX.

Where the wife of a deceased employee instituted a compensation proceeding in her individual capacity, and sued as administratrix under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665), an award in the compensation proceeding, based on a finding that the employee was employed in intrastate commerce, was conclusive in the action under the federal act as against the administratrix, so far as she represented herself as one of the beneficiaries.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

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10. MASTER AND SERVANT—ENGAGEMENT IN INTERSTATE COMMERCE QUESTION OF FACT.

In an action under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665), the question whether the deceased employee was employed in interstate commerce at the time of his death is one of fact for the determination of the jury.

(For other cases, see Master and Servant. Dec. Dig. § 284[1].)

On Petition for Modification.

12. MASTER AND SERVANT—COMPENSATION AWARD NOT CONCLUSIVE AS JUDGMENT IN REM.

A workmen's compensation award, based on a finding that the deceased employee was employed in intrastate commerce, is not conclusive as against the whole world as a judgment in rem under Code Civ. Proc. § 1908, providing that a judgment or order in respect to the personal, political, or legal condition or relation of a particular person is conclusive on the condition or relation of the person.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

13. MASTER AND SERVANT — COMPENSATION AWARD NOT BINDING ON ONE NOT DEPENDENT.

A workmen's compensation award based on a finding that the deceased employee was employed in intrastate commerce is not conclusive on an adult daughter who was not dependent on deceased, and not entitled to participate in the award, but for whose benefit recovery is sought under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665).

(For other cases, see Master and Servant, Dec. Dig. § 416.)

Appeal from Superior Court, Sacramento County; Charles Busick, Judge.

Action by Ruth Williams, as administratrix of Harry Williams, deceased, against the Southern Pacific Company. From a judgment for plaintiff, defendant appeals. Reversed.

Devlin & Devlin, of Sacramento, for appellant.

Theodore A. Bell, of San Francisco, for respondent.

FINCH, P. J. Plaintiff was given judgment for damages under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665), for the death of her husband, Harry Williams, alleged to have been caused by the negligence of the defendant while the deceased was in the discharge of his duties as brakeman on an interstate train of the defendant company.

Appellant does not contest the implied finding of negligence, but earnestly contends that the deceased was not employed in interstate commerce at the time of the injury resulting in his death. This contention is based on two propositions advanced by the defendant: First, that the evidence conclusively establishes that the train on which the deceased was employed was not an interstate train; secondly, that in a proceeding instituted by the plaintiff, in her individual capacity, against the defendant before the Industrial Accident Commission, it was adjudged that at the time of his death the deceased was employed in intrastate commerce, and that such determination is res adjudicata between the parties to this action.

The injury and resulting death of Harry Williams occurred November 25, 1917. The original complaint in this action was filed January 9, 1918. On April 12, 1918, the defendant filed its answer, denying that

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the deceased was employed in interstate commerce at the time of his death. To avoid the bar of the statute of limitations to a recovery before the Industrial Accident Commission in the event of a decision by the superior court that the deceased was not employed in interstate commerce, the plaintiff, Ruth Williams, in her individual capacity, just prior to the expiration of one year from the time of her husband's death, made application to the Commission for adjustment of her claim for damages, alleging the pendency of the action in the superior court, and that the defendant therein had "answered alleging that deceased was engaged in intrastate commerce at the time of his death," and praying that the proceeding before the Commission "be held in abeyance, after service upon the defendant, until final determination of the said civil action." On December 19, 1918, counsel for Mrs. Williams appeared before the Commission and moved that the proceeding be held in abeyance during the pendency of the action in the superior court. The motion was opposed by counsel for the defendant, and was denied by the Commission. Thereupon counsel for Mrs. Williams applied to the Supreme Court for a writ of prohibition restraining the Commission from proceeding in the matter pending the court's action. The application was denied. The defendant admitted all the facts stated in the application before the Commission, and did not resist the award prayed for. The Commission thereupon awarded Mrs. Williams the sum of $5,000 as damages, and a certified copy of its findings and award was filed by the defendant in the superior court of Sacramento county, and judgment thereon was duly entered.

The respondent contends that the doctrine of res adjudicata has no application to the findings and award of the Industrial Accident Commission; that, since the superior court first acquired jurisdiction, its determination of any issue before it is conclusive, notwithstanding a prior inconsistent determination of the same issue by the Commission; and that the parties to the two proceedings are not identical, in that the plaintiff sued as an individual in the one and as administratrix in the other.

In Western Metal Supply Co. v. Pillsbury, 172 Cal. 411, 156 Pac. 491, Ann. Cas. 1917E, 390, it is said:

"Where compensation is sought the proceedings are in substance those of a court in an action at law. * * * After hearing by the Commission, it makes and files its findings of fact and its 'award which shall state its determination as to the rights of the parties.' * * * The findings thus made are 'conclusive and final' * * * and the award itself is not reviewable except by a writ of certiorari under which the review is restricted in scope. * * * Any party in interest may file a certified copy of the findings and award with the clerk of the superior court, and judgment must be entered by the clerk in conformity therewith. * * * We shall not take the time to review in detail the cases just cited, but content ourselves with saying that we think there is nothing in them which would support the claim that the powers exercised by the Industrial Accident Commission of this state in making awards of compensation are not strictly judicial."

See, also, Carstens v. Pillsbury, 172 Cal. 576, 158 Pac. 218; Pacific Coast Casualty Co. v. Pillsbury, 171 Cal. 319. 153 Pac. 24; Gouanillou v. Industrial Accident Commission (Sup.) 193 Pac. 937; Massachusetts, etc., Co. v. Industrial Accident Commission, 176 Cal. 491, 168 Pac. 1050.

The findings of the Industrial Accident Commission are res adjudicata. In re Hunnewell, 220 Mass. 351, 107 N. E. 934; Centralia Coal Co. v. Industrial Accident Commission, 297 Ill. 513, 130 N. E. 727.

[1] It is not claimed that either the action in the superior court or the proceeding before the Commission could have been successfully pleaded in abatement of the prosecution of the other, but respondent cites 15 Corpus Juris, 1161, to the effect that—

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"Where two tribunals have concurrent jurisdiction over the same parties and subject-matter, "the tribunal where jurisdiction first attaches retains it exclusively, and will be left to determine the controversy and to fully perform and exhaust its jurisdiction and to decide every issue or question properly arising in the case."

At page 1165 of the same volume, however, it is stated that—

"The rule is limited to actions which deal either actually or potentially with specific property or objects, and where a suit is strictly in personam, nothing more than a personal judgment being sought there is no objection to a subsequent action in another jurisdiction."

There is some confusion in the decisions because of failure to recognize the limitation just stated. In strictly personal actions the great weight of authority sustains the rule as stated in the case of Boatmen's Bank v. Fritzlen, 135 Fed. 667, 68 C. C. A. 288, that—

"It is not the final judgment in the first suit, but the first final judgment, although it may be in the second suit, that renders the issues in such a case res adjudicata in the other court."

For further authorities to the same effect, see Insurance Co. v Harris, 97 U. S. 331, 24 L. Ed. 959; Schuler v. Isreal, 120 U. S. 506, 7 Sup. Ct. 648, 30 L. Ed. 707; 1 Freeman on Judgments (4th Ed.) § 320; Jones v. Jones, 108 N. Y. 415, 15 N. E. 707, 2 Am. St. Rep. 447; Lancashire Ins. Co. v. Corbetts, 165 Ill. 592, 46 N. E. 631, 36 L. R. A. 640, 56 Am. St. Rep. 280; Davis v. Bedsole, 69 Ala. 362; Bourgeois v. Jackobs, 45 La. Ann. 1310, 14 South. 68; Oxford v. Paris, 33 Me. 179; Bank of U. S. v. Merchants' Bank, 7 Gill (Md.) 415; Marble v. Keyes, 9 Gray (Mass.) 221; Allis v. Davidson, 23 Minn. 442; Nave v. Adams, 107 Mo. 414, 17 S. W. 958, 28 Am. St. Rep. 421; Casebeer v. Mowry, 55 Pa. 419, 93 Am. Dec. 766.

[2] The plaintiffs in the two proceedings are not the same, and therefore the award of the Commission is not a bar to the whole cause of action in the superior court. Troxell v. Delaware, L. & W. R. Co., 227 U. S. 434, 33 Sup. Ct. 274, 57 L. Ed. 586.

"A judgment obtained by one or more of several joint owners or creditors, having claims against a common debtor, is not a bar to a subsequent action by the other claimants, or separate suits by each of them, for the recovery of their claims, although it is res judicata as to the claims of those who brought the former suit." 15 Standard Encyc. of Proc. 514; Suisun L. Co. v. Fairfield School District, 19 Cal. App. 594, 127 Pac. 349; Harris v. Alcock, 10 Gill & J. (Md.) 226, 32 Am. Dec. 158.

[3] A material issue in both proceedings was the character of Williams' employment; if intrastate, the Commission had exclusive jurisdiction to award compensation; if interstate, then the jurisdiction was in the superior court. The Commission determined that the employment was in intrastate commerce, and the fact—

"so determined must, as between the same parties or their privies, be taken as conclusively established so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of persons and property if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them." Southern Pacific R. Co. v. United States, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 335; 2 Black on Judgments (2d. Ed.) § 506.

In Spokane & Inland Empire R. Co. v. Whitley, 237 U. S. 487, 35 Sup. Ct. 655, 59 L. Ed. 1060, L. R. A. 1915F, 736, in construing a statute of Idaho similar to the federal Employers' Liability Act, the court said:

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"The recovery authorized is not for the benefit of the 'estate of the decedent; the proceeds of the recovery are not assets of the estate. Where the personal representative is entitled to sue, it is only as trustee for described persons, the 'heirs' of the decedent. * * * They are the sole beneficiaries. * * * It may also be premised that, when suit is duly brought by the trustee under such a statutory trust, it is a necessary and conclusive presumption that the trust will be executed and the rights of the beneficiaries as fixed by the statute which created the obligation will be recognized by all courts before whom the question of distribution may come."

In Ruiz v. Santa Barbara Gas, etc., Co., 164 Cal. 191, 128 Pac. 332, it is said:

"It is settled by the decisions that an action of the character authorized by section 377 of the Code of Civil Procedure is one solely for the benefit of the heirs, * * * that the money recovered in such an action does not belong to the estate but to the heirs only, and that an administrator has the right to bring the action only because the statute authorizes him to do so, and that he is simply made a statutory trustee to recover damages for the benefit of the heirs."

In Corcoran v. Chesapeake & O. Canal Co., 94 U. S. 741, 24 L. Ed. 190, the plaintiff brought the suit upon certain bonds and the defendant pleaded a prior judgment as a bar. The court, in sustaining the plea, said:

"It is also argued that in that suit Corcoran was only a party in his representative capacity of trustee, and he here sues in his individual character as owner of the bonds, * * * and in his latter capacity is not bound by that decree. But why is he not bound? It was his duty as trustee to represent and protect the holders of these bonds; and for that reason he was made a party, and he faithfully discharged that duty. It would be a new and very dangerous doctrine in the equity practice to hold that the cestui que trust is not bound by the degree against his trustee in the very matter of the trust for which he was appointed. If Corcoran owned any of these bonds and coupons then, he is bound, because he was representing himself. If he has bought them since, he is bound as a privy to the person who was represented."

In Estate of Bell, 153 Cal. 331, 95 Pac. 372, the court arrived at a similar conclusion where the administratrix had proceeded in her representative capacity in one case and in her individual capacity in the other. The court said:

"In both proceedings she was the real party in interest, asserting individual and not representative rights, and is bound by the judgment."

See, also, In re Parks' Estate, 166 Iowa, 403, 147 N. W. 850; Chandler v. White Oak Creek Lumber Co., 131 Tenn. 47, 173 S. W. 449.

In 2 Black on Judgments (2d Ed.) § 536, it is said:

"If one sues as trustee, and afterwards in his individual capacity, in respect of the same subject-matter, he is bound by the decree in the former suit. For if, at that time, he owned the subject of the trust, he was representing himself."

[4] Without multiplying authorities, it may be stated as a general rule that, where one appears in a representative capacity in one action and in his individual capacity in another action, involving the same subject-matter, without any change in his relation to that subject-matter, a judgment in the one case is conclusive of his rights in the other.

Counsel for respondent contends that the rule as thus stated is in conflict with that laid down in the case of Troxell v. Delaware, L. & W. R. Co., 227 U. S. 434, 33 Sup. Ct. 274, 57 L. Ed. 586. The judgment pleaded as a bar in that case was given in an action by Mrs. Troxell as

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surviving widow in behalf of herself and children for the death of her husband. The court in that action held that it was brought under the state law.

"In such an action there could be no recovery because of the negligence of the fellow workman of Troxell." "The jury was confined to the question of responsibility for failing to provide proper safety appliances."

The plaintiff was given judgment, which was reversed on appeal. The second action was then brought by Mrs. Troxell, as administratrix, under the federal act, under which there might be a recovery for the negligence of fellow workmen. In the second action the trial court held that—

"The former case had adjudicated matters as to defects in cars, engines, and rails, [and] submitted to the jury only the question of the negligence of fellow servants."

Judgment was again rendered in favor of the plaintiff, and the Circuit Court of Appeals "reversed the judgment, holding that the first proceeding and judgment was a bar to a recovery in the second action." In overruling the decision of the Circuit Court of appeals, the Supreme Court held that—

"Where the second suit is upon a different claim or demand, the prior judgment operates as an estoppel only as to matters in issue or points controverted and actually determined in the original suit. * * * And the plaintiff's right to recover because of the injury occasioned by the negligence of the fellow servants was not involved in or concluded by the first suit."

The court further held that—

"There was not that identity of parties in the former action by the widow and the present case, properly brought by the administratrix under the Employers' Liability Act, which renders the former suit and judgment a bar to the present action."

[5] Appellant urges that this latter statement by the court is mere dictum, but—

"Where there are two grounds, upon either of which the judgment of the trial court can be rested, and the appellate court sustains both, the ruling on neither is obiter, but each is the judgment of the court, and of equal validity with the other." Union P. R. Co. v. Mason City & Ft. D. R. Co., 199 U. S. 160, 26 Sup. Ct. 19, 50 L. Ed. 134.

The decision goes no further than to hold that, because there was not identity of parties plaintiff in the two actions, the second was not wholly barred by the judgment in the first. The question whether an issue actually determined in the first was conclusive on the same issue in the second as against a recovery for the benefit of Mrs. Troxell was not before the court. The trial court held that the judgment in the first action was a bar as to all issues actually determined in that suit. The correctness of this holding was not in controversy before the higher court, and was not considered by it. The opinion in the Troxell Case does not warrant the conclusion that the court intended thereby to overrule its prior decision in the Corcoran Case, supra, and similar decisions by the highest courts of many of the states.

[6] In the proceeding before the Commission of Mrs. Williams, she appeared in her individual capacity, and in the action in the superior court she represented herself as one of the beneficiaries, and had control of the prosecution of the case.

"Parties, in the larger legal sense, are all persons having a right to control the proceedings, to make defense, to adduce and crossexamine witnesses, and to appeal from the decision, if an appeal lies." Green v. Bogue, 158 U. S. 478, 15 Sup. Ct. 975, 39 L. Ed. 1070.

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Having recovered judgment for compensation in the proceeding before the commission by establishing the fact that the deceased was employed in intrastate commerce. and that judgment having become final, she could not recover in the action in the superior court by disproving the same fact on which the first judgment was necessarily based.

Not knowing what the determination of the trial court would be as to the character of employment of the deceased, and naturally desirous of avoiding an entire failure of compensation. the plaintiff felt the necessity of making the application to the Commission. even though recovery in that tribunal is limited in amount. In states which provide but one tribunal for the trial of such actions, that tribunal determines in the one action whether the employment was interstate or intrastate, and renders judgment accordingly under the federal act or the state law as the case may warrant, and the predicament in which the plaintiff herein found herself cannot arise.

The judgment was for $25,000, of which $5,000 was apportioned to Vivian Peabody, an adult married daughter of the deceased. The complaint alleges that she was not dependent upon the deceased. Not being dependent, she was not entitled to compensation under the state law, and she was not a party to the proceeding before the Commission. It is clear that the award of the Commission is not a bar to a recovery in her behalf under the federal act, nor is any fact found by the Commission res adjudicata as to her.

[7] The complaint alleges that Mrs. Peabody was not dependent upon the deceased. There was no allegation that she had any ground for expecting any pecuniary benefit from a continuance of his life. The evidence shows that Mrs. Peabody is the only child of deceased, and was 21 years old at the time of his death; that she was married in 1915. and her husband was about 32 years old at the time of the trial in February. 1919; that he is a machinist, and in 1918 enlisted in the navy, and went into training as an airplane mechanic, and at the time of the trial was expecting to be discharged at any time; that the only source of income of Mrs. Peabody while her husband was in the service was a government allowance of $30 a month for herself and $7.50 for their child. neither she nor her husband having any property. There was no evidence that Mrs. Peabody had received any assistance from her father after her marriage. She lived with and was supported by her parents prior to her marriage. The deceased and his wife were both of the age of 39 years, and had a life expectancy of 28.9 years. The deceased was an experienced brakeman, and was in line for promotion. His last monthly pay check was $148, though that was somewhat above the average. He and his wife were in good physical health. They had not accumulated any property.

Appellant contends that under the facts shown the case of Gulf, C. & St. F. R. Co. v. McGinnis. 228 U. S. 173. 33 Sup. Ct. 426. 57 L. Ed. 785, is conclusive against a recovery in behalf of Mrs. Peabody. In that case the administratrix sued under the federal act for the benefit of herself and four children, one of whom was an adult married daughter. Judgment was given for the sum of $15,000, one-half of which was apportioned equally to the four children. The Court of Civil Appeals affirmed the judgment. 147 S. W. 1188. The Supreme Court of the United States reversed the judgment on the sole ground that, under the pleadings and proofs, the married daughter was not entitled to recover. The court said:

"There was neither allegation nor evidence that Mrs. Saunders was in any way dependent upon the decedent, nor that she had any reasonable expectation of any pecuniary benefit as a result of a continuation of his life. * * * In a series of cases lately decided by this court, the act in this aspect has been construed as intended only to compensate the sur-

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viving relative of such a deceased employee for the actual pecuniary loss resulting to the particular person or persons for whose benefit an action is given."

See, also, Garrett v. Louisville, etc., R. R. Co., 235 U. S. 312, 35 Sup. Ct. 32, 59 L. Ed. 242.

[8] There is no distinction between the McGinnis Case and this. In neither case was there any evidence from which to infer that pecuniary benefits would have been received except the bare fact of the relationship of father and daughter. In the McGinnis Case it was held that the issue raised was a federal question and that case is controlling here where the identical question is presented.

[9] The court gave the following instruction:

"It is the duty of the father, the mother, and the children of any poor person who is unable to maintain himself by work, to maintain such person to the extent of their ability."

While the instruction is correct as an abstract statement of the law, it applies only in cases of dependency, and, as stated, the complaint herein alleges that Mrs. Peabody was not dependent.

[10] Appellant contends that the evidence is not sufficient to support the implied finding that the deceased was employed in interstate commerce at the time of his death. The question is one of fact for the determination of the jury. The trial court correctly instructed the jury as to the law applicable to the question. On a retrial a different state of facts may be shown, and a discussion here of the evidence would serve no useful purpose.

The judgment appealed from is reversed.

We concur: Burnett, J.; Hart, J.

On Petition for Modification.

PER CURIAM. Appellant has filed a petition for the modification of the decision herein by this court, concluding as follows:

"The appellant therefore asks that the opinion heretofore rendered and filed be modified so as to declare that the daughter, Vivian Peabody, is also bound by the finding of the Industrial Accident Commission, to the effect that the decedent was engaged in intrastate employment at the time of his death, and that, if it be necessary for a consideration of this point, a rehearing be granted, limited, however, solely to the one point, namely, the effect of the award of the Industrial Accident Commission as to the right of the administratrix to recover on behalf of the daughter."

In appellant's opening brief the contention is stated as follows:

"The finding of the commission fixing the status of the employment is an adjudication in rem and binds the world."

[11, 12] The proceeding before the Commission has none of the characteristics of an action in rem. It may be stated as a general proposition that no one is bound by a judgment rendered in a proceeding of which he had no legal notice, though actual notice is not necessary. Freeman on Judgments (4th Ed.) § 606. If the world is to be bound, the world must have notice. Freeman v. Alderson, 119 U. S. 185, 7 Sup. Ct. 165, 30 L. Ed. 372. Only those who are entitled to appear and assert their interest in the subject-matter of the suit are bound by the judgment. Freeman on Judgments (4th Ed.) § 617; Gridley v. Boggs, 62 Cal. 202. Appellant relies on the provisions of section 1908 of the Code of Civil Procedure as follows:

"In case of a judgment or order against a specific thing, or in respect to the probate of a will, or the administration of the estate of a decedent, or, in respect to the personal, political, or legal condition or

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relation of a particular person, the judgment or order is conclusive upon the title to the thing, the will, or administration, or the condition or relation of the person."

This section was construed in the case of Gridley v. Boggs, supra, which was commenced by George W. Gridley in his lifetime, and the prosecution thereof was continued by his administratrix after his death to obtain a decree setting aside a deed made by him at a time when it was alleged he was incompetent. The deceased had made a will a few months prior to the execution of the deed in question. The will was offered for probate, and rejected by the court on the ground that the deceased was of unsound mind at the date of the execution thereof. In the trial of the case of Gridley v. Boggs the findings and decree in the probate proceeding were offered in evidence, and objection thereto was sustained by the court. It was claimed on appeal that the judgment denying probate of the will was conclusive as to Gridley's mental condition, under the provisions of section 1908 of the Code of Civil Procedure. The court said:

"Certainly all those who might be affected by a judgment that Gridley was insane when the will was executed did not have the right to appear and assert their rights in the proceeding for the probate of the will. The legal notice of that proceeding ran only to those interested in Gridley's estate. And, as to 'the more general ground,' public policy only requires, at most, that a judgment as to the status of a particular person, which shall be conclusive as against those not parties to it, shall be a judgment which simply determines such status in a proceeding whose sole end and aim is to determine it. The judgment of the superior court determined that a certain instrument, purporting to be the last will and testament of George W. Gridley, was not his last will and testament. The proceeding was not a special inquiry to determine his status as to sanity or insanity. The finding of insanity was of a probative fact upon which the court held the will to be invalid, as it might have held it to be invalid upon proof of duress or undue influence."

Appellant relies on the case of Northwestern Redwood Co. v. Industrial Accident Commission (Sup.) 194 Pac. 33, in which it is said that "the proceeding may be characterized as one quasi in rem." It is apparent from the context that this statement had no reference to the ordinary proceeding before the Commission, but was limited to the particular matter under discussion, the right of the wife to subject community property within the jurisdiction of the court to her demands against her husband who was beyond such jurisdiction. The court said:

"It is sufficient to say that the purpose of this proceeding is to enforce the rights of the wife in community property located in this state, and that constructive notice to the husband is therefore sufficient to give jurisdiction to pass upon the questions so involved. The proceeding may be characterized as one quasi in rem. In such proceeding notice by publication is a sufficient compliance with the federal Constitution."

This discussion has proceeded upon the assumption that the terms "condition or relation of a particular person," as used in section 1908 of the Code of Civil Procedure, are broad enough to include the status of one's employment as to its intrastate or interstate character. Such assumption, however, appears to be unwarranted. The right of a mechanic to a lien for his wages may depend upon the character of the work in which he is engaged, yet it would hardly be contended that a judgment establishing the character of such work is in rem, binding upon the whole world. There is no distinction in principle between the two cases. Other similar illustrations may readily be suggested. Appellant's contention finds no support in reason or authority.

[13] For the purposes of the argument, at least, it may be conceded that all persons entitled to share in the award of the Commission are bound by the adjudication of the Commission, not because the award is

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a judgment in rem, but because they were represented in the proceeding by Mrs. Williams, but Mrs. Peabody, not being dependent upon the deceased was not entitled to participate in the award. and cannot be said to have been so represented. Having no right to appear in the proceeding or to assert any rights therein, she is not bound by the award. Under the federal law her right of recovery is not based on dependency, but upon her reasonable expectation, if any, of pecuniary benefit from a continuance of her father's life.

The petition is denied.

GLOBE INDEMNITY CO. v. HENDERSON. (Civ. 3967.)

(District Court of Appeal, First District, Division 2. California. Oct. 10, 1921. Hearing Denied by Supreme Court Dec. 8, 1921.)

202 Pacific Reporter, 683.

1. MASTER AND SERVANT—EVIDENCE HELD NOT TO SUPPORT FINDINGS FOR COMPENSATION INSURER AGAINST WRONGDOER.

In an action by a general contractor's insurer against an independent contractor, whose negligence was alleged to have caused injuries to general contractor's employee, evidence that the employee had received compensation in specified amount from the insurer, and that named physician was treating employee upon the request of the insurer, *held* insufficient to sustain findings that after the accident the insurer furnished employee with hospital and medical expenses, and had been, previous to, and was at time of trial, paying him workmen's compensation.

(For other cases, see Master and Servant, Dec. Dig. § 405[6].)

On Rehearing before the Supreme Court.

6. MASTER AND SERVANT — MEASURE OF COMPENSATION INSURER'S RECOVERY AGAINST WRONGDOER STATED.

In an action by an employee and a compensation insurance carrier against a third party, whose negligence caused injuries, in which the appellate court affirmed judgment for the employee, but reversed judgment for insurance carrier and directed a retrial as to certain issues, the amount awarded insurance carrier on retrial should not exceed the amount awarded employee nor the amount insurer has paid or has become obligated to pay for the benefit of the employee as insurance carrier, and the judgment for insurance carrier should provide that any payment made by third party to either employee or insurance carrier should be credited on both judgments.

(For other cases, see Master and Servant, Dec. Dig. § 389.)

Appeal from Superior Court, Alameda County; Joseph S. Koford, Judge.

Action by the Globe Indemnity Company and George L. Masow against H. B. Henderson. Judgment for plaintiffs, and defendant appeals. Judgment for last-named plaintiff affirmed, and judgment for first-named plaintiff reversed, with directions.

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L. Gonsalves, of Oakland, for appellant.

Earle Warren, of Oakland, and Hadsell, Sweet & Ingalls, of San Francisco, for respondents.

STURTEVANT, J. The plaintiffs recovered a judgment against the defendant in the sum of $2,500 for damages, and the defendant has appealed, bringing up the judgment roll and a bill of exceptions.

Morris & Muller, as general contractors, were engaged in erecting a brick garage on the southeast corner of Broadway and Twenty-Fourth streets in Oakland. George L. Masow, one of the plaintiffs, was working for the contractors as a carpenter, and at the time of the accident hereinafter mentioned was standing on some planking which rested on the rafters. The defendant, H. B. Henderson, as an independent contractor, was engaged in hoisting the rafters into place. The rafters, more properly called trusses, were made of wood, and after each one had been constructed it was about 60 feet long from tip to tip, about 12 feet high, and, when the planks had been nailed together, the dimensions of a cross section were 8x10 inches. The weight of one of these trusses was such that the defendant was using a gin pole 37 feet 6 inches high, supported by four guy lines. While one of the trusses was being raised into place one of the guy lines tore loose, the gin pole toppled over, and the plaintiff Masow was injured, and for the injuries so received he brought this suit to recover damages.

[1] In their complaint the plaintiffs aver that the Globe Indemnity Company is a New York corporation doing business in California, and as such was the insurance carrier of Morris & Muller; that after the accident the Globe Indemnity Company furnished Masow with hospital and medical expenses, and has been and now is paying him workmen's compensation. The court found all of said allegations to be true. The appellant in his brief attacks each of those findings as not being supported by the evidence. In reply to appellant's contention the respondent states that the evidence shows that since the accident the plaintiff has received compensation from the Globe Indemnity Company amounting to about $1,100, exclusive of his doctor and hospital expenses, and that Dr. Shade treated Masow, acting upon the request of the Globe Indemnity Company. Such testimony, standing alone, is not sufficient to support the allegations regarding the Globe Indemnity Company, and the judgment in favor of that company is not supported by the evidence.

[2] The appellant claims that the plaintiff Masow was guilty of contributory negligence. This claim rests upon the assertion that a short time before the accident Masow saw the gin pole swerving, and, from that fact, he should have assumed that the pole was not properly anchored. In another place in the testimony Masow testified:

"I did not observe anything in connection with the erection of the boom until it came across the trusses. Up to that time I did not know that anything was wrong with the manner in which the boom was erected, or the manner in which the boom was being held."

In view of this testimony it is patent that the most that can be said is that the evidence on the subject of contributory negligence was conflicting. However, this court is bound by the finding of the trial court in the face of conflicting testimony.

It is further claimed by the appellant that it was not shown by the plaintiffs that the injury to Masow was the result of the falling of the gin pole. In this behalf the defendant asserts that when the gin pole fell it did not strike the plank on which the plaintiff Masow was standing. There is some evidence supporting that reasoning. Be that as it may, another witness testified:

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"I believe plaintiff Masow was standing on the second purline; * * * after Mr. Masow had fallen the gin pole was resting on the second purline."

The situation, therefore, is another instance of conflicting testimony, and the conflict was for the trial court, and not for this court.

[3-5] The defendant makes the further claim that under the facts pleaded and proved he was not negligent. In this behalf he takes the position that it was his duty to exercise ordinary care (Civ. Code, § 1714), and that he did so. The record does not show the weight of the gin pole, neither does it show the weight of the trusses which it was engaged to lift up into place, but we have set forth above the dimensions of the trusses, and we may add that the same were constructed out of pine timber, and this court will take judicial notice that each one of the trusses was a very heavy load. To raise such a weight required a very strong gin pole, and therefore a gin pole of great weight. To stand a pole of great weight, 37 feet 6 inches long, perpendicularly is to maintain a very dangerous instrumentality. When the danger is great the care should be great. Foley v. Northern California Power Co., 14 Cal. App. 401, 407, 112 Pac. 467; Spear v. United Railroads, 16 Cal. App. 637, 663, 117 Pac. 956. Now, the evidence shows that the defendant had anchored his gin pole by four guy lines. That one end of each guy line was fastened to the top of the pole, and that the other end of line 3 and the other end of line 4 were fastened to pegs driven into the foundation soil. Exhibit A is a diagram. The diagram shows that the guy lines were not fastened at right angles such as north, south, east, and west, but that lines 1 and 2 were fastened on Webster street, line 4 was fastened on the opposite side of the building lot, and line 3 was fastened in Twenty-Fourth street, but in such a location that the straining strength was practically the same as though it were on the same side of the building as line 4. It is clear that with lines so fastened the tendency of the pole to lean toward Twenty-Fourth street, or from Twenty-Fourth street, was not sufficiently guarded against. Again it does not require the ability of an engineer to note that if the top of the gin pole were allowed to swerve in any direction the result would be that there would be a strain on the opposite guy line approximately equal to the weight of the truss. If one anchorage was not entirely sufficient the same guy line should have been anchored two or three times, and if such fastening was not sufficient, additional guy lines should have been attached to guard completely against any leaning of the gin pole. The trial court made a finding that the gin pole was negligently and carelessly secured, and in view of the foregoing facts we are not at all inclined to question the soundness of that finding.

The judgment in favor of George L. Masow is affirmed, and the judgment in favor of the Globe Indemnity Company is reversed, with directions for the trial court to retry the issues contained in findings 1, 2, and 8, and thereafter to render such judgment for or against the Globe Indemnity Company as may be supported by the law and facts.

We concur: Langdon, P. J.; Nourse, J.

Opinion of Supreme Court in Bank Denying Hearing

PER CURIAM. [6] The petition for a rehearing in this court is denied. We deem it proper to say, however, that upon the retrial, if judgment is given in favor of the plaintiff Globe Indemnity Company, it must not exceed the amount already adjudged to plaintiff Masow, with interest, less any payments made thereon in the meantime, nor be in excess of the amount said company has paid, or has become obliged to pay for the benefit of Masow, as insurance carrier for Morris & Muller, and the judgment should also provide that any payment made by defendant to either of the plaintiffs shall be credited on both judgments.

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Shaw, C. J., and Lennon, Waste, Wilbur, Sloane, and Shurtleff, JJ., and Richards, Judge pro tem., concur.

ANDERSON v. LYNCH.

(Supreme Court of Errors of Connecticut. Nov. 30, 1921.)

115 Atlantic Reporter, 474.

MASTER AND SERVANT—AWARD OF WEEKLY COMPENSATION FOR FIXED PERIOD FOR PARTIAL INCAPACITY HELD UNAUTHORIZED AS A LUMP SUM ALLOWANCE.

The Compensation Commissioner cannot award weekly compensation for a fixed period of time to an employee partially incapacitated by injury to his back, an injury not specifically enumerated in Gen. St. 1918, § 5352, and such award cannot be sustained as a single lump sum allowance under section 5367.

(For other cases, see Master and Servant, Dec. Dig. § 385[20].)

Appeal from Superior Court, Middlesex County; Gardiner Greene and Frank D. Haines, Judges.

Proceeding by John Anderson under the Workmen's Compensation Act to obtain compensation for personal injuries, opposed by William T. Lynch, the employer. From a judgment of the Superior Court, confirming an award of the Compensation Commissioner, the employer appeals. Error, and cause remanded.

The Commissioner found that the claimant whose back was injured suffered an injury arising out of and in the course of his employment, that his average wages computed in accordance with the statute were $24 a week, and awarded compensation "at the rate of $12 a week for 30 weeks," and that the respondent pay all medical, surgical, and hospital expenses. On the respondent's appeal, the superior court sustained the award on the ground that it was within the spirit and meaning of section 5367,[1] and, if not, that the error was not injurious to the respondent. In the superior court counsel agreed that the claimant's incapacity was partial. Respondent appeals from the ruling and decision of the superior court, because the award of the Commissioner was contrary to the statute, and because he had no authority to render an award of weekly compensation for a fixed period of time.

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[1] Sec. 5367. *Commutation into Lump Sums.* When he finds it just or necessary, the Commissioner may approve or direct the commutation, in whole or in part, of weekly compensations under the provisions of this chapter into monthly or quarterly payments, or into a single lump sum, which may be paid to the one then entitled to the compensation, and such commutation shall be binding upon all persons who may be enitled to compensation for the injury in question. In any such case of commutation, a true equivalence of value shall be maintained, with due discount of sums payable in the future; and when commutation is made into a single lump sum, the Commissioner may direct that it be paid into any savings bank, trust company or life insurance company which is authorized to do business within this state, to be held in trust for the beneficiary or beneficiaries under the provisions of this chapter and paid in conformity with the provisions of this chapter.

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Thomas C. Flood, of Portland, for appellant.

Gustaf B. Carlson and Carl F. Anderson, both of Middletown, for appellee.

BEACH, J. (after stating the facts as above). The reasons of appeal assume that the claimant's incapacity is partial, and the superior court in its memorandum states that counsel so agreed. There is, however, no such finding by the Commissioner, and the award of weekly compensation equal to one-half of the claimant's average weekly earnings at the time of his injury could not lawfully have been made except in the case of total incapacity. Nevertheless, the injury in question is not one of those enumerated in section 5352, and so far as the Commissioner's jurisdiction to render an award of weekly compensation for a fixed period of time is concerned, it makes no difference whether the incapacity is partial or total.

No express authority for such an award can be found in the statutes. The claimant's contention is that the Commissioner could have allowed him a lump sum under section 5367, and therefore could reach the same result by allowing him a lump sum divided into 30 weekly payments. We think section 5367 did not authorize the Commissioner to award a single lump sum in this case. The authority given by that section is not to award by way of compensation such a lump sum as the Commissioner may deem just, but to "approve or direct the commutation, in whole or in part, of weekly compensations under the provisions of this chapter into monthly or quarterly payments, or into a single lump sum." The authority to commute the weekly compensations already provided for in the act into monthly payments, or into a single payment, carries its own limitations on its face. If the period for which the weekly compensations is to be continued is a fixed period of time, as it is in the cases specifically enumerated in section 5352, and in cases of permanent total disability, the award can be commuted into a single lump sum without changing its value to the claimant or its cost to the respondent. But in all other cases the duration and amount of the weekly payments is dependent on the continuance and the degree of the claimant's incapacity. Such payments may, for the time being, be commuted into monthly or quarterly payments, but they cannot be commuted into a single lump sum without violating the express requirement of section 5367 that—

"In any such case of commutation, a true equivalence of value shall be maintained, with due discount of sums payable in the future."

Many other provisions of the statute also express its manifest intent that the injured employee shall in every adjudicated case receive no more and no less than the statutory compensation, and that in every settlement by special agreement or substitute system of compensation he shall receive no less than the statutory compensation. In all cases not covered by the schedule of injuries enumerated in section 5352, the statute requires that the weekly compensation, or its true equivalent in value, when commuted into monthly or quarterly payments, shall continue during the period of total or partial incapacity, not exceeding 520 weeks. In such cases the statute makes the future compensation dependent on the actual continuance and degree of incapacity of the claimant; and the Commissioner has no power to award compensation on any other terms. He is not to award such damages as he deems just, but to determine what the facts are, and then apply the statutory measure of compensation to the particular case.

There is error, and the cause is remanded to the superior court, with directions to set aside the judgment for the claimant and to remand the cause to the Commissioner for further proceedings in accordance with this opinion.

The other Judges concurred.

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AMALGAMATED ROOFING CO. v. TRAVELERS' INS. CO. (No. 14296.)

(Supreme Court of Illinois. Dec. 22, 1921.)

133 Northeastern Reporter, 259.

1. MASTER AND SERVANT — COMPENSATION INSURER ESTOPPED BY INDUSTRIAL BOARD'S DECISION ON LIABILITY OF EMPLOYER OF INDEPENDENT CONTRACTOR.

Under policy to indemnify against obligation for compensation under Workmen's Compensation Law, and to defend against proceedings thereunder, although based on groundless demands, where insurer was notified of such a proceeding, and defended, but failed to review decision therein that claimant was an employee of insured, and that insured was liable for compensation, insurer was estopped to deny that claimant was insured's employee, and that the award was covered by the policy, and hence could not raise the objection that claimant was the employee of an independent contractor, that the award was made on account of insured's failure to cause the independent contractor to carry compensation insurance, and that Laws 1913, p. 355, § 31, declaring a person having work done by an independent contractor whose employees were not so insured an "employer" of such employees was amended in 1917 (Laws 1917, p. 504) so as not to declare such person an "employer."

(For other cases, see Master and Servant, Dec. Dig. § 416.)

3. MASTER AND SERVANT—"INDEPENDENT CONTRACTOR" AND "EMPLOYEE" DISTINGUISHED.

The principal consideration in determining whether a workman is an employee or an independent contractor is the right to control the manner of doing the work, and it is not the actual exercise of the right by interfering with the work, but the right to control, which constitutes the test.

(For other cases, see Master and Servant, Dec. Dig. § 367.)

(For other definitions, see Words and Phrases, First and Second Series, Employee; Independent Contractor.)

Appeal from Second Branch, Appellate Court, First District, on Appeal from Municipal Court of Chicago; Wells M. Cook, Judge.

Action by the Amalgamated Roofing Company against the Travelers' Insurance Company. Judgment for defendant was affirmed by the Appellate Court, and, on certificate of importance, plaintiff appeals. Reversed and remanded.

Roy O. West, Percy B. Eckhart, William Rothmann, and William M. Klein, all of Chicago, for appellant.

Frank M. Cox and Albert N. Powell, both of Chicago (Robert J. Folonie, of Chicago, of counsel), for appellee.

DUNN, J. The Appellate Court for the First District, having affirmed a judgment of the municipal court of Chicago in favor of the defendant, the Travelers' Insurance Company, granted a certificate of importance and appeal to the plaintiff, the Amalgamated Roofing Company.

The appellant is a corporation organized to buy and sell at wholesale and retail roofing materials and other building materials, and to construct and erect all kinds of buildings. It had a plant at Clearing, Ill., consisting of several buildings. In the spring of 1918 it undertook the erection of a new warehouse adjoining the north end of its plant, using

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the west wall as a part of the new structure. About the middle of May the appellant, through its president, entered into an oral contract with J. N. Colvin to lay the roof of the new warehouse at $1.50 a square, and to make some repairs on the old roof, the price of which was not agreed on, the appellant furnishing the material. The work was done under the direction of Colvin, who was told to look for instructions as to the work to the appellant's foreman, Robert McLean. Colvin hired, paid, and discharged the workmen, though one was discharged by him at McLean's request. McLean gave directions about the work, which were followed by Colvin and his workmen. On May 28, Walter M. Frame was employed by Colvin to work on the job, and on June 1, while so employed, received an injury which caused his death the same day.

The appellee, a liability insurance company, had issued to the appellant a policy whereby it agreed with the appellant—

"as respects personal injuries sustained by his employees, including death at any time resulting therefrom, as follows:

"*Indemnity.*—I. (a) To pay to the person, and in the manner provided by the Workmen's Compensation Law, any sum due or to become due from his employer because of any such injury and the obligation for compensation therefor imposed upon or accepted by this employer under certain statutes cited and described in an indorsement attached to this policy, each of which statutes is herein referred to as the Workmen's Compensation Law. It is agreed that all of the provisions of each Workmen's Compensation Law covered hereby shall be and remain a part of this contract as fully and completely as though written herein, so far as they apply to compensation for any personal injury or death covered by this policy while this policy shall remain in force, and all premiums provided by this policy or by any indorsement hereon shall be fully earned, whether any such Workmen's Compensation Law, or any part of any such, is now or shall hereafter be declared invalid or unconstitutional. This obligation for compensation shall include all provisions of the Workmen's Compensation Law respecting funeral expenses, medical, surgical, nurse, and hospital service, medical or surgical apparatus or appliances, and medicines. Nothing herein contained shall operate to so extend this policy as to include within its terms any Workmen's Compensation Law, scheme, or plan not cited and described in an indorsement hereto attached.

"(b) To indemnify this employer against loss by reason of the liability imposed upon him by law for damages on account of such injuries.

"*Service.*—II. (1) To serve this employer by the inspection of work places covered by the policy when and as deemed desirable by the company, and thereupon to suggest to this employer such changes or improvements as may operate to reduce the number or severity of injuries during work; and (2) upon notice of such injury by investigation thereof and by settlement of any resulting claims in accordance with the law.

"*Defense.*—III. To defend in the name and on behalf of this employer any suits or other proceedings which may at any time be instituted against him on account of such injuries, including suits or other proceedings alleging such injuries and demanding damages or compensation therefor, although such suits, other proceedings, allegations or demands are wholly groundless, false or fraudulent.

"*Expenses.*—IV. To pay all costs taxed against this employer in any legal proceeding defended by the company, all interests accruing after entry of judgment, and all expenses incurred by the company for investigation, negotiation or defense.

"*Persons Covered.*—V. This agreement shall apply to such injuries sustained by any person or persons legally employed by this employer whose entire remuneration shall be included in the total actual remunera-

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tion for which provision is hereinafter made, upon which remuneration the premium for this policy is to be computed and adjusted, and to such injuries sustained by the president, any vice president, secretary or treasurer of this employer, if a corporation; but the remuneration of any such officer may be excluded unless he personally supervises the manual or mechanical processes covered hereby."

The policy became effective January 28, 1916, and was to remain in force until canceled by one of the parties in the manner provided by section (b) of the policy. By the terms of section (a) of the policy, which is set out above, the provisions of the Workmen's Compensation Act of 1913 (Laws 1913, p. 335), the Workmen's Compensation Act of 1915 (Laws 1915, p. 400), and any laws amendatory thereof which might become effective while the policy was in force, became a part of the contract, those acts being described in the indorsement attached to the policy mentioned in section (a).

On July 11, 1918, Rhoda Frame, the administratrix of the estate of Walter M. Frame, filed with the Industrial Commission a petition for compensation for his death, which she alleged resulted from an accident arising out of and in the course of his employment by the appellant, J. N. Colvin and the J. N. Colvin Roofing Company. A hearing before an arbitrator resulted in a finding that the deceased and the respondents on June 1, 1918, were operating under the provisions of the Workmen's Compensation Act, and on that date the deceased sustained an accidental injury which arose out of and in the course of his employment, and an award against the respondents of $10 a week for 400 weeks. On review by the Industrial Commission the award was ordered on December 2, 1918, to stand as the award of the Commission. It has not been reviewed in any proceeding for that purpose, and the appellant is performing the award. The appellee was notified of the proceeding before the Industrial Commission, but denied any liability under its policy. It did, however, through its attorney make defense in the appellant's name before the arbitrator and the Commission, but no claim is based on its action in this regard. After the confirmation of the award the appellee finally declined any further connection with the case, and disclaimed any liability by reason of its contract, as it had done from the beginning.

In its statement of claim the appellant alleged that Frame, while working for and employed by the appellant under the Workmen's Compensation Laws of the state of Illinois, received accidental injuries which caused his death; that his administratrix brought proceedings for compensation against the appellant before the Industrial Board; that the appellee had due notice of such proceedings and appeared and defended; that an award, as above mentioned, was made on December 2, 1918, and that the appellee on December 19, 1918, refused to longer defend the appellant in said proceeding and other proceedings for the review of the decision, and refused to pay the award or any part thereof, and that the appellant has paid all accrued payments on the award. The appellee's affidavit of merits denied that Frame was an employee of the appellant, but alleged that he was an employee of J. N. Colvin, an independent contractor, and that the award of the Industrial Commission was made on account of the failure of the appellant to cause Colvin and his employees to carry compensation insurance, and not on the ground that Frame was an employee of the appellant. The cause was heard by the court without a jury.

[1] The appellee's contentions are that the policy did not insure the appellant as to Frame, because he was not, at the time he was injured, in the employ of the appellant, but was an employee of Colvin, an independent contractor, while the contract on the part of the appellee to indemnify the appellant was expressly limited to appellant's own employees.

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At the time the policy was issued section 31 of the act of 1913 was in force, which provided, in substance, that any person contracting to have done for him any work enumerated as extra-hazardous in paragraph (b) of section 3, requiring the employment of employees on the premises where such work was to be done, who did not require the person, firm, or corporation undertaking to do such work to insure his, their, or its liability to pay the compensation provided for in the act to his, their, or its employees, should be included in the term "employer," and with the immediate employer should be jointly and severally liable to pay the compensation provided for and be subject to all of the provisions of the act. Laws 1913, p. 355. This section was amended in 1917 (Laws 1917, p. 504), and the amended section was in force when Frame received his injury. It provided as follows:

"Any one engaging in any business or enterprise referred to in subsections 1 and 2 of paragraph (b) of section 3 of this act who undertakes to do any work enumerated therein, shall be liable to pay compensation to his own immediate employees in accordance with the provisions of this act, and in addition thereto if he directly or indirectly engages any contractor, whether principal or subcontractor to do any such work, he shall be liable to pay compensation to the employees of any such contractor or subcontractor unless such contractor or subcontractor shall have insured, in any company or association authorized under the laws of this state to insure the liability to pay compensation under this act, or guaranteed his liability to pay such compensation. In the event any such person shall pay compensation under this section he may recover the amount thereof from the contractor or subcontractor, if any, and in the event the contractor shall pay compensation under this section he may recover the amount thereof from the subcontractor, if any. This action shall not apply in any case where the accident occurs elsewhere than on, in or about the immediate premises on which the principal has contracted that the work shall be done."

This act did not declare that the person, firm, or corporation contracting to have the work done shall be included in the term "employer," and it is argued that the contractor's employees did not become the employees of the person, firm, or corporation contracting to have the work done, and were therefore not within the terms of the appellee's policy. The appellant, on the other hand, contends that the finding of the Industrial Commission that the deceased, Walter M. Frame, and respondents were operating on the 1st day of June, 1918, under the provisions of the Workmen's Compensation Act, and that on the date last above mentioned the deceased sustained accidental injuries which did arise out of and in the course of the employment, was conclusive and binding on the appellee, and that the appellee, having refused to further defend the proceeding, is stopped to claim that Frame was not an employee of the appellant.

By the policy the appellee not only undertook to pay the compensation provided by the Workmen's Compensation law, but also to defend, in the name and on behalf of the employer, any suits or other proceedings which might at any time be instituted against it on account of such injuries, including suits or other proceedings alleging such injuries and demanding damages or compensation therefor, although such suits, other proceedings, allegations, or demands are wholly groundless, false, or fraudulent. The petition filed with the Industrial Commission alleged that on the 1st day of June, 1918, Walter M. Frame received an injury by reason of an accident arising out of and in the course of his employment by the above-named employers, which injury resulted in the death of said employee. Name of injured employee, Walter M. Frame; name of employer, Amalgamated Roofing Company, J. N. Colvin, and J. N. Colvin Roofing Company. This was a proceeding instituted against the appellant on account of injuries alleged to have been sustained by an employee

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demanding compensation therefor, and the appellee was bound to defend the proceeding though it was wholly groundless, false, or fraudulent. The appellee, being bound to defend the proceeding for compensation and to indemnify the employer against loss by reason of the liability imposed upon it by law for damages on account of such injury, is concluded equally with the appellant by the award in that proceeding. That award was a liability imposed by law upon the appellant for damages on account of an injury to its employee. The evidence on which that finding and award were made does not appear in this record. The claim as made was for an injury to the deceased as an employee of the appellant. Paragraph (f) of section 19 of the Workmen's Compensation Act (Laws of 1917, p. 502) provides:

"The decision of the Industrial Board, acting within its powers, according to the provisions of paragraph (e) of this section, and of the arbitrator or committee of arbitration, where no review is had and his or their decision becomes the decision of the Industrial Board in accordance with the provisions of this section, shall, in the absence of fraud, be conclusive, unless reviewed as in this paragraph hereinafter provided."

The decision of the Industrial Commission not having been reviewed under this statute, became conclusive upon the appellant as an award of compensation against it as Frame's employer, and a liability was thereby imposed upon it by law for compensation because of his injury. The award is conclusive on the appellant that Frame's administratrix was entitled to compensation because of an accidental injury which arose out of and in the course of the deceased's employment by the appellant. The appellee, having contracted to defend that proceeding and to indemnify the appellant against loss by reason of the liability imposed upon it by law for such damages is also bound by the award.

[2] The policy provided that—

"This agreement shall apply to such injuries sustained by any person or persons legally employed by this employer whose entire remuneration shall be included in the total actual remuneration for which provision is hereinafter made, upon which remuneration the premium for this policy is to be computed."

The agreement was also subject to the condition that—

"The premium is based upon the entire remuneration earned during any policy period by all employees of this employer engaged in the business operations described in said declarations and not herein elsewhere specifically excluded, the amount of such remuneration to be exhibited by the employer to the company as provided in condition (c) hereof, and the earned premium adjusted in accordance therewith at the rates hereinafter specified."

The appellee argues that, from these and other provisions of the contract, it appears that the parties intended to contract with reference to such injuries as might be sustained during any policy period by the appellant's own personal employees hired and paid by the appellant and carried by it on its time books and pay roll. The appellee was authorized to examine the books of the appellant at any time so far as they relate to the remuneration earned by any employees of the appellant while the policy was in force.

It is argued that the persons covered by the contract are limited by the remuneration paid by the appellant to its employees, as shown by the appellant's audited pay roll, time books etc., furnished by the appellant to the appellee for the purpose of determining the premium payable on the contract. The liability of the appellee on the policy is not limited, because the total premium which it was entitled to collect could not be ascertained under the policy until after the end of the policy year. The appellee was liable under the policy for an injury to an employee of the

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appellant, and the appellant was liable for premium upon the entire remuneration earned by all its employees, regardless of what the time books and pay rolls of the appellant might show; but the amount of the premium could not be ascertained until the expiration of the policy year, because it is impossible to know what will be the entire remuneration earned during any part of the period by all the employees of the employer until the expiration of the policy period. The payment of the premium in advance was not contemplated and is not a condition precedent to liability for the compensation.

The appellant has argued that Frame was an employee of the appellant at common law, but that is a question of fact which was determined adversely to the appellant by the municipal court and the Appellate Court and is not open for consideration here.

[3] Whether Colvin was an independent contractor or an employee of the appellant was a question of fact upon which the evidence was disputed. The principal consideration in determining whether a workman is an employee or an independent contractor is the right to control the manner of doing the work. It is not the actual exercise of the right by interfering with the work, but the right to control which constitutes the test.

"An independent contractor is one who undertakes to produce a given result without being in any way controlled as to the method by which he attains that result." Jaggard on Torts, § 73.

The fact that payment is to be made by the piece or the job or the day or hour does not necessarily control, where the workman is subject to the control of the employer as an employee and not as a contractor. Decatur Railway & Light Co. v. Industrial Board, 276 Ill. 472, 114 N. E. 915; Bristol & Gale Co. v. Industrial Com., 292 Ill. 16, 126 N. E. 599; Franklin Coal Co. v. Industrial Com., 296 Ill. 329, 129 N. E. 811. This question, however, is not the controlling question in this case. It was in the proceeding before the Industrial Commission. The municipal court did not have before it the evidence which was heard by the arbitrator or the Industrial Commission. Even if it had had the right in this collateral proceeding to review the decision of the Commission it had not the evidence upon which the Commission acted. It was not a question to be determined by the municipal court whether Frame was an employee of the appellant or not. The question before that court was whether there was a liability imposed upon the appellant by law for damages on account of an injury to its employee. The law provided a tribunal for the determination of that question. The appellee agreed to defend for the appellant any proceedings which might at any time be brought against the appellant on account of such injuries, even though wholly groundless, false, or fraudulent, and to indemnify the appellant against loss by reason of the liability imposed upon it by law.

The appellant submitted to the trial court various propositions of law and fact to be held by the court. Among others was the following proposition of law:

"The court holds that, by the finding and decision of the Industrial Board of Illinois that Walter M. Frame was an employee of the plaintiff, and by the failure and refusal of the defendant to review the same, the defendant is estopped to deny that the said Walter M. Frame was, at the time he received the injuries which caused his death, an employee of the plaintiff, and that the finding of said Industrial Commission is final, conclusive, and binding upon the defendant in this action."

The court refused this proposition, and it was error to do so.

The judgments of the Appellate Court and the municipal court will be reversed, and the cause will be remanded to the municipal court.

Reversed and remanded.

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CHICAGO & A. R. CO. v. INDUSTRIAL COMMISSION ET AL. (No. 14114.)

(Supreme Court of Illinois. Dec. 22, 1921.)

133 Northeastern Reporter, 204.

MASTER AND SERVANT — DEATH OF CUSTODIAN SHOT WHILE SELLING GASOLINE WITHOUT AUTHORITY HELD NOT TO "ARISE OUT OF AND IN THE COURSE OF EMPLOYMENT."

Where a railroad employee in charge of a pumping station and also acting as custodian of the railroad's property at such station had no authority or permission to sell gasoline, but agreed to sell some to persons who did not intend to pay therefor, and by whom he was killed in an attempt to lock him up in order that they might make their escape without paying, the injury causing death did not arise out of and in the course of the employment within Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

Error to Circuit Court, Sangamon County; Frank W. Burton, Judge.

Proceeding under the Workmen's Compensation Act by Martha Drischel and others for compensation for the death of John H. Drischel, opposed by the Chicago & Alton Railroad Company, employer. Compensation was denied, and the decision confirmed by the circuit court and the applicants bring error. Affirmed.

E. A. Perry, of Springfield, for plaintiffs in error.

Patton & Patton, of Springfield (William L. Patton and Henry L. Patton, both of Springfield, and Silas H. Strawn, of Chicago, of counsel), for defendants in error.

FARMER, J. This writ of error was granted for the purpose of reviewing a judgment of the circuit court of Sangamon county confirming the action of the Industrial Commission in denying compensation under the Workmen's Compensation Act (Hurd's Rev. St. 1919, c. 48, §§ 126-152i) to plaintiffs in error. John H. Drischel, an employee of defendant in error, was shot and killed at the place of his employment on the night of August 11, 1917. He left a widow and two dependent children, who filed an application with the Industrial Commission for compensation. At the hearing before an arbitrator compensation was denied on the ground that the deceased and his employer were at the time engaged in interstate commerce, and the arbitrator made an order dismissing the application for want of jurisdiction. On a review by the Industrial Commission of the decision of the arbitrator the commission held the parties were subject to the Workmen's Compensation Act, but that the injury causing the death did not arise out of and in the course of the employment, and denied the application for compensation. The circuit court confirmed the decision of the Industrial Commission, and this court granted applicants' petition for a writ of error.

Deceased had been employed about nine years at the pumping plant of defendant in error at a pumping station where its railroad crosses the Sangamon river. His duties were to pump water into a tank for engines of both passenger and freight trains. Deceased lived in a building at the pumping station. Gasoline was kept in another building at the station to

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run the pump engine and also for use of deceased in cooking, but not for sale to any one. The foreman of the water department of defendant in error testified Drischel was custodian of its property there, but had no authority or permission to sell gasoline. Roy Watkins testified that he, Roscoe Ruhlon, Odie Jones, and two girls were riding in an automobile the night of August 11, 1917, and about 10:30 they went to the pumping station where Drischel was employed, woke him, called him out, and said they wanted some gasoline; that it was an emergency case. Drischel went to the oil house, unlocked the door, and began filling a can with gasoline. Ruhlon gave witness a revolver and told him to lock Drischel up in the oil house. After the oil was brought out Ruhlon took the revolver and tried to lock Drischel in the oil house, but he forced his way out, and a scuffle ensued, during which Drischel was shot. Watkins testified when Ruhlon drew his gun Drischel told him to quit fooling, take the oil, and go on, but, fearing Drischel might telephone the police, it was thought best to lock him in the oil house, as they did not intend to pay for the gasoline. Ruhlon was in the penitentiary at the time of the hearing, and Jones in the state reformatory. It was stipulated they would testify they were the other two men in the automobile; that they went to the pumping station to get gasoline and did not intend to pay for it. Drischel at first objected to letting them have it, but finally agreed to sell them some. He went to the house where the gasoline was kept, filled a can, and in a controversy that occurred when they refused to pay for it Drischel was shot and killed.

Defendant in error contends: (1) That the injury causing Drischel's death did not arise out of and in the course of his employment, but arose out of and in the course of a violation of his duty to his employer, viz. an attempt to sell gasoline, which he had no authority to do; (2) that even if the injury arose out of and in the course of the employment, the duties of Drischel bore such a close relation to interstate commerce as to be a substantial part of it and the Industrial Commission had no jurisdiction.

Plaintiffs in error contend that Drischel was employed in two different capacities, one of which was engineer at the pumping station, the other as custodian of his employer's property at the station, and that the injury and death occurred while he was acting only in the latter capacity, and Ohio Building Vault Co. v. Industrial Board, 277 Ill. 96, 115 N. E. 149, and Chicago Dry Kiln Co. v. Industrial Board, 276 Ill. 556, 114 N. E. 1009, Ann. Cas. 1918B, 645, are relied on as supporting the right to compensation. In both of those cases the injured employee was night watchman and was assaulted while in the performance of his duty as such. Conceding Drischel was custodian of the property of defendant in error at the pumping plant and his duty was to protect it against depredations of others, did the injury occur while he was engaged in the performance of that duty? The uncontradicted proof is that he was engaged in selling the property, which he had no right to do. It is argued that the men in the automobile appealed to him to sell them gasoline on the ground that it was an emergency case, which was a mere subterfuge, for they had agreed among themselves before going to the station that they would procure it by force or fraud and would not pay for it; that the act was, in effect, a robbery, in resisting which Drischel was killed while trying to protect his employer's property. The proof shows that Drischel consented to sell the automobile party the gasoline. Without any knowledge on his part of their intention not to pay for it he proceeded to fill a can for them, for which he asked $1. After securing the gasoline the men in the automobile, or some of them, attempted to lock Drischel in the building where the gasoline was kept, so that they might get away before the police could be called. A scuffle or fight resulted from that attempt, in which Drischel was shot. The shot was not the

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result of Drischel's efforts to prevent the men from taking his employer's gasoline, for he had procured it for them in the expectation that they would pay for it. He even consented, according to the testimony of Watkins, when one of the men displayed a gun, that they "quit fooling, take the oil, and go on." As custodian of his employer's property Drischel's duty was to protect it for the use for which it was kept. He was not discharging his duty as custodian while selling the property. Whatever may have been Drischel's intention with reference to the money he expected to receive for the gasoline cannot alter the situation. His injury and death did not arise out of his duty to protect and preserve the gasoline for his employer's use, but resulted from a violation of that duty. This court in several cases has discussed the question when an injury to an employee arises out of and in the course of the employment. In Central Garage v. Industrial Com., 286 Ill. 291, 121 N. E. 587, the court, reviewing authorities, American and English, said:

"The adjudicated cases, American and English, so far as we are informed, universally hold that an injury to an employee while engaged in a voluntary act not accepted by or known to the employer and outside the duties for which he is employed cannot be said to arise out of his employment."

The cases decided by this court holding the killing or injuring of a watchman while in performance of the duty of his employment are clearly distinguishable from this case. Under the proof in this case it cannot be said the injury and death of the employee arose out of and in the course of the performance of his duty to his employer.

The judgment of the circuit court is affirmed.

Judgment affirmed.

GOLDSMITH v. PAYNE, DIRECTOR GENERAL OF RAILROADS.
(No. 14062.)

(Supreme Court of Illinois. Oct. 22, 1921. Rehearing Denied Dec. 13, 1921.)

133 Northeastern Reporter, 52.

1. MASTER AND SERVANT—INTRASTATE CARRIER SUBJECT TO WORKMEN'S COMPENSATION ACT.

A railroad company engaged in intrastate commerce is subject to the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

3. MASTER AND SERVANT—BURDEN ON CARRIER TO AVOID COMPENSATION ACT.

To avoid liability under the Workmen's Compensation Act, a railroad company engaged in both interstate and intrastate commerce has the burden of showing that the work being done at the time of the injury was in interstate commerce.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

Appeal from Circuit Court, Lake County; Claire C. Edwards, Judge.

Action by Joseph Goldsmith against John Barton Payne, Director General of Railroads. From judgment for defendant, plaintiff appeals. Reversed and remanded, with directions.

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Ralph J. Dady, of Waukegan, and Morse Ives, of Chicago, for appellant.

Edgar R. Hart and I. C. Belden, both of Chicago, and Hervey C. Coulson, of Waukegan (Nelson J. Wilcox, of Chicago, of counsel), for appellee.

DUNN, J. Joseph Goldsmith brought an action on the case in the circuit court of Lake county against the Director General of Railroads for the United States, operating the railroad of the Chicago & Northwestern Railway Company, for damages for injuries received on January 13, 1920. The declaration averred that the defendant was operating as a common carrier a certain train in interstate commerce, and his employees engaged in the operation of the train were engaged in interstate commerce, and that the plaintiff, while riding in a vehicle upon a public street in the city of Waukegan across the railroad track, and exercising all due care for his own safety, was injured by the negligence of the defendant's servants. The defendant filed the general issue and two special pleas, which alleged that in operating the train the defendant was engaged in both intrastate and interstate commerce, and that the plaintiff was an employee of the Great Lakes Fruit Company, an Illinois corporation. Facts were alleged showing that the plaintiff, the Great Lakes Fruit Company, and the defendant were all bound by the provisions of the Workmen's Compensation Act of the state of Illinois (Hurd's Rev. St. 1917, c. 48, §§ 126–152i), and that the plaintiff's injuries arose out of and in the course of his employment by the Great Lakes Fruit Company, wherefore it was averred that the plaintiff's right to damages for the injuries complained of was under the Workmen's Compensation Act and this action could not be maintained. The plaintiff demurred to the special pleas, the demurrer was overruled, the plaintiff electing to stand by his demurrer, judgment was rendered against him, and he has appealed directly to this court on the ground that a constitutional question is involved.

[1-3] A railroad company engaged in intrastate commerce is subject to the Workmen's Compensation Act. Keeran v. Peoria, Bloomington & Champaign Traction Co., 277 Ill. 413, 115 N. E. 636. Friebel v. Chicago City Railway Co., 280 Ill. 76, 117 N. E. 467. A railroad company engaged in interstate commerce is not subject to that act. Staley v. Illinois Central Railroad Co., 268 Ill. 356, 109 N. E. 342, L. R. A. 1916A, 450. To avoid liability under the act a railroad company engaged in both interstate and intrastate commerce has the burden of showing that the work being done at the time of the injury was in interstate commerce. Payne v. Industrial Com., 296 Ill. 223, 129 N. E. 830. It appears from the pleadings that in the occurrence in which the plaintiff was injured the defendant was engaged in interstate commerce, and was therefore not bound by the provisions of the Workmen's Compensation Act. Section 3 of that act provides that its provisions shall apply automatically to all employers and employees engaged in carriage by land or water, but, as held in Staley v. Illinois Central Railroad Co., supra, the Congress of the United States, by the federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665), has taken jurisdiction of the subject-matter of the Workmen's Compensation Act so far as it applies to interstate commerce, and has excluded carriers engaged in interstate commerce from the provisions of that act.

[4] The special pleas were based upon sections 6 and 29 of the Workmen's Compensation Act. Section 6 provides that no common-law or statutory right to recover damages for injury or death sustained by an employee engaged in the line of his duty, other than the compensation provided by the act, should be available to any employee covered by the provisions of the act or his legal representative, or to any one dependent

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upon him or otherwise entitled to recover damages for such injury. These provisions apply only to the right of the employee against his employer, and have no reference to the liability of third persons causing injury to the employee. By section 29, however, the rights of employees suffering injury or death in the course of or arising out of the employment, not proximately caused by the negligence of the employer, but caused under circumstances creating a legal liability for damages on the part of some person other than the employer, are dealt with, and it is declared that if the person, other than the employer who is liable for damages for the injury or death, is bound by the provisions of the act, the right to recover damages shall belong to the employer, and shall be limited to the amount of compensation payable under the act; but if the person, other than the employer, so liable for damages is not bound by the provisions of the act, then legal proceedings may be brought against such other person by either the employer or the injured employee. Gones v. Fisher, 286 Ill. 606, 122 N. E. 95. The act divides employers and employees who are under its provisions from employers and employees who are not under its provisions, and establishes a different rule in regard to the respective rights and liabilities of all employers and employees under the act from that which applies to employers and employees not under the act. Keeran v. Peoria, Bloomington & Champaign Traction Co., supra. In Vaughan's Seed Store v. Simonini, 275 Ill. 477, 114 N. E. 163, Ann. Cas. 1918B, 713, and Marshall v. City of Pekin, 276 Ill. 187, 114 N. E. 497, it was held that an employer might be subject to the provisions of the Workmen's Compensation Act so far as some part of his business was concerned, and not subject to its provisions so far as another part of his business was concerned. If he was engaged in any extrahazardous business of the character of those mentioned in the act, then he would be subject to the act so far as his employees engaged in that business were concerned, but he would not be under the provisions of the act so far as other employees not engaged in the extrahazardous business were concerned. The last two cases cited arose under the act of 1913, while this case is governed by the act of 1917, the provisions of which apply without election to all employees of employers engaged in any business declared by the act to be extrahazardous. Being engaged in carriage by land. appellee is subject to the provisions of the Workmen's Compensation Act so far as the intrastate business which he transacts is concerned, and would be subject to its provisions as to all his business as a carrier but for the fact that Congress, having assumed jurisdiction to regulate his interstate business in this respect, has excluded it from the operation of the Workmen's Compensation Act. While the federal Employers' Liability Act has no application to the appellant or his injury, it does have the effect of excluding the appellee from the provisions of the Workmen's Compensation Act as to the business in which he was engaged when the appellant was injured. Therefore, when engaged in interstate commerce the appellee and his employees so engaged are not bound by the act, and he is not entitled to the benefit of the provisions of section 29 in favor of employers who are bound by the act. The pleas did not state any defense to the action.

The judgment will be reversed, and the cause remanded, with directions to sustain the demurrer.

Reversed and remanded, with directions.

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McNAUGHT v. HINES, DIRECTOR GENERAL OF RAILROADS.
(No. 13861.)

(Supreme Court of Illinois. Oct. 22, 1921. Rehearing Denied Dec. 7, 1921.)

133 Northeastern Reporter, 53.

2. MASTER AND SERVANT — COMPENSATION ACT PROVISION FOR EMPLOYEES IN EXTRAHAZARDOUS BUSINESS HELD VALID.

Workmen's Compensation Act, § 3, making the law binding on those engaged in extrahazardous enterprises or businesses, is a valid exercise of the police power.

(For other cases, see Master and Servant, Dec. Dig. § 347.)

3. MASTER AND SERVANT — MEAT PACKER'S SALESMAN HELD WITHIN COMPENSATION ACT PROVISIONS AS TO EXTRAHAZARDOUS EMPLOYMENT.

Under Workmen's Compensation Act, §§ 3-5, a salesman of a packing company which was engaged in an extrahazardous business was included within the provisions as to such business, injured on his way from visiting a customer in the general line of his employment, though not actually engaged in extrahazardous employment.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

4. MASTER AND SERVANT — PERSONAL REPRESENTATIVE OF DECEASED EMPLOYEE WITHIN COMPENSATION ACT, HELD NOT ENTITLED TO SUE NEGLIGENT THIRD PERSON BOUND BY ACT.

Where employer and employee were within the terms of the Workmen's Compensation Act when the employee was killed by third person, a carrier engaged in intrastate commerce, and therefore likewise within the act, the personal representative of the deceased employee was prohibited by section 29 from maintaining action against the carrier.

(For other cases, see Master and Servant, Dec. Dig. § 389.)

Error to Appellate Court, Third District, on appeal from Circuit Court, McLean County; Sain Welty. Judge.

Action by Rosamond McNaught, administratrix, against Walker D. Hines, Director General of Railroads. From judgment for plaintiff, defendant brought error from the Appellate Court, and on affirmance there (220 Ill. App. 15) brings certiorari. Reversed and remanded, with directions.

George B. Gillespie, of Springfield (L. J. Hackney, of Cincinnati, Ohio, A. E. & R. C. De Mange, of Bloomington, Stanley W. Merrell, of Cincinnati, Ohio, George M. Gillespie. of Springfield, and F. L. Littleton. of Cincinnati, Ohio. of counsel), for plaintiff in error.

Sigmund Livingston, of Chicago, and W. W. Whitmore, of Bloomington, for defendant in error.

CARTER, J. Defendant in error. as administratrix of her husband's estate. brought a suit in the circuit court of McLean county against Walker D. Hines, Director General of Railroads. operating the Cleveland, Cincinnati, Chicago & St. Louis railway. for the death of her husband, claiming it to have been caused by the negligence of the railway

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company. On the trial before a jury a verdict in favor of defendant in error was given for $9.000 and judgment entered thereon in the circuit court. On appeal to the Appellate Court that judgment was affirmed, and the case has been brought to this court on petition for certiorari.

The declaration consisted of four counts, each charging in some form negligence in the operation of the engine and cars of the railway company. It appears that on January 24. 1918. the deceased was a traveling salesman for the Wink Packing Company, of Peoria. On the afternoon of that day he arrived at the village of Lilly, in McLean county. on an interurban car a few minutes before 6 o'clock. The Wink Packing Company sold meats and their by-products. and the object of the deceased in going to Lilly was to procure an order from the firm of Rutledge & Garrett. a customer. About 40 people lived in Lilly. and the buildings there located consisted of several business places. plaintiff in error's railroad depot. an interurban depot. and about 12 houses. The plaintiff in error's railroad runs through this place east and west. and the interurban electric railway parallels it on the north. about 75 feet distant therefrom. A block south of the railroad tracks an unnamed street runs east and west parallel therewith. and ends at the east side of Hay street. On the north and south sides of this unnamed street or passageway above mentioned, and west of Hay street, are located some of the business places mentioned. The store of Rutledge & Garrett is located at the southwest corner of the intersection of the unnamed street and Hay street. Running north from this street for a short distance is a cement walk, beyond which is a path which runs diagonally in a northeasterly direction. crossing the railroad tracks in the center of Hay street. and continuing northeasterly across Hay street to the interurban station, which is north of the interurban tracks and on the east side of Hay street. Hay street is not a regularly traveled highway and has no definite width. Where it crosses plaintiff in error's tracks it is planked to a width of 19 feet. The evidence tends to show that after the deceased had obtained an order from Rutledge & Garrett he started north on Hay street toward the interurban station to take an interurban car then shortly to be due; that as he approached the crossing plaintiff in error's train also approached it from the east. running between 50 and 60 miles per hour; that it was dark, and the headlight on the approaching engine was an oil lamp. There was some conflict in the evidence as to the signals given and as to the speed of the train. There were no eyewitnesses who were able to see the accident at the actual time it happened. Some of the witnesses saw the deceased approaching plaintiff in error's railway as the train in question was coming from the east. and said that he was running or going at what might be called a "dogtrot;" that he disappeared in the steam that was escaping from the engine, and was struck by the engine; but the onlookers did not see him struck because of the steam or smoke from the engine. He died very shortly after being struck.

Numerous objections have been raised by plaintiff in error on the merits, and it is earnestly insisted that an instruction directing a verdict should have been given by the trial court. Plaintiff in error filed a plea of general issue. also a special plea. In the special plea it is averred that the Wink Packing Company, which employed the deceased at the time of his death, was a corporation organized under the laws of this state and engaged in an extrahazardous business. in which statutory and municipal ordinances and regulations were imposed for regulating. guarding, use and placing of machinery or appliances for the protection and safeguarding of its employees; that deceased was killed while engaged in the duties of his employment: that neither employer nor employee had elected not to be bound by the provisions of the Workmen's Compensation Act then in force; that plaintiff in error was engaged in the business of car-

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riage by land of goods and passengers between points in the state of Illinois for hire; and that the provisions of the Workmen's Compensation Act applied to plaintiff in error and its employees. A demurrer was filed to this special plea and sustained, and the trial was had upon the general issue.

The Workmen's Compensation Act in force at the time of this accident was that of 1917. Laws 1917, p. 505. That act repealed the previous provisions stating what parties came within the Workmen's Compensation Act. and provided in section 3, among other things:

"The provisions of this act hereinafter following shall apply automatically. and without election, to all employers and their employees engaged in any of the following enterprises or businesses which are hereby declared to be extrahazardous. namely."

Then followed an enumeration of various articles of extrhazardous businesses. among which were included:

"3. Carriage by land or water and loading or unloading in connection therewith. 4. The operation of any warehouse or general or terminal storehouses. * * * 8. In any enterprise in which statutory or municipal ordinance regulations are now or shall hereafter be imposed for the regulating. guarding, use or the placing of machinery or appliances or for the protection and safeguarding of the employees or the public therein; each of which occupations, enterprises or business are hereby declared to be extrahazardous."

It is obvious in reading the opinion of the Appellate Court that that court held that the Workmen's Compensation Act did not apply because the deceased was not at the time of his death engaged in an extrahazardous occupation. In reaching this conclusion that court relied entirely upon the decisions of this court which construed the Workmen's Compensation Act as it existed in this state prior to the passage of said act of 1917. The opinion of the Appellate Court relies especially on the decisions of this court in Sanitary District v. Industrial Board, 282 Ill. 182, 118 N. E. 475, where the accident occurred in February. 1914—and upon Bowman Dairy Co. v. Industrial Com., 292 Ill. 284, 126 N. E. 596. where the accident occurred February 5, 1917. In both of those cases the accidents took place before the act of 1917 was in force; therefore it is clear that those decisions are not necessarily decisive with reference to the act here to be considered. Indeed, this court distinctly stated in Oriental Laundry Co. v. Industrial Com., 293 Ill. 539, 127 N. E. 676, that it was unnecessary to pass on that question there; that this court was not intending to intimate by anything said in that opinion that the law of 1917—or as amended in 1919 (Laws. 1919, p. 538), which is practically the same on this question—would not bring employees engaged in extrahazardous occupations automatically under the act, entirely independent and separate from the extrahazardous employment in which the workmen might or might not be employed at the time. In Harper on Workmen's Compensation (2d Ed.), the author, in discussing the provision of the Workmen's Compensation Act now under consideration, says, on page 178:

"Under the present compulsory law, which is based squarely upon the police power and does not depend in any way upon the election of the employer, if the employer's business falls within the hazardous classification. under the principles of police power referred to in the Elerding Case, 254 Ill. 579, 98 N. E. 982, 40 L. R. A. (N. S.) 893, all employees in that business should be entitled to the protection of the act, and such an application of the act would not be an unconstitutional discrimination as between employers, such as might be said to result in the case of an elective law."

[1] The first rule for the interpretation of a statute is to let the lawgiver—the Legislature—speak, and that there shall be no application

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of rules of construction if the language used is plain in its ordinary meaning, for the very potent reason that there is nothing for a court to do but read and apply the law. Where the language of a statute is clear and unambiguous there is no room for construction, and the words used must be taken in their ordinary, natural, and commonly received sense. Illinois Central Railroad Co. v. City of Chicago, 173 Ill. 471, 50 N. E. 1104, 53 L. R. A. 408. It is the duty of courts to accept a statute as they find it. People v. Rose, 174 Ill. 310, 51 N. E. 246, 44 L. R. A. 124; People v. Atchison, Topeko & Santa Fe Railway Co., 201 Ill. 365, 66 N. E. 232. There can be no question that the railroad company was a carrier engaged in carriage as a common carrier by land between points within the state, within the meaning of paragraph 3 of section 3 of the act of 1917, and that the death of McNaught resulted from the acts of servants and the operation of instrumentalities promoting and carrying on the business of the company as a carrier by land. The eighth paragraph in the special plea in plain language so alleges.

[2] Section 3 of the act, making the law binding upon those engaged in extrahazardous enterprises or businesses, has been sustained as a valid exercise of the police power of the state. Grand Trunk Western Railway Co. v. Industrial Com., 291 Ill. 167, 125 N. E. 748. See, also, Mobile, Jackson & Kansas City Railroad Co. v. Turnipseed, 219 U. S. 35, 31 Sup. Ct. 136, 55 L. Ed. 78, 32 L. R. A. (N. S.) 226, Ann. Cas. 1912A, 463. It would also seem plain from a reading of the special plea that if the facts set forth therein are true the Wink Packing Company and the deceased were within the act. The first part of section 3 and paragraph 8 of said section would seem clearly to apply, for under the allegations of the special plea the Wink Packing Company was engaged in an enterprise or business in which statutory and municipal ordinances and regulations were imposed for the regulating, guarding, and placing machinery or appliances for the protection and safeguarding of its employees and of the public therein. The plea alleges that the Wink Packing Company was carrying on the business of buying, slaughtering, storing, and warehousing meat animals and carcasses, selling and loading meats and meat products, and other wares and merchandise; that a great number of carcasses of meat were hung by it in cold storage rooms; that in connection with its business it operated mechanical hoists, pulleys, shafts, and bearings driven by electric motors of great size, and freight elevators operated by electric motors, which also operated other machinery, and that the business was one in which statutory and municipal ordinance regulations were then and there imposed for the regulating, guarding, use, and placing of machinery and appliances and for the protection and safeguarding of its employees.

[3] Counsel for defendant in error argue, as we understand them, that under sections 4 and 5 of the act of 1917 it was not intended to include employees as within the act unless they were actually engaged in extrahazardous employment at the time of the injury. Section 4 enumerates who shall be considered employers under section 3 of the act, and the last paragraph of section 5 provides that the term "employee" shall be construed to mean "every person in the service of another under any contract of hire, express or implied, oral or written. * * * who are legally permitted to work under the laws of the state, who, for the purpose of this act, shall be considered the same and have the same power to contract," and then adds, "but not including any person who is not engaged in the usual course of the trade, business, profession or occupation of his employer." Hurd's Stat. 1917, p. 1451. It would seem clear from this exception, however, that the Legislature intended to include all others within the act who are not excluded by this exception. 2 Lewis' Sutherland on Stat. Const. (2d Ed.) 916. The plea alleged that the deceased was an employee of the Wink Packing Company then en-

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gaged in the business of buying and slaughtering meat animals buying and dressing, storing, warehousing, selling and loading meat products and other wares and merchandise, and that at the time he was killed he was engaged in the business of selling such products. The usual course of business shown in this plea is in accord with the same. To sell through salesmen is as much a part of the business made extrahazardous as a whole by statute as to buy through purchasers, pack through packers, grind, store, load, and deliver. It took all these different parts of the work to make the sum total of the business in which the employer and his employees were all engaged, each doing his separate part in the usual course of the whole business. Therefore it would seem to follow necessarily that the deceased at the time he lost his life was engaged in the usual course of business of his employer. Illinois Publishing & Printing Co. v. Industrial Com. (No. 14012) 132 N. E. 511.

[4] All three parties being under the Workmen's Compensation Act, according to the allegations of the special pleas, section 29 of said act prohibits the prosecution of this cause by the personal representative of the deceased employee. Goldsmith v. Payne, (No. 14062) 133 N. E. 52.

The trial court erred in sustaining the demurrer to the special plea. The judgments of the Appellant and trial courts will therefore be reversed, and the cause remanded to the circuit court, with directions to overrule the demurrer and to proceed further in harmony with the views herein expressed.

Reversed and remanded, with directions.

KANAWHA FUEL CO. v. INDUSTRIAL COMMISSION ET AL. (No. 14005.)

(Supreme Court of Illinois. December 22, 1921.)

133 Northeastern Reporter 238.

1. MASTER AND SERVANT—EARNINGS FROM INCREASE OF PAY NOT CONSIDERED IN DETERMINING EXTENT OF PARTIAL INCAPACITY WITHIN COMPENSATION ACT.

The part of an employee's earnings after injury due to an increase of rate of pay after the injury for the class of work at which he was employed is properly left out of account in determining the extent of his partial incapacity, relative to award under Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 385[11.])

2. MASTER AND SERVANT—COMPENSATION AWARD FOR PARTIAL INCAPACITY HELD NOT SUSTAINED COMPETENT EVIDENCE.

An injured employee's statement on application under Workmen's Compensation Act that before the accident he was able to load 10 or 12 tons of coal per day, and 5 or 6 after the accident, is not competent evidence to sustain a finding of partial incapacity, to the extent of pactically one-half, it being proved, and not disputed by him, that before he was injured he loaded an average of 6.9 tons per day for 23 days, and that after returning to work he loaded an average of 6.1 tons for 59 days; the necessary conclusion being that what he did was the measure of his ability.

(For other cases. see Master and Servant, Dec. Dig. § 405[6].)

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Error to Circuit Court, Perry County; Louis Bernreuter, Judge.

Proceeding under the Workmen's Compensation Act by Adam Ellison against the Kanawha Fuel Company. Award made by the arbitrator was confirmed by the Industial Commission and by the circuit court, and defendant brings error. Reversed and remanded, with directions.

George W. Dowell, of Du Quoin (Robert H. Davis, of St. Louis, Mo., of counsel), for plaintiff in error.

A. W. Kerr, of Chicago, and George R. Stone, of Marion, for defendant in error.

CARTWRIGHT, J. Defendant in error, Adam Ellison, an unmarried man, was employed by the plaintiff in error, the Kanawha Fuel Company, in its mine near Du Quoin, Perry county, and on July 9, 1919, he was injured by a fall of slate, coal, and other substances from the roof, injuring his shoulder, and back and fracturing the sixth, seventh, eighth and ninth ribs on the left side. The parties were subject to the provisions of the Workmen's Compensation Act (Hurd's Rev. St. 1919, c. 48, §§ 126–152i), and the injury arose out of and in the course of the employment. The application of Ellison for compensation was heard by an arbitrator, and at the time of the hearing the applicant had been furnished with medical service and paid $245. The only dispute before the arbitrator was whether and to what extent Ellison was then incapacitated from pursuing his usual and customary line of employment in the future. The arbitrator made an award in his favor of $12 per week for 13$^{4}/_{7}$ weeks for the period of total incapacity, and a further award of $6 per week for 402$^{3}/_{7}$ weeks for partial incapacity for pursuing his usual and customary line of employment. The arbitrator found that $6 per week was 50 per cent. of the difference between what Ellison earned before the injury and what he was able to earn afterward, which was a finding on the disputed question. On a review by the Industrial Commission it was ordered that the decision of the arbitrator stand as the decision of the Industrial Commission, and on a writ of certiorari out of the circuit court the award was confirmed.

[1, 2] The question now to be determined in whether there is any competent legal evidence in the record to sustain the finding and decision of the arbitrator, confirmed by the Industrial Commission, as to the extent of partial incapacity. The evidence related to the average amount which Ellison earned before the accident and the average amount which he was earning or was able to earn at the time of the hearing. He was employed to load coal and also to do incidental cleaning-up work. There was no evidence of any partial incapacity in performing the latter kind of work, but he testified that before the accident he was able to load 10 or 12 tons of coal per day and five or six afterwards; that he returued to work in the mine on October 13, 1919, and had worked pretty nearly every day the mines were in operation, and, in fact, worked every day until quite recently before the hearing. It was proved, and not disputed nor questioned by Ellison, that before he was injured he loaded an average of 6.9 tons per day for 23 days, and that after returning to work he loaded an average of 6.1 tons for 59 days. He was actually earning more money per day after the injury than before, but that was due to a difference in the rate per ton for loading, which before the accident was 65 cents per ton and afterwards 74½ cents per ton. It was proper not to take into account the excess on account of the increased rate, and there was a slight difference in the number of tons loaded per day before and after the accident. The fractures were all healed and the ribs in natural position. There was no physical displacement or apparent objective disability, and the complaint was of pain and subjective symptoms. While Ellison gave an estimate of what he was able to do before and after the ac-

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cident, he did not dispute in any manner or deny that he did actually load the number of tons before and after his injury as above stated, and the necessary conclusion is that what he did was the measure of his ability. There was therefore no competent evidence to justify a conclusion that $6 a week was 50 per cent. of the difference between what Ellison earned before the injury and what he was able to earn afterward.

Counsel for defendant in error say that ample protection is afforded the plaintiff in error by the statutory provision for a review and reduction of the award if the evidence should justify it, but that is not an answer to the error assigned that the award is unsupported by competent evidence.

The judgment is reversed as to the award for partial incapacity, and the cause is remanded to the circuit court. If the defendant in error shall move to have his application remanded to the Industrial Commission for further consideration, the court is directed to allow the motion and remand the application accordingly.

Reversed and remanded, with directions.

SHOAL CREEK COAL CO. v. INDUSTRIAL COMMISSION ET AL. (No. 14110.)

(Supreme Court of Illinois. Dec. 22, 1921.)

133 Northeastern Reporter, 218.

3. MASTER AND SERVANT — EVIDENCE HELD NOT TO SUPPORT FINDING OF COMPENSATION CLAIMANT'S INCAPACITY.

Where the evidence in a compensation proceeding as to the employee's actual earnings showed that before the injury he averaged $6.60 a day when paid 66 cents a ton for loading coal, and after the injury averaged $6.76 a day when paid 75 cents a ton, his testimony that before he was injured he could load from 15 to 18 tons, and after the injury averaged about 8 or 9 tons, would not support a finding that the difference in the average weekly earnings amounted to $10.30 a week.

(For other cases, see Master and Servant, Dec. Dig. § 405[5].)

Error to Circuit Court, Montgomery County; Thomas M. Jett, Judge.

Proceeding under the Workmen's Compensation Act by James Files for compensation for injuries, opposed by the Shoal Creek Coal Company, employer. Compensation was awarded, and the award affirmed by the circuit court, and the employer brings error. Reversed and remanded, with directions.

Hill & Bullington, of Hillsboro, for plaintiff in error.

A. W. Kerr and Sam Gilbert, both of Chicago, for defendant in error.

CARTWRIGHT, J. The defendant in error, James Files, while working as a miner for the plaintiff in error, the Shoal Creek Coal Company, in loading coal in its mine, was injured on October 22, 1919, by the falling of a rock from the roof. Medical services were furnished by the plaintiff in error, and $90.86 was paid to him as compensation under the

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Workmen's Compensation Act. His application for an adjustment of his claim for additional amounts on account of temporary total incapacity for work and partial incapacity after the period of total inability to work was heard before an arbitrator, and it was stipulated that the accident arose out of and in the course of his employment; that he was unmarried; that his yearly wage was $1,340, and his weekly wage $25.70. that medical services had been furnished, and $90.86 paid as compensation; and that the only question in dispute was the extent of the disability. The arbitrator made an award of $12 per week for 11 weeks for temporary total incapacity, and $5.15 per week for 405 weeks for partial incapacity for work. The arbitrator found that $5.15 per week was one-half of the difference between the weekly wage earned by the applicant before the accident and what he was able to earn afterward in a suitable employment.

Upon a review of the decision of the arbitrator on the petition of the plaintiff in error, the Industrial Commission affirmed the award. The plaintiff in error sued out of the circuit court of Montgomery county a writ of certiorari, commanding the Industrial Commission to certify its record to the court. A return was made, and the plaintiff in error moved the court to set aside the award and dismiss the proceedings for the reason that the Workmen's Compensation Act of 1919 (Laws 1919, p. 538), under which the proceeding was had, was unconstitutional and void, because in conflict with the Constitutions of the state of Illinois and the United States, by limiting the review in the circuit court, to questions of law. The court denied the motion, and found against the plaintiff in error on the merits, and affirmed the award.

[1, 2] Counsel for the defendant in error have argued at some length that the Workmen's Compensation Act of 1919 did not violate any constitutional provision and was a valid enactment; but if plaintiff in error had waived any right it might have had to question the validity of the act it would not be proper to consider the arguments on that question. The right claimed in the circuit court which it was alleged the act violated was a right under the state and federal Constitutions to have the facts upon which the claim of liability rested reviewed by a judicial tribunal. Being the right to have a liability to a money judgment reviewed upon the facts, the general rule is that such a right may be waived, and is waived, not only by an express waiver, but by a course of conduct which in justice and right will prevent an attack upon the constitutionality of the law. Any one who claims that a statute is unconstitutional, as an invasion of rights secured to him, should raise the question at the earliest opportunity, and he may waive his constitutional right by taking part, without objection, in judicial proceedings otherwise unconstitutional as against him. If he takes part, without objection, in a proceeding which fixes his liability under the statute, he has acknowledged its validity, and cannot attack it as unconstitutional. Shepard v. Barron, 194 U. S. 553, 24 Sup. Ct. 737, 48 L. Ed. 1115; Humbird v. Avery, 195 U. S. 480, 25 Sup. Ct. 123, 49 L. Ed. 286; Hellen v. City of Medford, 188 Mass. 42, 73 N. E. 1070, 69 L. R. A. 314, 108 Am. St. Rep. 459; 6 R. C. L. 94; 12 Corpus Juris, 773; 19 Ann. Cas. 181, note.

In People v. Rodgers Co., 277 Ill. 151, 115 N. E. 146, where the people had brought a suit under the act for licensing architects, and contended in this court that section 5 of the act was unconstitutional, it was held that they were in no position to question the validity of the act, and it was not possible for the court to consider a constitutional question as raised. In that case the objection was made by the party bringing the suit; but the court has repeatedly held that the right to question the constitutionality of a law under which an action is brought is waived by prosecuting an appeal from the judgment to the Appellate Court, and submitting the case for review to a court having no authority to decide con-

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stitutional questions. Indiana Millers' Mutual Fire Ins. Co. v. People, 170 Ill. 474, 49 N. E. 364; Barnes v. Drainage Comrs., 221 Ill. 627, 77 N. E. 1124. Case v. City of Sullivan, 222 Ill. 56, 78 N. E. 37; Pittsburg Cincinnati, Chicago & St. Louis Railway Co. v. City of Chicago, 242 Ill. 178, 89 N. E. 1022, 44 L. R. A. (N. S.) 358, 134 Am. St. Rep. 316. The failure to raise any objection to a proceeding amounting to an invasion of a constitutional right constitutes a waiver of the right, and if the Compensation Act and all proceedings under it were void, because in conflict with the state and federal Constitutions, it was the right and duty of the plaintiff in error to avail itself of the objection at the first reasonable opportunity. Instead of doing that, it furnished medical services, paid compensation under and by virtue of the act, appeared before the arbitrator and Industrial Commission and claimed the benefit of what it had furnished and paid, stipulated facts which were necessary to be proved by the applicant, and made no suggestion that the proceedings in any way invaded its constitutional rights. No question of public morals or public policy prevented the waiver of the objection to the statute, and, the right being personal to the plaintiff in error, it must be held that it acknowledged the validity of the statute, and any question as to its constitutianality was waived.

[3] On the hearing before the arbitrator it was proved that the rock which fell struck the applicant on the back of the neck, head, and shoulders; that no bones were broken; that he was in a hospital at St. Louis about a week and was at home 6 or 7 weeks before he returned to work, on December 29, 1919, and had worked until the week of the hearing, when he got into a fight and was discharged. He said that before he was injured he could load from 15 to 18 tons of coal a day, and after he returned he could load 7 or 8 and sometimes 10 tons, but the average was about 8 or 9; that before the injury he received 66 cents a ton for loading, and after he returned received 75 cents a ton; that he kept no record of his earnings, or the amount of coal he loaded, either before or after the injury; that he could not remember how much l., worked after the injury, but he lost some time; that he did not know how many days he lost, but he thought about 14 days when the mine worked and that he suffered pain in his neck and shoulders. At the time of the hearing there were no physical changes in the applicant, but there was pain on pressure, and the muscles of the neck and shoulder were bruised so badly in the injury that it took them a long time to heal.

While the applicant stated what he could do before and after the injury, it was proved, and not questioned in any way or denied, that in fact he worked 53 days and 6 hours before the injury and received 66 cents a ton, amounting to $355.03, which showed an average of not exceeding 10 tons per day. Before the injury his average earnings were $6.60 per day, and after he returned to work they averaged $6.76 per day; but the rate was higher per ton after the injury. As the applicant kept no record of his earnings or the amount he loaded, either before or after the injury, and did not dispute facts proved as to such earnings, it is manifest that the competent evidence did not sustain the award for partial incapacity. The average earnings before the injury were stipulated to be $25.70, and the finding of $10.30 per week as the difference between what the applicant earned before the injury and what he earned or was able to earn afterward, taking into account the increased rate per ton, is not supported by competent evidence.

The judgment of the circuit court as to partial incapacity at $5.15 for 405 weeks is reversed, and the cause remanded to the circuit court, with directions, if the applicant shall move to have the cause remanded to the commission for further consideration and evidence it shall be so remanded.

Reversed and remanded, with directions.

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DRISCOLL v. WEIDELY MOTORS CO. (No. 11192.)

(Appellate Court of Indiana, Division No. 1. Nov. 30, 1921.)

133 Northeastern Reporter, 12.

MASTER AND SERVANT — MINOR HELD ILLEGALLY EMPLOYED ON ELEVATOR PRECLUDING RECOVERY UNDER COMPENSATION ACT.

A boy 14 years old, employed in a factory as a toolroom errand boy, who carried light tools on a stairway and used a push truck placed on an elevator to transfer heavy tools, and who was killed in using the elevator to return the truck to the toolroom after delivering a tool weighing 35 pounds, *held* injured in work under his employment, and, such work being unlawful, under Burns' Ann. St. 1914, § 8024, prohibiting the employment of any young person between the ages of 14 and 18 to operate an elevator, the entire contract of employment was invalid, defeating jurisdiction to award compensation for his death.

(For other cases, see Master and Servant, Dec. Dig. § 366.)

Appeal from Industrial Board.

Proceedings under Workmen's Compensation Act (Laws 1915, c. 106), by Ella Driscoll, to recover compensation for the death of her son, William Driscoll, opposed by the Weidely Motors Company, employer. From an order of the Industrial Board dismissing claim, claimant appeals. Affirmed.

James E. Deery, of Indianapolis, for appellant.

James W. Fesler, Harvey J. Elam, and Howard S. Young, all of Indianapolis, for appellee.

ENLOE, J. On July 12, 1920, one William Driscoll, a boy of the age of 14 years, entered the service of appellee in the capacity of a "toolroom errand boy." On the 17th day of August, 1920, he, while in the service of appellee at its manufacturing plant, received the injury, by accident, which caused his death. The appellant made application to the Industrial Board for an award of compensation as the dependent mother of said deceased, with whom he lived and to whom he contributed all his earnings for her support. Such proceedings were had thereafter that the cause was reviewed by the full Board, and said Board made a finding that—

"On the 17th day of August, 1920, one William Driscoll was in the service of the defendant, Weidely Motors Company, at an average weekly wage of $15.41; that the said William Driscoll was born August 31, 1905, and was under 15 years of age on the 17th day of August, 1920; that among other things the said William Driscoll was hired to and was permitted to operate an elevator; that on the 17th day of August, 1920, while performing work that he was hired to do, the said William Driscoll was operating an elevator with the knowledge, acquiescence, and consent of the defendant, Weidely Motors Company; that while so operating said elevator he received a personal injury by an accident arising out of the operation of said elevator, which resulted in his death on the 20th day of August, 1920; that the plaintiff is the mother of the said William Driscoll; that at the time of his injury and death she was partially dependent upon him for maintenance and support; that, by reason of the facts hereinbefore found, the Industrial Board is without jurisdiction to hear and determine the plaintiff's claim."

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Based upon such finding, the Industrial Board dismissed said claim, from which order of dismissal this appeal is prosecuted.

The appellant insists that under the evidence the deceased was lawfully in the service of the Weidely Motors Company as an errand boy, and that operating the elevator was outside of the duties for which he was employed at the time of the injury, and that therefore the appellant is entitled to an award of compensation. This contention necessitates an examination of the evidence to determine whether there is any evidence which fairly tends to support the findings of said Board.

Our statute (section 8024, Burns' 1914), provides:

No person, company, corporation or association shall employ or permit any young person to have the care, custody, management of or to operate any elevator."

A "young person" is defined by statute to be a person between the age of 14 and 18 years. It necessarily follows that if the deceased, who was a "young person," and who met his death while operating an elevator, was performing a service for which he was employed, that his contract of employment was therefore illegal, and the Board had no jurisdiction to make an award in this case.

It appears from the evidence that when the deceased was first employed one Paul Mills, who was also an errand boy, was directed by an assistant foreman of appellee motors company to show young Driscoll the different work he was to do and how to do it. It also appears that the foreman of said motors company instructed said Mills to show the deceased the work he was to do and how to do it, and to remain with him two or three days until he got onto the work; that it was a part of the work of an errand boy to get tools from the toolroom and deliver them to the workmen, and also to return tools to said toolroom; that the toolroom in said plant was on the second floor of the building; and that in delivering tools to the workmen and in returning them to the toolroom, if the tools were light, they would be carried by the errand boy up a stairway, but, if the tools were heavy, they were usually placed on a truck, which was placed on the elevator and thus taken by the errand boy from floor to floor, as occasion demanded.

Just prior to his injury the deceased had delivered a tool called a milling cutter, and weighing 35 or 40 pounds, to one of the workmen, and had used the elevator to transfer said tool from one floor to another, and, having delivered said tool, was returning the two-wheel push truck upon which he had delivered said tool to the toolroom, where said truck belonged and was kept, using the elevator for that purpose, and that in so using the elevator the accident occurred which caused his death.

We think the evidence abundantly shows that it was a part of the usual work of an errand boy under his employment to use this elevator, as occasion should demand, in making delivery of tools, and that the finding of the Industrial Board is abundantly sustained. This part of the employment of the deceased being prohibited by law, his entire contract of employment was invalid.

The order of the Industrial Board is therefore affirmed.

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IN RE TROUTMAN.

IN RE KIRK. (No. 11318.)

(Appellate Court of Indiana, Division No. 1. Dec. 9, 1921.)

133 Northeastern Reporter, 150.

MASTER AND SERVANT — NO PART OF COMPENSATION BARRED BY DELAY IN GIVING NOTICE.

Where an employee suffering temporary total disability within Workmen's Compensation Act, § 31, fails to give notice of injury until after the expiration of the 30 days allowed by section 22, and the employer is not prejudiced thereby, the delay in giving notice merely postpones the time when the payment of compensation begins, and does not bar employee's right to any portion of the compensation.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

Certified Questions from Industrial Board.

Proceedings by Helen Troutman and Lorenzo Kirk for compensation under the Workmen's Compensation Act. Certified questions from Industrial Board answered.

ENLOE, J. The Industrial Board has submitted to this court the following statements of fact, together with the questions hereinafter stated, for our determination, pursuant to the provisions of the Workmen's Compensation Act:

"I. On the 2d day of July, 1921, one Helen Troutman was in the employ of the Elite Cloak Company at an average weekly wage of $15; that on said date both the employer and employee were under and subject to the Indiana Workmen's Compensation Act; that on said date the said Helen Troutman received a personal injury by an accident arising out of and in the course of her employment, resulting in her temporary total disability to work for a period of 11 weeks; that the employer did not at said time have actual knowledge of such injury, nor did it acquire such knowledge at any time until 8 weeks had expired; that the employee did not give to the employer written notice at any time until on the evening of the expiration of the eighth week; that the employee has presented a claim for compensation, and insists that she is entitled to 10 weeks' compensation under clause (j) of section 31, Acts 1919 (Acts 1919, p 162).

"On the other hand, the employer contends that she is entitled to only three weeks, by reason of the following provision in section 22, Acts of 1919, to wit: 'Unless such notice is given or knowledge acquired within thirty days from the date of the injury or death, no compensation shall be paid until and from the date such notice is given or knowledge obtained.' Acts 1919, p. 161.

"In answer to this contention the employee contends that the following provision in section 22, Acts of 1919, to wit: 'No lack of knowledge by the employer or his representative and no want, failure, defect or inaccuracy of the notice shall bar compensation, unless the employer shall show that he was prejudiced by such lack of knowledge or by such want, failure, defect or inaccuracy of the notice, and then only to the extent of such prejudice'—does not shorten her period of compensation, but merely extends the time when compensation begins until the date upon which notice was given, which was on the day of the expiration of the eighth week; that there is no claim by the employer that he was pre-

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judiced in any respect by the lack of knowledge of the employee's injury or by her failure to give notice at any time prior to the date upon which notice was given.

"II. On the 28th day of May, 1921, one Lorenzo Kirk was in the employment of the Hubbard Steel Co. at an average weekly wage in excess of $24. That on said date the said Kirk received a personal injury by an accident arising out of and in the course of his employment, by which a piece of steel penetrated the right eyeball, resulting in the total and permanent loss of the vision of said eye; that the employer did not have actual knowledge of said injury at the time of its occurrence, and did not acquire knowledge of such injury at any time within the period of 10 weeks after its infliction; that on the last day of the tenth week immediately following the injury, the employee gave written notice to his employer of said injury.

"The employer makes no claim that its rights were prejudiced in any respect whatever by the failure to have actual knowledge of the injury at the time that it occurred, or by its failure to acquire knowledge within 10 weeks after, or by the failure of the employee to give written notice of such injury until the expiration of 10 weeks thereafter. The employee has filed a claim for compensation on account of said injury, claiming that he is entitled to compensation for the period of 150 weeks under clause (f) of section 31 of the Indiana Workmen's Compensation Act (Acts 1919, p. 162).

"The employer contends that he is entitled to only 140 weeks' compensation by reason of the failure of actual knowledge on its part at the time of the injury, and its failure to acquire knowledge for 10 weeks thereafter, and the failure of the employee to give notice of such injury until the expiration of 10 weeks. This claim is made under the following provision of section 22: 'Unless such notice is given or knowledge acquired within thirty days from the date of the injury or death, no compensation shall be paid until and from the date such notice is given or knowledge obtained.'

"Upon the other hand, the employee insists that he is entitled to 150 weeks' compensation, and that the failure of the employer to have actual knowledge at the time of the injury or to acquire knowledge within ten weeks thereafter, and his failure to give notice until the expiration of 10 weeks, merely postpones the date upon which compensation begins. This claim is made under the following provision of section 22: 'No lack of knowledge by the employer or his representative and no want, failure, defect or inaccuracy of the notice shall bar compensation, unless the employer shall show that he is prejudiced by such lack of knowledge or by such want, failure, defect or inaccuracy of the notice, and then only to the extent of such prejudice.' Acts 1919, p. 161.

"Upon the foregoing facts the members of the Industrial Board disagree as to the proper award to be made in each of such cases. Therefore, upon the facts stated, the Industrial Board of Indiana respectfully submits the following questions of law for determination.

"First: Upon the facts stated in (I) would an award of compensation for 10 weeks be according to law?

"Second: Upon the facts stated in (II) would an award of compensation for 150 weeks be according to law?"

The question for our consideration in this case involves the construction of a statute. The issue between the employer and employee in each case is clear-cut.

Workmen's Compensation Laws have been adopted in many states, and the courts of such states have, from time to time, been called upon to interpret various provisions of such laws. In doing so, certain rules have been announced as rules for the guidance of the courts, in their endeavor

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to reach a correct conclusion as to the scope, meaning, or construction of such laws.

In the case of In re Young, 218 Mass. 346, 106 N. E. 1, it was said:

"The act is to be interpreted in the light of its purpose, and, so far as reasonably may be, to promote the accomplishment of its beneficient design."

In the case In re Kelley, 64 Ind. App. 594, 116 N. E. 306, it was said:

"Effect should be given to all parts of the statute where it is reasonably possible so to do in harmony with the spirit and purpose of the whole act."

In Ft. Wayne, etc., Co. v. Pfeiffer, 60 Ind. App. 615, 111 N. E. 192, this court said:

Remedial statutes "are liberally construed to make them effective as to those who come within their provisions."

In the case In re Petrie, 215 N. Y. 335, 109 N. E. 549, the provision of the statute under consideration was the following:

"The loss of the *first phalange* of the thumb or finger shall be considered to be equal to the loss of one-half of such thumb or finger," etc. (Our italics.)

The commission found that the claimant has suffered an injury by accident, to the third finger of his right hand, and that "in the amputation of the third finger about one-third of the bone of the distal phalange was cut off." It was contended on appeal that the injury was not compensable because the claimant had not lost the *first phalange,* but had lost only *a part thereof,* and hence was not within the statute. The court, in denying such contention to be tenable, said:

"The Workmen's Compensation Law was adopted in deference to a widespread belief and demand that compensation should be awarded the workmen who were injured and disabled, temporarily or permanently, in the course of their employment, even though sometimes the accident might occur under such circumstances as would not permit a recovery in an ordinary action at law. The underlying thought was that such a system of compensation would be in the interest of the general welfare by preventing a workman from being deprived of means of support, as the result of an injury received in the course of his employment. The statute was the expression of what was regarded by the Legislature as a wise public policy concerning injured employees. Under such circumstances we think it is to be interpreted with fair liberality, to the end of securing the benefits which it was intended to accomplish."

The Supreme Court of Washington in Zappala v. Industrial Com., 82 Wash. 314, 144 Pac. 54, L. R. A. 1916A, 295, said:

"The act should be liberally interpreted, to the end that the purpose of the Legislature in suppressing the mischief and advancing the remedy be promoted even to the inclusion of cases within the reason, although outside the letter of the statute."

Section 22 of our Workmen's Compensation Act in the plainest language says:

"No l. k of knowledge * * * and no want, failure, defect, or inaccuracy of the notice shall bar compensation, unless," etc.

There is no contention in this case of any prejudice having been suffered by reason of not having received notice of these injuries within 30 days, and hence we need not consider the exception contained in said statute.

Suppose the claimant, Helen Troutman, had suffered a temporary total disability of only 8 weeks, at the close of which time she had informed her employer of said accident; suppose, further, that he had been in no way prejudiced by her failure to give such notice within the 30

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days, could it, with any reason be said that she had, by such delay in giving notice to her employer, lost her right to recover compensation, when the statute says such delay shall not bar her right? Not only the letter, but the entire spirit, of our statute forbids such an interpretation. Yet this is what the employers interested in the matters now before us would have us declare. We cannot so hold. Even if there were doubts as to whether the claimants, under the facts stated, were entitled to compensation for the full periods claimed, we would be compelled, under the authorities cited supra, to resolve all reasonable doubts in favor of such claimants.

We hold that the failure to give notice, under the circumstances set forth in these cases, merely postpones the time when the payment of compensation begins, and does not bar these claimants of their right to any portion of such compensation. We therefore answer each of said questions in the affirmative.

GENERAL AMERICAN TANK CAR CORPORATION v. WEIRICK ET AL. (No. 11179.)

(Appellate Court of Indiana. Division No. 2. Dec. 23, 1921.)

133 Northeastern Reporter, 391.

1. MASTER AND SERVANT — COMPENSATION, SUPPORTED BY EVIDENCE, CONCLUSIVE.

Where there is some evidence to support a finding and award of the Industrial Board, it will not be disturbed on appeal.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

2. MASTER AND SERVANT—"ACCIDENT," WITHIN COMPENSATION ACT, DEFINED.

An "accident," within the Workmen's Compensation Act, means an unlooked-for mishap, an untoward event, which is not expected or designed; but an injury may be the result of accidental means, so as to be compensable, though the act involving the accident was intentional.

(For other cases, see Master and Servant, Dec. Dig. § 372.)

(For other definitions, see Words and Phrases, First and Second Series, Accident—Accidental.)

3. MASTER AND SERVANT — FINDING OF COMPENSABLE DEATH FROM BREATHING GAS HELD JUSTIFIED.

In a proceeding under the Workmen's Compensation Act to recover compensation for death, where there was evidence that deceased, though diseased, was performing his duties with substantial regularity, and that he breathed gases and fumes from molten brass, but had been affected by the gas before, *held*, that the Industrial Board was justified in finding that death was the result of an accident, and not of disease.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

4. MASTER AND SERVANT—COMPENSATION RECOVERABLE FOR DEATH FROM DISEASE ACCELERATED BY INJURY.

An award may be made by the Industrial Board for an employee's death from a disease accelerated by an accidental injury in course of employment, so as to cause death soon after the injury.

(For other cases, see Master and Servant, Dec. Dig. § 376[2].)

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5. MASTER AND SERVANT — INDUSTRIAL BOARD NOT BOUND BY STRICT RULES OF EVIDENCE.

The Industrial Board, being an administrative body, is not bound by the strict rules of law as to the admissibility of evidence.

(For other cases, see Master and Servant, Dec. Dig. § 404.)

Appeal from Industrial Board.

Proceeding by Cecil Weirick and others against the General American Tank Car Corporation before the Industrial Board for an award. From an award of the Industrial Board in favor of plaintiffs, defendant appeals. Award affirmed.

Wm. J. Whinery, of Hammond, for appellant.

Bomberger, Peters & Morthland, of Hammond, for appellees.

NICHOLS, J. Proceeding commenced by appellees before the Industrial Board of Indiana, praying for an award of compensation under the Indiana Workmen's Compensation Act (Laws 1915, c. 106) for alleged injuries resulting in the death of Joseph E. Weirick. Appellant's defense to this action was that appellees' decedent did not meet with any injury by accident arising out of and in the course of his employment while in the employ of appellant, that no accident of any kind or character whatsoever occurred or took place, and that no accident arose out of and in the course of the employment of said decedent by appellant in any manner or form whatsoever, causing any injury to said decedent, or the death of said decedent in any manner whatsoever.

Appellant contends that the evidence conclusively established appellant's defense. After hearing the evidence, the full Industrial Board found that November 4, 1920, the decedent was in the employment of appellant, that on said date he received a personal injury by an accident arising out of and in the course of his employment, which resulted in his death the same day, and rendered an award in favor of appellee accordingly from which this appeal.

[1] Appellant earnestly and forcefully contends that the evidence conclusively shows that no accident occurred within the meaning of the Compensation Law; that, even though appellee's decedent was affected by fumes and gases arising from molten metal, such fact was incident to his employment, and in no way unusual; and that it appears from the evidence that the death was a result of disease, and not of an accident. It is so well established that, where there is some evidence to support the finding and award of the Industrial Board, the same, as in the case of the verdict of a jury, will not be disturbed on appeal, that we need not cite authorities to that effect. In this case there is not much conflict in the evidence, except that the evidence of appellant's witnesses as medical experts was in conflict with the evidence of appellees' witness, who was the attending physician. We would not have much difficulty in disposing of this conflict under the evidence as a whole in this case, even if it were necessary so to do. In this regard we follow the reasoning and opinion of the court in the case of Miami Coal Co. v. Luce, 131 N. E. 824.

[2-4] There was some evidence that the deceased breathed the fumes and gases arising from molten brass and was thereby accidentally injured, which injury resulted in death, and we hold that the Industrial Board was fully justified in its finding that the deceased came to his death by accidental means while in the due course of his employment. An accident has been repeatedly defined by this court, in industrial appeals, as an unlooked for mishap, an untoward event, which is not expected or designed. United Paper Board Co. v. Lewis, 65 Ind. App. 356, 117 N. E.

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276; Haskell-Barker Car Co. v. Brown, 67 Ind. App. 178, 117 N. E. 555; Puritan Bed Spring Co. v. Wolfe, 68 Ind. App. 330, 120 N. E. 417. An injury may be the result of accidental means, though the act involving the accident was intentional. U. S. Casualty Co. v. Griffis, 186 Ind. 126, 114 N. E. 83, L. R. A. 1917F, 481; Western Commercial Travelers' Ass'n v. Smith, 85 Fed. 401, 29 C. C. A. 223, 40 L. R. A. 653. The principle is well expressed in the last case cited, in which the court defines "accidental means" as follows:

"An effect which is not the natural or probable consequence of the means which produced it, an effect which does not ordinarily follow and cannot be reasonably anticipated from the use of those means, an effect which the actor did not intend to produce and which he cannot be charged with the design of producing under the maxim to which we have adverted, is produced by accidental means. It is produced by means which were neither designed nor calculated to cause it. Such an effect is not the result of design, cannot be reasonably anticipated, is unexpected, and is produced by an unusual combination of fortuitious circumstances; in other words, it is produced by accidental means."

While it appears that the decedent had been affected by the poisonous gas before, it is apparent that he did not anticipate or design the serious consequences resulting in his death. Yet the evidence abundantly justifies the inference that the immediate cause of the death was the injury by the inhalation of the noxious gas. That the deceased man was diseased at the time of his injury cannot be denied, but such disease had not progressed to the point of disability. He was with substantial regularity performing the duties of his employment up to the time of his injury, and if the disease was thereby accelerated, so as to produce death so soon after the injury, the injury must be regarded as the cause of the death. Under such circumstances, the dependents are entitled to recover. In re Bowers, In re Colan, In re Williams, 65 Ind. App. 128, 116 N. E. 842; Puritan Bed Spring Co. v. Wolfe, 68 Ind. App. 330, 120 N. E. 417. Indiana Car & Equipment Co. v. Celotto, 69 Ind. App. 341, 121 N. E. 834; Geizel v. Regina Co. (N. J. Sup.) 114 Atl. 328.

[5] Appellant complains that the Industrial Board refused to strike out certain evidence given before one member of the Board; but we need not consider this question, for there is ample evidence to sustain the finding of the Industrial Board without the evidence that appellant presents as objectionable, and further, the Industrial Board, being an administrative body, is not bound by the strict rules of law as to the admissibility of evidence, and this assignment presents no question.

The award is affirmed.

HANNA ET AL. v. WARREN. (No. 11191.)

(Appellate Court of Indiana, Division No. 2. Nov. 29, 1921.)

133 Northeastern Reporter, 9.

MASTER AND SERVANT — FARMERS BLASTING AND LOADING SURFACE COAL HELD ENGAGED IN "MINING" AND NOT "FARM LABOR," WITHIN COMPENSATION LAWS.

Where farmers hired employees to blast surface coal, load it in wagons, and haul and shovel the coal into cars under a contract with a third person, who agreed to buy the coal at specified price per car, the owner of the farm receiving a share of the net profits and a royalty for

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each ton mined and shipped, the farmers while so engaged were not engaged in "farm labor," but were engaged in "mining" within the workmen's compensation laws, and were liable for compensation for injuries to an employee in the course of his employment.

(For other cases, see Master and Servant, Dec. Dig. § 363.)

(For other definitions, see Words and Phrases, First and Second Series, Mining.)

Appeal from Industrial Board.

Proceedings under the Workmen's Compensation Act by Louis Warren for compensation for injuries, opposed by Newton Hanna and others, employers. Award by Industrial Board for claimant, and employers appeal. Affirmed.

James B. Filbert and A. M. Beasley, both of Linton, for appellants.

John A. Riddle, of Vincennes, for appellee.

McMahan, J. This is an appeal from an award by the Industrial Board. The facts are, in substance, as follows: At the time of the accident to appellee and for many years prior thereto appellant, Lemuel Hanna, owned a farm in Greene county. He lived upon this farm practically all his life and had never followed any occupation or business other than farming, except as hereinafter stated. At said time and for many years prior thereto, appellant, Newton Hanna, made his home with appellant, Lemuel Hanna, and worked with him upon said farm. Appellant Raymond Brown is the son-in-law of appellant Lemuel Hanna. About the 1st of September, 1920, Roy Price made an offer to appellants to buy from them such coal as they would be able to put in cars at the Vicksburg switch, and offered them such a price therefor that they were induced to engage in mining and loading coal from an outcrop on said farm. Appellants with the assistance of appellee and other employees engaged in mining and loading coal from said outcrop pursuant to said contract with Roy Price. In such work appellants made no investment in any machinery or mining tools of any kind, but used their farm teams, wagons, scrapers, and shovels in loading such coal. The coal cropped out upon the surface of said farm, required no mining and no operation, except to blast it and load it in wagons and haul and shovel the coal into the car. Appellants, except for a short time in 1916, had never marketed coal from this outcrop, and the total time they operated did not exceed four weeks, during which time they mined and loaded between 20 and 25 cars, then quit the work for the reason that the market price of coal became so low that the loading thereof by them ceased to be profitable. Appellee, while working for appellants as aforesaid, received an injury which resulted in the total loss of sight in his right eye. The Industrial Board found that the accident and injury to appellee arose out of and in the course of his employment, and awarded him compensation at the rate of $13.20 a week for 150 weeks.

There is no merit in the contention that the award is not sustained by sufficient evidence. The evidence is that appellee had been earning nearly $7 a day, and that as a result of the accident and injury to his eye had lost over 90 per cent. of the vision of one eye.

Appellants contend that they are farmers, and as such are not subject to the Workmen's Compensation Laws (Laws 1915, c. 106). This contention cannot prevail. At the time of the accident and for several weeks prior thereto appellants were mining and loading coal under an agreement whereby appellant, Lemuel Hanna, received one-half of the net profits from the business and a certain royalty for each ton of coal mined and shipped. Appellants while engaged in this work were not en-

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gaged in farm labor as that term is generally understood. They were at the time of the accident and injury to appellee engaged in the mining business, and subject to the provisions of the Workmen's Compensation Laws.

There is no evidence to support the claim that appellee's injury was the result of his willful misconduct.

The award is affirmed.

INDIANA MANUFACTURERS' RECIPROCAL ASS'N ET AL. v. DOLBY. (No. 11246.)

(Appellate Court of Indiana, Division No. 2. Dec. 9, 1921.)

133 Northeastern Reporter, 171.

MASTER AND SERVANT—YOUNG PERSON HELD NOT "LAWFULLY EMPLOYED" PRECLUDING RECOVERY UNDER COMPENSATION ACT.

Where one between the age of 14 and 18 years, defined as a "young person" by Burns' Ann. St. 1914, § 8038, is employed without the affidavit as to age required by section 8022, the person is not lawfully employed within Workmen's Compensation Act, so as to sustain an award, notwithstanding there was a compliance with Burns' Supp. 1921, § 6674s (Acts 1921, c. 132, § 19), passed after the injury, the new statute having no application to the case.

(For other cases, see Master and Servant, Dec. Dig. § 366.)

(For other definitions, see Words and Phrases, First and Second Series, Employed.)

Appeal from Industrial Board.

Proceeding before the Industrial Board on a claim by David Dolby, father of Myrtle Dolby, deceased, against the Indiana Manufacturers' Reciprocal Association and the Wasmuth-Endicott Company. From an award of compensation, defendants appeal. Reversed, with instructions to dismiss claim.

Joseph W. Hutchinson, of Indianapolis, for appellants.

Bowers & Feightner and Lee M. Bowers, all of Huntington, for appellee.

NICHOLS, J. This was a proceeding before the Industrial Board by appellee, who was the father of Myrtle Dolby, the deceased, against appellants, to recover on account of physical care, and general nursing, and burial expenses of said decedent, it being claimed that her death resulted by reason of an accident arising out of and in the course of decedent's employment by appellant Wasmuth-Endicott Company. The accidental injury charged was the taking of typhoid fever germs into the system through the water supply furnished by the company, which resulted in decedent's taking typhoid fever, from which she died.

It appears by the evidence that Myrtle Dolby was born July 24, 1902. Her employment with appellant company commenced September 8, 1919, and continued until her death, which was on March 8, 1920. She was therefore during all the time of her employment over the age of 14 years and under the age of 18 years.

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Before we reach the discussion of the question as to the right of appellee to recover on the merits in this proceeding, we are met by appellant association's contention that the Industrial Board had no jurisdiction of appellee's claim, for the reason that the decedent, Myrtle Dolby, was not lawfully employed by appellant company. Section 8022, Burns' R. S. 1914, expressly requires that an affidavit shall be made by the parents or guardian showing the age, date, and place of birth of a young person before such person can be lawfully employed. If there is no parent or guardian, then such affidavit must be made by the young person to be employed. The father David Dolby, was living and was a witness before the Industrial Board. Section 8038, Burns' R. S. 1914, defines a young person to be one between the age of fourteen years and eighteen years. There is no claim that such an affidavit had been made or that such an affidavit had been placed on file with the employer. To the contrary, the evidence is that no such affidavit was on file. The award is therefore not sustained by sufficient evidence. The question here involved has been definitely decided by this court in the case of In re Stoner, 128 N. E. 938, in which it was held that where a person between the age of fourteen and eighteen years fails to procure an affidavit as required by section 8022, supra, such person is not lawfully employed, and is therefore not an employee, and not entitled to recover compensation under the Workmen's Compensation Act. Appellee says that there had been a compliance with section 6674s, Burns' Supp. 1921, and that such a compliance was a substantial compliance with the requirements of said section 8022, Burns', as will entitle the employee to bring an action under the Workmen's Compensation Law, but section 6674s, Burns' Supp. 1921, is section 19 of an act passed by the Legislature of 1921.

See Acts 1921, p. 337. Such act was therefore passed long after the death of Myrtle Dolby, and can have no application to the matters in controversy in this case.

Upon the authority of the case of In re Stoner, supra, the award of the Industrial Board is reversed, with instructions to the Board to dismiss the claim.

MANSFIELD ENGINEERING CO. v. WINKLE. (No. 11238.)

(Appellate Court of Indiana, Division No. 2. Dec. 23, 1921.)

133 Northeastern Reporter, 390.

MASTER AND SERVANT—EVIDENCE HELD TO SHOW COMPENSABLE DEATH.

In a proceeding under Workmen's Compensation Act to recover for death of servant struck on the head with an air hammer, evidence *held* sufficient to sustain a finding that death resulted from the accident, though the direct and immediate cause of death was a rupture of the heart.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Appeal from Industrial Board.

Proceeding by Nellie Winkle under the Workmen's Compensation Act (Acts 1915, c. 106) to obtain compensation for the death of her husband, George Winkle, opposed by the Mansfield Engineering Company, the employer. There was an award of compensation, and the employer appeals. Affirmed.

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Chas. E. Henderson and Chas. Unger, both of Indianapolis, for appellant.

Emsley W. Johnson and Joseph W. Hutchinson, both of Indianapolis, for appellee.

McMahan, J. The Industrial Board found that on April 23, 1921, one George Winkle, while in the employ of appellant, received a personal injury by accident arising out of and in the course of his employment, and resulting in his death. Compensation was awarded to the widow as sole dependent.

Appellant's only contention is that there is no evidence to connect the injury with the immediate cause of death. There is evidence tending to show that George Winkle was a structural iron worker, and at the time of his death was a vigorous, well-nourished man, 43 years old, and weighed 160 to 165 pounds; never complained of being sick or of any trouble with his heart. He was in good spirits and feeling well when he went to work on the day he was injured. About 9:30 a. m., while engaged in his regular work, he was struck on the forehead with an air-hammer which he was using. Immediately after receiving the blow he threw his hands over his face, and walked around for a few minutes and returned to his work. The blow was of sufficient force to produce a discolored spot about an inch in diameter and three or four other smaller places around the nose and beneath the eyebrows where the skin was broken. He left his work at noon, and complained that he was getting "awfully sick," and that his head was "hurting fit to kill." A little later he expressed a desire to go to a drug store, where he could get something for his head. He took a car and later went into a drug store, where he complained of a severe plain in the stomach, took a dose of magnesia and peppermint, fell to the floor and within a few minutes after taking the medicine vomited. He got home about 1:30, and died about a half hour later. When he reached the gate at his home he staggered and held to the gatepost. He then sat down on the doorsteps until his wife helped him into the house, when he sank to the floor and complained of pain in the chest and head. He became unconscious, and died within a few minutes after the physician arrived. The body was embalmed by an undertaker, and two days later an autopsy was held. It showed no apparent injury to the skull or brain. The heart was removed, and it was found that the tissue on the posterior side of the right auricle had degenerated to such an extent it was but slightly thicker than paper, and was ruptured. The direct and immediate cause of death was the rupture of the heart. Four or five physicians testified. Two of them in answer to the hypothetical questions testified that in their opinion the rupture of the heart which caused death was a probable result of the shock produced by the blow on the head. Others testified that the blow did not cause the rupture, and that the blow had nothing to do with the rupture.

There is no necessity for us to enter into a discussion of the law applicable to cases of this character. The right of the board to draw reasonable inferences from the evidence and the weight to be given to the finding of the board when there is any evidence to support the finding is settled by the decisions of this court. There is ample evidence to support the finding that the death of George Winkle was caused by an accidental injury which arose out of and in the course of his employment.

The award is therefore affirmed.

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STEVENS v. MARION MACHINE, FOUNDRAY & SUPPLY CO. (No. 11110.)

(Appellate Court of Indiana, Division No. 2. Dec. 2, 1921.)

133 Northeastern Reporter, 23.

2. MASTER AND SERVANT — ONE-EYED WORKMAN'S LOSS OF EYE COMPENSABLE AS PERMANENT LOSS OF "ONE EYE."

A one-eyed employee receiving an injury causing permanent loss of his eye is not entitled to compensation for total disability under Workmen's Compensation Act, § 29, and can recover merely for the "permanent loss of the sight of one eye," under section 31, though the loss of his eye resulted in total blindness.

(For other cases, see Master and Servant, Dec. Dig. § 385[11¼].)

Appeal from Industrial Board.

Proceedings under the Workmen's Compensation Act by W. H. Stevens for compensation for injuries, opposed by the Marion Machine, Foundry & Supply Company, employer, in which employer filed a petition for review on account of change of condition. Award for employer and employee appeals. Affirmed.

Van Atta & Clawson, of Marion, for appellant.

Joseph W. Hutchinson, of Indianapolis, for appellee.

DAUSMAN, C. J. When 11 years of age the appellant lost permanently the vision of his right eye by an accident. On February 16, 1919, being then 48 years of age, while in the employment of the appellee, he received an injury by accident, arising out of and in the course of his employment, which resulted in the permanent loss of his left eye. On March 4, 1919, the parties entered into a compensation agreement, by the terms of which the employer agreed to pay compensation "at the rate of $10.53 per week during total or partial disability, not exceeding 500 weeks." The agreement was duly approved by the Industrial Board, and compensation was paid in accordance with the agreement until January 13, 1921, at which time the employer refused to make further payments. Thereupon the employee filed with the Industrial Board his complaint, by which he sought a continuation of the compensation, on the ground that the injury resulted in permanent total disability. The employer then filed a petition for a review on account of a change in condition. After a hearing, the full board made a finding of facts. So much of the finding as is essential to the determination of the question here presented is as follows:

"That under said agreement the defendant has paid to the plaintiff 100 weeks' compensation at the rate of $10.35 per week; that, after entering into the said agreement, the plaintiff's injury resulted in total and permanent loss of the vision of his left eye."

The Board ordered that the plaintiff take nothing by his complaint; that the defendant's petition to review on account of a change in conditions be granted; that the compensation liability of the employer to the employee be terminated and that the plaintiff pay the costs of the proceeding.

The statute in force at the time of the accident contains the following provision:

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"For injuries in the following schedule the employee shall receive in lieu of all other compensation, a weekly compensation equal to fifty-five per cent. of his average weekly wages for the periods stated, * * * respectively, to wit: * * *

"(d) For the permanent and irrecoverable loss of the sight of one eye, or its reduction to one-tenth of normal vision with glasses 100 weeks." Section 31, Workmen's Compensation Act (Acts 1915, p. 400).

The foregoing provision is specific and arbitrary. We have a case, then, wherein the workman lost permanently the sight of one eye, and under the statute he is entitled to compensation for a period of 100 weeks and no more.

[1, 2] Counsel for the appellant contend that on the facts of this case the workman is entitled to compensation under section 29, which provides generally that, where the injury causes total disability, compensation shall be paid during the period of total disability, not to exceed, however, 500 weeks. The contention rests on the proposition that, the workman having permanently lost the sight of one eye in the days of his youth, it necessarily follows that the permanent loss of the sight of his other eye, by the industrial accident, resulted in permanent total disability for work. The contention cannot be sustained. The compensation plan is a legislative venture; and, of course, those who are instrusted with the administration of it can do nothing other than ascertain and execute the legislative intent. The rule is fundamental that in the construction and application of a statute specific provisions take priority over general provisions.

The concluding sentence of section 31, following the schedule of specific injuries, declares:

"In all other cases of * * * partial disability * * * compensation in lieu of all other compensation shall be paid when and in the amount determined by the Industrial Board," etc.

That language indicates unmistakingly that the Legislature regarded the several injuries mentioned in the schedule as injuries which of themselves naturally result in partial disability only, and would not result in total disability in the absence of complications. In the case at bar the injury resulted in "the permanent and irrecoverable loss of the sight of one eye," and nothing more. It is inaccurate to say that the injury resulted in total blindness. The industrial injury plus the injury received in childhood resulted in total blindness. Evidently the Legislature acted on the basis that normally a man has two eyes, either one of which is capable of supplying some light to the body, and that the loss of one constitutes a partial impairment only. This interpretation is supported by the fact that this feature of the statute has been amended to provide compensation for 500 weeks where the loss of the sight of both eyes results from the same accident. Evidently the Legislature did not intend that an industry should be chargeable on account of an injury to an eye which occurred long before the workman came to that industry.

The award is affirmed.

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HUGHES v. CUDAHY PACKING CO. (No. 34237.)

(Supreme Court of Iowa. Dec. 15, 1921.)

185 Northwestern Reporter, 614.

MASTER AND SERVANT—FINDING DISALLOWING COMPENSATION CLAIM FOR HERNIA HELD CONCLUSIVE.

In a proceeding to recover compensation under the Workmen's Compensation Act for hernia from strain resulting from injury sustained while claimant was performing his work of handling heavy meats, evidence before the Industrial Commissioner, who disallowed the claim on the ground that the hernia was not the result of injury in claimant's work, *held* in such conflict as to make the Commissioner's finding conclusive.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Preston and Weaver, JJ., dissenting.

Appeal from District Court, Woodbury County; W. G. Sears, Judge.

Plaintiff claims compensation from defendant because of a hernia from strain, resulting, as he claims, from an injury sustained while performing his work as an employee of defendant. Plaintiff's claim was disallowed by the arbitration committee, and, on review, by the Industrial Commissioner. The district court, on the evidence taken before the committee and Commissioner, reversed the finding of the Commissioner, and allowed compensation for the amount, and for the period of disability which it was stipulated he was entitled to recover, if it should be found he was entitled to recover at all. Defendant appeals. Reversed.

Sears, Snyder & Gleysteen, Vail E. Purdy, and H. C. Harper, all of Sioux City, for appellant.

F. L. Ferris, of Sioux City, for appellee.

PRESTON, J. The substance of plaintiff's claim is that for several months, up to the 13th of June, 1919, and for four or five weeks thereafter, while in the employ of defendant, he was engaged in handling heavy meats, some of the pieces weighing about 95 pounds; that some four or five weeks prior to June 13th a pain developed in his left groin, over the canal, but, thinking it only temporary, he kept on at work until about June 13th, when it developed into a hernia, the result of the constant strain incident to his employment, and on said June 13th he was obliged to quit work until he was operated upon. The operation was successful, and after his recovery he was able to perform labor. He claims further that his hernia is of traumatic origin, and was originated by a severe strain received in the usual course of his employment, and by reason of having to lift and throw heavy meats on a slippery floor, and while he was in a twisted position; that it did not develop instantly, and did not, for a time, prevent his continuing his work; that he continued his work for a time in ignorance of his actual condition; that he was finally compelled to cease labor; alleges that the hernia is the result of a strain received in the course of his employment, and is due to the unusual strain incident to his employment. Defendant admits the employment, and says that, if defendant has a hernia, as he claims, it was not of traumatic origin; that it was of long standing, and the result from a gradual weakening of the abdominal walls, and not the direct result of a strain or unusual pressure by reason of heavy lifting. Defendant therefore denies that the injury claimed for arose out of and in the course of his employment.

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We do not understand that the committee or the Industrial Commissioner refused compensation on the ground that there was a congenital tendency or a pre-existing cause, but rather that the evidence did not show that plaintiff's disability resulted from a fortuitous incident in the nature of an accident arising out of and in the course of employment. The Commissioner stated in his opinion that, while there is considerable medical evidence in regard to pre-existing cause or condition, and congenital tendency, such matters were unimportant; that if plaintiff, in the performance of service requiring the strength of an able-bodied man, had sustained some injury, definitely located and well defined, such as to break him down and destroy his earning power, it would not matter whether or not medical science decided him to have been subject to such development because of anatomical construction. The cases seems to so hold. The Commissioner further said that the matter of compensation for hernia is a source of much perplexing controversy. that, in order to establish a compensation claim based upon such cause, evidence must be submitted showing that a workman in usual strength and efficiency, in some specific incident of his employment, sustain such injury as to break him down and make necessary a surgical operation; no injury accidental or otherwise, involving any specific occurrence, such as a slip or fall, or definite strain from overlifting is in evidence; plaintiff is unable to name any time either as to an hour, a day, or a week, in which anything happened to him, which could be taken as a basis for the disability which is alleged. and concluded by saying that, in a case so conspicuously wanting in evidence as to injury arising out of and in the course of employment, compensation liability cannot be established.

The substance of claimant's testimony is:

That he is 49 years of age; farmer most of his life; never had any difficulty or discomfort from anything that was apparently a rupture up to about June, 1919; the first thing I observed in connection with this rupture was an awful pain struck me in there, and burning and hurting, until I would have to—if I could get a chance I would put my foot upon something to ease myself; kept on working as long as I could stand it, about four or five weeks, as near as I know; I am a married man, and have five children; kept on working from necessity; never complained to any one very much about my trouble; mentioned it to some of the men I was working with; Mr. Walker was one of them; I was advised to go to a doctor. and went to Dr. Cremin, also consulted Dr. Schott; he is the only one who treated me; complained to the company the next day after I quit work, four or five weeks after I claim I got the hernia; first learned I had hernia from Dr. Cremin about June 14th or 15th; I am unable now to state the exact date I received the hernia; gradually got worse; I continued work four or five weeks with this condition getting a little worse every day, until the pain got so severe I went to a doctor; some days the pain would be more severe than others; it became worse, and this was true during all the time until I had the operation; the first time I had the pain I didn't quit work; the day I quit I told the men I was working with that I was ruptured; I don't recollect the date I first experienced the pain: the time of day was about 2 o'clock; I remember that because it was directly after I ate my dinner; I suffered no blow or fall, or anything like that. it is the medium weight meats we handled at that time; heavier meats just before; it was two or three weeks after that I first noticed some swelling; it kept getting a little larger.

Dr. Schott, testifying for claimant, says in substance:

Examined plaintiff four or five months ago; found a left inguinal hernia; operated on him about two months ago; the operation was successful; he was in the hospital about three weeks and is now able to do reasonably hard work; the operation was November 14th; at the time of the operation the sac was rather delicate; no adhesions within the sac,

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and the contents consisted of omentum and epiplocele; it is pretty hard to say whether this hernia is congenital or otherwise; these hernias are supposed to be of a congenital condition—that is, a result of the weakened condition of the abdominal walls, a sac being formed which goes down through the internal ring; these ruptures may come down at any time after birth; their development may be hastened by trauma; from the history of this case it seems to me this condition was the result of trauma; from the examination I could not tell whether it was congenital or the result of trauma; at the time of the operation there was no evidence aside from what he told me that the hernia was due to trauma; I couldn't tell definitely how long the hernia had been existing; a man having no predisposition towards hernia would, in order to suffer a hernia from strain, have to have so severe a strain that from the time of the hernia he would be unable to work, and would be practically helpless; claimant could not have worked afterwards as he said he did unless he had some previous weakening of the abdominal muscles; he could have had a protrusion of this sort from strain which would caused considerable pain or discomfort, and gradually increasing in size to such an extent that he would quit work as a result; my idea of a traumatic hernia is one that may be brought down from a strain, either sudden or from time to time, coupled with a congenital condition; there may be a traumatic hernia in a well, vigorous person, having no previous condition of hernia, where the hernia is a result of trauma—a so-called traumatic hernia; you can also have a traumatic hernia if the trauma is the existing cause of a hernia in a person having a pre-formed congenital condition; this man probably had a pre-formed congenital condition present; there was a well-formed sac; there was no sign of acute injury; this hernia appeared to be a rather recent origin, and in hernias of this kind a man would be apt to keep on working until it caused him considerable discomfort.

Walker testifies:

Worked beside claimant; he was able to do his work regularly; there was a time when he complained first about two or three weeks before he quit work; the last day he told me he had a kind of lump in his side and I said it might be a rupture, and he had better see a doctor; I have been afflicted with rupture myself; claimant never cried out at any time; have no recollection of any such incident as that.

This is the substance of all of claimants' testimony.

For defendant, the nurse at the packing company says claimant came in on June 14th, and said he had a pain in his side caused from a strain and I sent him to Dr. Cremin; claimant said he had this pain for some four or five weeks.

Dr. Cremin, testifying for defendant, says:

Examined claimant June 14th; discovered he had a hernia; he gave me a history of the case; he said he had pain and discomfort in his side for four or five weeks; told me of no specific injury he had received; I inquired as to that; I found he had an inguinal hernia, and advised an operation; from the history of the case as given me by claimant, and as testified to by him, I am able to state that in my opinion this hernia was not traumatic in its origin; a hernia in a workman engaged in lifting meats daily of the weight described, and suddenly feeling a pain and saying nothing about it, and continuing this work for four or five weeks, during which there was a recurrence of the pain from time to time, could not, in my opinion, be a traumatic hernia; a traumatic hernia has got to have some great violence; it is a hernia that tears through the inguinal canal, tearing those tissues loose; any time you tear the tissues loose suddenly there is bound to be hemorrhage and extreme pain and shock; a man receiving a trauma like that would have to stop work instantly—the chances are he would fall down and be unable to stand; it would lay

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him off from working for several days; there is no way a traumatic hernia can arise without violence; this man had sac, which rules out any idea of a traumatic hernia.

On cross-examination he says:

All hernias are caused by strain; a large percentage of the male sex have congenital hernia to some extent after they reach the age of 30 or 35 years; any strain would have a tendency to accentuate or accelerate it; in a hernia of this type the condition is made usually of the omentum —that is, the covering on top of the intestines—made up of the intestines —that is pushed down through this canal.

He continues:

When it is pushed down, the covering, the peritoneum—the covering of the abdominal cavity—which forms a sac in which the bowels, the omentum, in this gradual process, are being pushed down gradually; that stretches the peritoneum and pulls down into this canal; and any sudden strain or anything that will cause these substances to go through that would suddenly weaken or force this sac, or anything that would tear the covering of the intestines, or the omentum, or anything that would cause it to be forced down through this sac, or what forms the sac; a traumatic hernia could have no sac; a recent hernia might have a thin sac, but that is not a traumatic hernia; that would be a congenital hernia.

1. Appellant contends that there is such a conflict in the testimony that the finding of the Industrial Commissioner is conclusive upon the court. If claimant's hernia was of long standing, and existed prior to his employment by defendant, or was not the result of an injury in his work as an employee of defendant, or if there was evidence, though disputed, tending to sustain defendant's contention, then the finding of the Commissioner is conclusive. We have held a number of times that, where there is a conflict—and this means, as I think, a substantial conflict, and not a mere scintilla or slight evidence by one party opposing that of the other—in the testimony, the decision of the Industrial Commissioner is conclusive. Under such circumstances I agree that it ought to be so, whether compensation in a given case is allowed or disallowed. Otherwise the courts will be flooded with cases which the Compensation Law contemplates shall be decided in a summary manner. litigation will be increased, rather than diminished, and claimants for compensation may be subjected to more, rather than less, vexation in an effort to secure a smaller recovery than they might recover in a common-law action. Thus employees, for whose benefit largely the compensation law was enacted, might be, in many instances, deprived of the benefits of the act. Among the numerous cases holding that the decision of the Commissioner is conclusive, see Jackson v. Telephone Co., 179 N. W. 849; Hanson v. Dickinson, 188 Iowa, 728, 176 N. W. 824; Pace v. Appanoose County, 184 Iowa, 498, 168 N. W. 916; Norton v. Coal Co., 180 N. W. 905; Miller v. Gardner, 180 N. W. 742; Pierce v. Bekins, 185 Iowa, 1346, 171 N. W. 191; Flint v. Eldon, 183 N. W. 344; Code, § 2477m33 (chapter 270, Acts 37th G. A.; Compiled Code, § 842).

Appellant cites Bachman v. Waterman, 68 Ind. App. 580, 121 N. E. 8, Campbell v. Clausen, 183 App. Div. 499, 171 N. Y. Supp. 522, and Miller v. Gardner, supra, as holding that, even though there are items of fact undisputed, the Industrial Commissioner's inferences of ultimate fact therefrom, if reasonable, is conclusive. But this cuts both ways. If the reasonable and proper inferences are contrary to the finding of the Commissioner, then such finding ought not to be conclusive. A majority of the court are of opinion that there is such a conflict in the testimony as to make the finding of the Commissioner conclusive, and that the judgment of the district court should be reversed; and it is reversed.

2. For myself, I am not convinced that there is such a conflict. If there is any conflict in the testimony, it is found in the testimony of the

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medical witnesses. I shall refer to this later, as briefly as may be, and attempt to show that there is no substantial dispute in the testimony of Dr. Schott and Dr. Cremin. Before doing that, however, I shall refer to the statute, which contemplates, as I think, that there must be a substantial conflict. The finding of the Commissioner is not absolutely binding in all cases, even though there may be a slight or trifling conflict in the evidence. The rule ought to be applied in the general run of cases; but, if we now lay down a hard and fast rule that the finding of the Commissioner is conclusive in all cases, the time may come when some other Industrial Commissioner might feel justified in arbitrary action in his findings. This court, and other courts, have held that, upon filing of the decision of the Industrial Commissioner in the district court, the court is not limited to the formal, ministerial, and perfunctory act of recasting said decision into the form of a court decree. The statute before cited, as it now stands, immediately following the provision that the finding of the Commissioner, in the absence of fraud, is conclusive, provides that the district court upon the hearing before it—

"may confirm or set aside such order or decree of the Industrial Commissioner, if he finds: * * *

"(3) That the facts found by the Industrial Commissioner do not support the * * * decree.

"(4) That there is no sufficient competent evidence in the record to warrant the Industrial Commissioner in making the order or decree complained of.

"No order or decree of the Industrial Commissioner shall be set aside by the court upon other than the grounds just stated."

Plainly this requires the district court to determine whether there is sufficient competent evidence in the record to warrant the finding of the Commissioner, etc. Before discussing the evidence as to the supposed conflict between the two doctors, it may be well to first refer to another matter.

3. As before stated, the Commissioner held that, in order to establish a compensation claim, it was necessary for plaintiff to show some specific incident of his employment in the nature of an accident, such as a slip, or fall, or some definite strain from overlifting, causing an injury such as to break him down and make necessary a surgical operation. This, we take it, is a question of law whether it must be shown that it was an accident, in the sense in which the Commissioner considered it. We may say in passing that it seems to us the evidence is undisputed that complainant's hernia did break him down, and that an operation was necessary. The defendant's doctor, Cremin, testifies that he advised an operation, and an operation was had. And in this connection, too, we may say that the Commissioner, in stating that complainant made no complaint, evidently overlooked the testimony of claimant and Walker, who both testify that claimant did make complaint, and that he complained about the time he claims he was injured by the sudden pain, about 2 o'clock in the afternoon of a time fixed by him. Going back to the question now as to whether it was necessary to show that it was an accident. There is no claim that claimant's alleged injury was willfully intentional, or that it could have been foreseen, or that it was expected by him.

Appellant argues at some length that to be compensable the injury must be the result of a slip, fall, or the like, in the nature of an accident. They cite cases decided under statutes of other states, where the statute itself provides compensation for accidental injuries. Appellant cites several provisions of the Iowa Compensation Law, and claims that our law provides compensation for accidental injury. But the only section of the statute pointed out wherein the word "accident" is used is section 2477m14, where, relating to procedure, it speaks of the place where the

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accident occurred. Appellant concedes that the title of the act described is "an act relating to employers' liability for personal injuries sustained by employees." Such is the language also in the title to the amendatory act, chapter 270, Acts 37th G. A. Appellant also points out that sections 2477m (a), 2477n (c). and 2477m1 (a), speak of a personal injury sustained by the employee; 2477m6 speaks of the employee receiving an injury; 2477m8 speaks of the occurrence of an injury; 2477m16 (e) again refers to the words "personal injury," etc., and for injuries received at places other than the employer's place of business where the employees are subject to the dangers incident to the business; 2477m16 (f) and (g) exclude injuries caused by the willful acts of other persons and disease, except it shall result from an injury; and 2477m1 (a) provides that no 'compensation' shall be allowed for an injury caused by the employee's willful intention to injure himself, etc. It will be seen that from the foregoing statutes there is but little in the statute on which to base the thought that injury must be accidental. It has been held in other jurisdictions, and even under statutes which use the word "accident," that in compensation acts the word is employed in contradistinction to the expression. "willful misconduct," which is found ordinarily in the same section or paragraph of the statute. 28 R. C. L. 787. Thus, in Wisconsin, the language is:

"Where the injury is proximately caused by accident, and is not * * * intentionally self-inflicted."

Under that statute, the court said, in Vennen v. Lumber Co., 161 Wis. 370, 375, 154 N. W. 640, 642, L. R. A. 1916A. 273–275 (Ann. Cas. 1918B, 293):

"These facts and circumstances clearly charge that Vennen's sickness was the result of an unintended and unexpected mishap incident to his employment. These allegations fulfill the requirements of the statute that the drinking of the polluted water of the deceased was an accidental occurrence."

We think the term "personal injury" is of much broader signficance than "personal injury by accident," or "accident" and like expressions found in different statutes. In Hanson v. Dickinson, 188 Iowa, 728, 733, 176 N. W. 823–825, we said:

"Manifestly the term 'personal injury' is of much broader significance than 'personal injury by accident.' It comprehends a great number of injuries, many of which will be found enumerated in Hurle's Case, 217 Mass. 223, 104 N. E. 336. L. R. A. 1916A, 279, Ann. Cas. 1915C, 919, and In re Madden, 222 Mass. 487, 111 N. E. 379."

This language was used in discussing another phase of the compensation act, but we think it is applicable to the instant case. The Supreme Court of Connecticut has held, in Larke v. Hancock Insurance Co., 90 Conn. 303, 97 Atl. 320, L. R. A. 1916E, 584:

"If the term 'personal injury' be given its narrowest construction, and confined to injuries of accidental origin, it must be held to include any form of bodily harm or incapacity, whether arising by direct contact or lesion caused by external violence or physical force, or untoward mishap."

We have held that the provisions of the Compensation Act are to be liberally construed, and not given the narrowest construction. Appellant cites cases wherein the word "accident" is defined. Some of these are accident insurance cases, and the like. They cite Kutschmar v. Briggs Mfg. Co., 197 Mich. 146, 163 N. W. 933, L. R. A. 1918B, 1133, and Tackles v. Bryant, 200 Mich. 350, 167 N. W. 36. It is true that under the Michigan statute the court has adopted a rule that an injury such as hernia or a rupture of the heart does not result from accident within the meaning

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of the Michigan statute, when the injury is received at a time when the employee is doing his regular work in the usual way, and there occurs no unusual, unexpected, or fortuitous happening which causes the injury. and which is accidental in character. L. R. A. 1918F, 873. The Kutschmar Case, supra, is referred to in the citation just given, where the court held that an employee who receives an injury in the nature of a hernia while engaged in his usual and ordinary employment, without the intervention of any untoward or accidental happening, is not within the provisions of the Compensation Act, which provides compensation for accidental injuries only. In that case the employee was lifting a beam weighing about 90 pounds, and he had to do this 90 or 100 times a day. but there was no fall or stumble. I think that under our statute the Michigan rule ought not to apply. If claimant in this case was injured at the time and in the manner testified to by him, it is clearly a personal injury within the m. ning of our statute. And I think that, if it occurred while he was in the employ of the defendant. and his hernia was the result of a constant strain, and a sudden breakdown, as he says, he was entitled to compensation even though there was no slip, or other specific incident in the nature of an accident. Appellee contends that under the Iowa law it is immaterial whether or not one meets with an accident giving some outward sign of injury or not, and that hernia, whether traumatic or inguinal, is compensable. whether the result of an accident of which there is no outward indication, or of a continued strain producing internal injuries or developing a hernia. They cite Rish v. Portland Cement Co., 186 Iowa, 443, 170 N. W. 532; Oliphant v. Hawkinson, 183 N. W. 805; L. R. A. 1916A, 228, 292 to 303, text and annotations; Adams v. Acme White Lead & Color Works, 182 Mich. 157. 148 N. W. 485, Ann. Cas. 1916D, 688, L. R. A. 1916A, 292; Zappala v. Industrial Ins. Commission, 82 Wash. 314, 144 Pac. 54, L. R. A. 1916A, 295. Poccardi v. Public Service Commission, 75 W. Va. 542, 84 S. E. 242. L. R. A. 1916A. 299, 303. In the last case it was held that, in the absence of conflict in the evidence, it was the duty of the Commission to give plaintiff the benefit of inferences arising in his favor from the facts proved in the absence of direct evidence. On the question as to the effect of a predisposition to hernia upon the right to recover compensation for injuries resulting in hernia, see L. R. A. 1917D, 111, note; Casper Cone Co. v. Industrial Commission, 165 Wis. 255, 161 N. W. 784, L. R. A. 1917E. 504. In the last case there was an accidental slip. We shall not further discuss the cases. To do so might be interesting. but enough has been said to show that under our statute the conclusion reached is right, and in harmony with other cases having a statute similar to our own. Furthermore, I think there is evidence in the record sufficient to establish the fact that there was a fortuitous event or mishap, definitely described, both as to time and circumstance. It is true that claimant was unable to fix a specific date, but this was because of his faulty memory as to dates. He does give about the time it occurred, before he was compelled to quit work June 13th; that it was 2 o'clock in the afternoon, just after he had eaten his dinner, and while lifting pieces of meat; that while so engaged the "first thing he observed in connection with this rupture was an awful pain struck him in there. and burning and hurting," etc. He had never had any trouble of this kind before. Dr. Cremin, testifying for defendant, says that all hernias are caused by strain, and that a large percentage of males have congenital hernia to some extent after they reach the age of 30 to 35 years; that any strain would have a tendency to accentuate or accelerate it. There is no evidence in the record contradicting the evidence of plaintiff and Walker as to the transaction about which they testify.

4. I think, after a careful reading of the testimony of Dr. Cremin, there is no material conflict or contradiction in the medical testimony. A careful reading of Dr. Cremin's testimony shows that, when he testified

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that, in his opinion, claimant's hernia was not the result of an injury. he meant it was not the result of an injury from a slip or accident. That was defendant's theory of the case from the start, and Dr. Cremin was called as a witness for the defendant. In addition to this, almost the first thing Dr. Cremin said in his testimony was that plaintiff told him of no specific injury, and that the doctor inquired as to that. He testifies:

"I told him that in my opinion the defendant was not responsible."

This shows that Dr. Cremin had the thought in his mind that it was necessary that the injury should have been by a fall or slip, or the like. Therefore he gives his opinion that this hernia was not traumatic in its origin. He says that a large percentage of males have congenital hernia to some extent after 30, and that any strain would have a tendency to accentuate or accelerate it. We have seen that the fact that claimant was predisposed to hernia is, under the facts in the case, unimportant. By a reference to Dr. Cremin's testimony before set out, it will be seen that he specifically states that any sudden strain, or anything that would cause these substances to go through, or anything that would tear the covering of the intestines, or anything that would cause it to be forced down, etc. In regard to the sac, he testifies finally that a recent hernia might have a thin sac. Dr. Cremin's testimony in some respects, is stronger for the plaintiff than is the evidence of Dr. Schott. Dr. Cremin's testimony is no stronger than his cross-examination makes it.

The purpose of cross-examination is to permit the witness to qualify or modify his prior statements, and this Dr. Cremin did. Again, when Dr. Cremin testifies that a traumatic hernia must have some great violence, and that when the tissues are suddenly torn loose there is bound to be hemorrhage and extreme pain, and so on, he is, I think referring to a man who is well, and without any predisposition to hernia. Dr. Schott says that, and refers to a well man. Dr. Schott's testimony also shows that less force would be necessary in a man predisposed to hernia. Dr. Cremin nowhere in his evidence contradicts or denies Dr. Schott's evidence as to that. In other words, Dr. Cremin does not say. or attempt to say, that a hernia could not result from an injury suffered, as claimant and Dr. Schott testify, when there was a tendency to hernia, as was probably the fact in claimant. Again, Dr. Cremin testifies as to what any sudden strain would do, etc. In claimant's work there would of necessity be a sudden strain every time he picked up a heavy piece of meat. Dr. Schott says a traumatic hernia is one that may be brought down from a strain either sudden or from time to time, coupled with a congenital condition. This is not denied by Dr. Cremin. The congenital condition was present in claimant. I think that under the statute, the district court was authorized to pass upon the question as to whether there was sufficient competent evidence to sustain the finding of the Commissioner. and that the court's determination that there was not sufficient evidence is justified by the record. I would affirm, and in this Mr. Justice Weaver concurs.

A majority favor reversal, and the case is reversed.

Evans, C. J., and Stevens, Faville, Arthur, and De Graff, concur in reversal.

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KRAFT v. WEST HOTEL CO. ET AL. (No. 34130.)

(Supreme Court of Iowa. Dec. 15, 1921.)

185 Northwestern Reporter. 895.

1. MASTER AND SERVANT—COMPENSATION INJURY HELD QUESTION OF LAW.

On appeal from decision of Industrial Commissioner, where conflicts in the evidence are only as to details and nonessentials, the question whether compensation claimant's injury arose out of and in the course of employment is one of law.

(For other cases, see Master and Servant, Dec. Dig. § 417[6].)

2. MASTER AND SERVANT—INJURIES BY FIRE STARTED BY LAMP USED CONTRARY TO RULES HELD COMPENSABLE, AS "ARISING OUT OF AND IN COURSE OF EMPLOYMENT."

Where hotel chambermaid, using an alcohol lamp, on retiring for the night in her room, to heat her hair curling iron, contrary to the hotel rules. finished curling her hair, and on returning to her room after a moment's absence, found the flame had started a fire on her dresser, which she extinguished, thereby setting fire to her clothing, the burns suffered thereby were compensable, as injuries "arising out of and in the course of employment."

(For other cases, see Master and Servant. Dec. Dig. § 373.)

(For other definitions, see Words and Phrases, First and Second Series. Course of Employment.)

Evans, C. J., and De Graff, J., dissenting

Appeal from District Court, Woodbury County; W. G. Sears, Judge.

On appeal to the district court from a decision of the Industrial Commissioner, the district court reversed the finding of the Commissioner, and awarded compensation to plaintiff for burns suffered by her, as she alleges. in attempting to put out a fire in her room in the West Hotel, in the course of her employment. The defendants appeal. Affirmed.

Brouillette & Gorder, of Sioux City, for appellants.

C. R. Metcalfe, of Sioux City, for appellee.

PRESTON, J. This is another case under the compensation law. where upon each successive appeal there has been a reversal. The arbitration committee awarded compensation, and upon review by the Industrial Commisssioner, without any new evidence being introduced, he was of the opinion that plaintiff was not engaged in the course of her employment at the time of her injury. and upon appeal to the district court the Commissioner was reversed. The district court did not. we take it, assume to pass upon conflicting evidence, but held as matter of law. as do we. that claimant was injured in the course of her employment, and entitled therefore to compensation.

[1, 2] It may be, as contended by appellants, that there is a conflict in the evidence at some points and some inconsistencies in plaintiff's story, but, if so, the conflict, if any, is as to details and nonessentials. This being so. it becomes a question of law whether plaintiff's injury arose out of and in the course of her employment. There is no question but that she was severely burned, and for several months was in a hospital, and

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unable to work; that she was in the employment of the hotel company as a chambermaid and that she was injured while in her room. No one was with her at the time. A doctor and her father testify as to the character of her injuries, loss of time and so on. It is fairly established by the evidence, without any substantial conflict, that in the evening of May 10, 1917, claimant was in her room preparing to retire. She was dressed in underwear, and some sort of an apron dress, perhaps to be used as a nightgown. Soon before the accident she had been engaged in putting up her hair. Some of the other 15 chambermaids used kid curlers, but in this instance claimant was using a curling iron, and to heat it she put it across the top of an alcohol lamp, referred to by some of the witnesses as a can. It had an open top and no wick; a lid went over the top. Some of the girls used alcohol lamps, and others kerosene, which were kept in their rooms. They had been forbidden by the hotel management from having in their rooms, or using, alcohol lamps such as claimant was using. This was the first time claimant had used such a lamp, and she did not know how to put out the flame. She had finished curling her hair, and then left her room for a moment to find another girl to come and put it out, or show her how, but found none. Returning to her room she saw that the wind had either blown the lace curtain into the lamp flame, which was four or five inches high, or the flame was blown against a handkerchief, or hair or hemp switch which were lying a few inches from the lamp on the dresser, on a dresser scarf or spread. The handkerchief was set on fire. The handkerchief was consumed, and the switch partly so; burned on top, she procured a towel at a washstand and began whipping the fire, attempted to put it out, and in the whipping operation her own clothing caught fire, and she was severely burned. She extinguished the fire on the dresser and attempted to put out the fire on her person. She wrapped herself in a blanket, screamed, and ran into an adjoining room. Soon afterwards others came and found her on the bed with the blanket around her, the fire extinguished. Such is the substance of her testimony.

There were 500 or 600 rooms in the hotel, and many guests. Plaintiff's claim is that in attempting to put out the fire she was trying to save the hotel property and its inmates. This was expected of her and the other chambermaids and help. A witness connected with the hotel management so testifies, saying that if plaintiff or any of the maids saw a fire in any of the rooms he would expect them to do the best they could to put it out and notify the management. It is thought by appellant that some matters brought out on cross-examination, and alleged contradictory statements claimed to have been made by her to witnesses testifying for defendant, destroy her testimony, and show that the accident did not happen as she contends. We shall not attempt to refer to all such matters, but enough to show that her story was not substantially shaken nor rendered improbable or unreasonable.

[3, 4] First it is thought it is improbable that one would have the window up, when the temperature was, as the evidence shows at 50, but it is known by every one that many people sleep with their windows up with the temperature lower than that; that they air their rooms before retiring. It is also thought that it is improbable that the window was up at all, because when others came, shortly after the accident, they found the window down. It would be the natural thing for some one in the excitement to put the window down to prevent more draft and spread of the fire. True, no one testifies that this was done, but the fact that the window was down soon afterwards does not necessarily contradict her evidence that the window was up a few minutes before. It is, of course, a circumstance. The weather man testifies that at the time in question the velocity of the wind was five miles an hour, and that therefore the wind was not strong enough to blow the curtain against the flame. The

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proof does not show any standard or rule, if there is any, or what velocity is necessary to blow a lace curtain. It is not probable and it is not proved that a velocity of five miles means that the wind blows steadily at that velocity. Every one from common observation knows that there are little currents of air—sitting in the yard, noticing the leaves on the trees, will observe one moment a lull, and the next a commotion or rustle of the leaves. It is also common knowledge that it requires very little wind to blow a lace curtain from the window. The evidence shows that opposite the window there was a long narrow space or court. The general manager of the hotel testifies that claimant told him. when he went to the room soon after, and when he asked her how it happened. that she had a pan on the bed with alcohol in it, sitting down on the bed, and it tipped over and ignited her clothing. Just how a pan of alcohol being tipped over in the bed would ignite one's clothing we fail to comprehend. There is no claim that she said the pan of alcohol was ligthed, or that the bedding was burned. This conversation is supposed to have taken place just after the accident, and while she was suffering from her burns. The evidence was proper, but it was impeaching only and under all the circumstances is of slight consequence. The manager also testifies that:

He had just come in from the theater, and was told that plaintiff had been burned, and he went right up to the room. "Saw Miss Kraft was in pain, and the first thing I ordered done was to call a physician and the ambulance; don't think it was over 5 or 10 minutes after the accident when I got there. When I first went upstairs she was wrapped in a quilt or a blanket. in room 112 or 114—I can't say which. Went into both rooms; examined her room, 114, as to windows; did not notice anything on the dresser; did not see any handkerchief or switch on the dresser that I can recollect."

As said there was excitement, and their attention was directed to plaintiff, who was suffering, although they claim to have noticed other conditions and the situation, some testifying to one thing, and some to another. Another circumstance relied upon by appellant is that plaintiff testifies that the switch lying on the dresser was burned only on the top and that the dresser scarf was not burned. It is not material whether the switch was only partly burned, or entirely burned, or whether the switch was lying two inches or five inches from the lamp. If the things on the dresser were on fire, and claimant attempted to put it out, and in so doing her own clothing caught on fire, it would be sufficient. The switch was about a foot long. and two inches wide. It does not appear whether it was twisted or not, but, in any event, if it was lying on the dresser and the wind blew the flame so as to strike it on top it would not be at all improbable that it was burned only on the top before plaintiff put out the fire. Appellants call attention to the fact that in her petition for compensation she stated that the wind blew the blaze against the dresser scarf and set it on fire, but, as appellants argue, she testified that in whipping the fire out of the switch and handkerchief she caught afire, and that she was unable to explain how. Under the circumstances and in the excitement it would hardly be expected that any one could give the exact situation as to every minor detail.

[5, 6] Appellants argue from the above that if her story is true she must have caught on fire from sparks which lit on her apron, and in that case, they say the burning would have been slow and she would have had ample time to have extinguished it. and that it would have spread slowly and gradually over her apron. From this they argue that she must have tipped the lamp over in the whipping operation, although she testifies that she did not overturn it. She does testify, however, that her clothing burned quickly, and that before she could do anything she was all aflame. If there is anything well known, and of common knowledge, it is that a person's clothing catching on fire, does burn very quickly.

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But suppose. in attempting to whip out the fire, she did tip over the alcohol, and that made the flames blaze up more quickly, it would not affect the situation, or show that she was not injured in attempting to put out the fire and save her employer's property and perhaps the lives of the guests in the hotel. She testifies that she whipped hard with the towel. The tendency of such whipping to spread the flames does not require proof, since it is known by every one. So, too, it is a well-known fact that a light air current would blow a blaze of this character from one side to the other. The suggestion about sparks is all argument. The argument is somewhat strained, since it assumes that sparks set fire to plaintiff's clothing, and then builds the rest of the argument upon such assumption. These, in the main, are the alleged contradictions and inconsistencies relied upon. There may be some others of similar import. We have gone into the circumstances more in detail than necessary perhaps. We have done so to show that plaintiff's testimony is not rendered unbelievable or even improbable, and that there is no substantial conflict. The essential facts entitling plaintiff to compensation are not disputed, either by plaintiff's cross-examination or by the evidence introduced by defendant, that the things in the room were on fire; that it was her duty to her employer to put it out; that she was burned in attempting to do so is without dispute. That was the situation when she returned to the room and found the fire in the room. The substance of the evidence introduced by defendant has been referred to. There are some other circumstances in the record which perhaps should be referred to briefly. Plaintiff had been employed in this position about six months. Her duties were to clean up the rooms, make the beds, etc. She usually got through with her work about 3 or 4 o'clock in the afternoon, but under some circumstances she was required to work later and evenings. She bought this lamp for the purpose of curling her hair, because the other girls or some of them, had used them for that purpose, and they had been doing so for two months, but it appears that the management did not know of such use. The girls kept them in their rooms.

1. It is contended by appellants that claimant's injuries did not arise out of and in course of the employment, because she was not injured in the performance of an act in the furtherance of her employer's business, but in the performance of an act personal to herself, and for her own exclusive benefit. convenience. and comfort; that it arose from a risk common to the general public, or the female portion of it, and that she was injured several hours after she had finished her work for the day. It is true that she was not, at the time, engaged in making a bed, but she was in her room subject to call. It is doubtless true that women generally curl their hair, but that is not all there is to it. We suppose that plaintiff's employers would expect her to dress in some manner in the performance of her work. It is not an exaggeration to say that for a woman to comb her hair is a part of dressing, or to put up her hair in curl papers the night before, that her appearance may be presentable the next day. But it seems to us this is beside the mark. It is true that a part of this whole transaction was the curling of her hair. But she had finished it, and had left the room, and upon returning discovered the fire. which threatened her employer's property. Under such circumstances, it was her duty, as before shown, and she was expected as an employee of the hotel company, to put out the fire. This is quite different from women generally curling their hair; nor was she engaged in the simple act of curling her hair as a matter personal to herself alone. We think, under the circumstances shown, the injury to her did arise out of and in the course of her employment. As said in 28 R. C. L. 801, that, simple as these terms appear. they have filled volumes with discussion. We have not been favored with citation of authority by appellee on this point Appellants have cited a large number of cases in this country and Eng-

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land and Scotland. This court has given its interpretation of the words in Pace v. Appanoose County, 184 Iowa, 498, 168 N. W. 916. Reid v. Washer Co., 179 N. W. 323, Rish v. Cement Co., 186 Iowa, 443, 170 N. W. 532, and other cases. It is unnecessary to restate the proposition now.

2. It is next contended by appellants that since claimant had been forbidden to use a lamp of this character, she may not recover, because, as they say, her injury did not arise out of the employment, and was not incidental thereto. A large number of cases, both American and foreign are cited on this proposition, of which Feda v. Cudahy Co., 102 Neb. 110, 166 N. W. 190, State ex rel. Miller v. District Court, 138 Minn. 326, 164 N. W. 1012, L. R. A. 1918F, 881, are illustrative. In the Feda Case the employee was employed as a trucker, whose duties were to take trucks loaded with meat from the fourth to the fifth floor of the packing house, using an elevator. Playing and scuffling in working hours was strictly forbidden. The employee was killed while doing that, and the court held that under the evidence he had abandoned his work and that therefore his injuries did not arise out of the employment. In State ex rel. Miller, a messenger boy while returning from delivering a message climbed upon an automobile truck, which was proceeding in tha direction, and while so riding he slipped on a roller in the floor of the truck, became entangled in the gears, and was injured. It was held by a divided court that though the accident happened while plaintiff was in the course of his employment it did not grow out of it and that it was not incidental thereto. In another case cited, a miner infringed a rule forbidding him to carry his lamp naked on his cap, while carrying cartridges not inclosed in the case. Another case is where a lineman in working about live wires failed to use rubber gloves, as the rules of the employer required, and as he had been recently directed by a foreman to do. In these cases the employee was injured while doing the act forbidden. Counsel in the instant case seek to separate this transaction and rely upon the use of the alcohol lamp and upon what occurred prior to the time she left the room to learn how to extinguish it. There was no explosion of the lamp while she was curling her hair. That act had been completed up to the time she had been injured. She was not injured while curling her hair. When she returned she found that some of the articles on the dresser were on fire, and the destruction of the building was threatened. In such a situation she was expected to put out the fire, perhaps it would have been her duty to do so and save her employer's property without any direction to do so. Suppose the fire had been started in some other way, or by the use of some other kind of a lamp, her duty to put out the fire would have been no different. She was injured then, while attempting to put out the fire. She may have been negligent in the first instance in using such a lamp, but appellant does not claim that that question figures in the case. Without stopping to cite extensively, authorities bearing on the question as to whether an injury arises out of and in the course of the employment, or is incidental thereto, the case of Reid v. Washer Co., supra, has a bearing, as do a number of cases therein cited. See, also, the cigarette case, Rish v. Cement Co., supra. Some novel questions are presented by appellee, but in the view we take of the case, it is unnecessary to discuss them. Without further prolonging the opinion we are of opinion that the Industrial Commissioner misconstrued and misapplied the law, and that the district court properly decided the case.

The judgment is affirmed.

Weaver, Arthur, and Faville, JJ., concur.

EVANS, C. J. (dissenting). The evidence is such in my judgment, as to make the finding of the Industrial Commissioner, binding, under the statute, both upon the district court and upon us. I would therefore sustain such finding of the Commissioners.

Justice De Graff joins in this dissent.

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DOLEN v. MUNCIE SAND CO. (No. 23755.)

(Supreme Court of Kansas. Dec. 10, 1921.)

202 Pacific Reporter, 846.

(Syllabus by the Court.)

MASTER AND SERVANT — AWARD OF WEEKLY PAYMENTS AUTHORIZED ON RECONSIDERATION OF COMPENSATION CLAIM.

Under the Workmen's Compensation Act the plaintiff recovered a judgment for $520 for broken ankles, the journal entry reciting that "The future damages of plaintiff is left open for the further consideration of the court." More than a year thereafter on notice and hearing the court gave the plaintiff judgment for $6 a week until July 6, 1925. *Held*, that the court had jurisdiction so to adjudge, and *held*, further, it was not error to award weekly payments instead of a lump sum judgment.

(For other cases, see Master and Servant, Dec. Dig. § 385[20], 419.)

Appeal from District Court, Wyandotte County.

Proceedings by Elias Dolen against the Muncie Sand Company. Judgment for plaintiff, and defendant appeals. Affirmed.

W. L. Wood, of Kansas City, for appellant.

J. K. Cubbison and Wm. G. Holt, both of Kansas City, for appellee.

WEST, J. The plaintiff broke his ankles by an accident arising out of and in the course of his employment by the defendant. A demand for arbitration being refused, he sued and recovered judgment for $520 up to the date thereof. The journal entry recites "and the future damages of plaintiff is left open for the further consideration of the court." The jury returned answers to special questions to the effect that the plaintiff was temporarily totally disabled from earning wages, and would in the future be partially disabled from following the occupation in which he was employed at the time of his injury, but that since the expiration of his total disability and to the time of trial he had been employed at wages equal to or greater than he was earning when injured. This judgment was rendered May 28, 1918. On January 27, 1921, the defendant was served with notice that a motion for final judgment, or a review of the former order filed on January 30, 1920, would be heard February 12, 1921. On the day last mentioned, the court having heard the arguments and examined the briefs of the parties adjudged the plaintiff entitled to recover $6 a week from the date of filing this motion, January 30, 1920, the plaintiff to be paid the judgment in a lump sum, and further ordered and adjudged that the plaintiff have $6 a week therefrom until July 6, 1925, payable weekly. The defendant appeals from this order assigning as error the entry of the judgment after the expiration of the term in which the case was originally tried. The plaintiff also filed notice, and complains of the judgment because the court refused to allow the plaintiff a lump sum judgment for the amount due and to become due, less $520 already paid.

The defendant argues that the trial court lost control over the judgment at the close of the term in which it was entered, and cites decisions to support the contention that with the ending of the term jurisdiction of the court over a case ceases, which is true in ordinary cases. Here, however, the court expressly retained jurisdiction of the case and

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held it over for further consideration, and from this order no appeal was attempted and no complaint thereof was made. No authorities are produced by either side on this specific question. but it is usual for a court to retain jurisdiction of cases for future or further consideration, and the power to do so is as clear as the power to continue from term to term. The Civil Code defines a final order as one affecting a substantial right in an action "when such order in effect determines the action and prevents a judgment." A final judgment has been defined as—

"One which finally decides and disposes of the whole merits of the case, and reserves no further question, or direction, for the future or further action of the court." Brown v. Galena Mining & Smelting Co., 32 Kan. 528, syl. 2, 4 Pac. 1013.

"There are certain well-defined exceptions to the rule of the common law limiting the modification of judgments to the term of court in which they are entered. The power of the courts to make amendments of judgments after the term at which they are entered in part depends on the character of the judgment and in part on the nature of the amendment. A judgment, not final in its effect, may generally be amended after the expiration of the term at which it was rendered, if susceptible of being corrected without prejudice to the rights of the parties. * * * So where a court awards a decree of divorce it is not unusual for the court to retain indefinitely the power to modify certain parts of the decree as altered circumstances in the future may warrant; thus the court may amend and modify provisions affecting future payments of alimony and the custody of children." 15 R. C. L. 678. § 129.

"But the rule against amendment after the term does not apply to interlocutory judgments or such as remain in fieri, or to action in that behalf taken with the consent of the parties concerned or at their request. or where the judgment is carried over the term by a motion to amend or correct it or a petition for a rehearing." 23 Cyc. 861.

Section 13 of chapter 226 of the Laws of 1917 provides that in case of arbitration no award shall be for a lump sum except as to such portion as shall be found to be due and unpaid at the time of the award, but this does not apply to a trial by the court in the absence or refusal of arbitration.

Section 20 provides that after a jury trial—

"The judgment in the action, if in favor of the plaintiff, shall be for a lump sum equal to the amount of the payments then due under this act, with interest on the payments overdue, or, in the discretion of the trial judge, for periodical payments, as in an award; provided. in no case shall a lump sum judgment be rendered for any injury not ascertainable by objective examination. * * *"

In Goodwin v. Packing Co., 104 Kan. 747, 180 Pac. 809, it was said that an injury resulting from a knife cut above the wrist could be determined by objective examination only. In Southern v. Cement Co., 108 Kan. 213, 194 Pac. 637, it was said:

"Where the matter is settled by arbitration compensation for future loss can be awarded only in periodical payments, but a different rule is provided where the controversy is determined by a court." 108 Kan. 215, 194 Pac. 638.

There can be no reasonable doubt that broken ankles present a case in which an objective examination would clearly show the injury, and the statute itself vests the trial judge with discretion to other periodical payments, and hence it cannot be said that in so awarding the court committed error or abused its discretion.

The judgment, as entered, is therefore affirmed.

All the Justices concurring.

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WILSON & CO. v. WARD. (No. 23730.)

(Supreme Court of Kansas. Dec. 10, 1921.)

202 Pacific Reporter, 862.

(Syllabus by the Court.)

1. MASTER AND SERVANT — THOUGH EMPLOYER NOT ESTOPPED BY ARBITRATION UNDER COMPENSATION ACT, HIS RELIEF IN REVIEWING COURT IS LIMITED.

In an action by an employer to set aside an award of an arbitrator under the Workmen's Compensation Act, the court found that the cause of claimant's disability did not arise out of or in the course of her employment, but held that, because the employer had agreed to arbitrate, and and appeared before the arbitrator, it was not within the power of the court to cancel the award. The court further found that at the time of the review the claimant was capable of earning at least $12 per week in some suitable employment. and awarded her the minimum amount of $6 per week for 416 weeks payable as her wages were payable. *Held* (following Goodwin v. Packing Co.. 104 Kan. 747, 750, 180 Pac. 809; Boyd v. Mining Co., 105 Kan. 551, 185 Pac. 9; Roper v. Hammer, 106 Kan. 374, 187 Pac. 858) that, while the employer was not estopped by consent to the arbitration, the provisions of the statute limiting the scope of an arbitrator's decision prevents the employer from obtaining any other relief than that granted by the court.

(For other cases, see Master and Servant, Dec. Dig. § 417[5].)

2. MASTER AND SERVANT—ARBITRATOR'S DECISION FINAL EXCEPT FOR LIMITED REVIEW PROVIDED IN COMPENSATION ACT.

Under the provisions of section 11, c. 226, Laws 1917, "unless such consent or order of appointment expressly refers other questions, only the question of the amount of compensation shall be deemed to be in issue." Whatever issues are referred, the decision of the arbitrator upon them is final, except for the limited review provided in the statute.

(For other cases, see Master and Servant, Dec. Dig. § 417[5].)

3. MASTER AND SERVANT—COMPENSATION ACT DOES NOT LIMIT SCOPE OF COURT'S INQUIRY AS TO ARBITRATOR'S MISCONDUCT, OR EXCESSIVENESS OR INADEQUACY OF AWARD.

The statute does not attempt to limit the scope of the inquiry which the court may make in determining whether there has been fraud, undue influence, or misconduct upon the part of the arbitrator, or whether the award be grossly excessive, or grossly inadequate, or whether there has been an increase or decrease of disability.

(For other cases, see Master and Servant, Dec. Dig. § 417[5].)

4. MASTER AND SERVANT—COMPENSATION AWARD PROPERLY REDUCED BY REVIEWING COURT.

Upon the court's findings of fact, it possessed authority to declare the award excessive and to reduce the amount.

(For other cases, see Master and Servant, Dec. Dig. § 417[9].)

Appeal from District Court, Wyandotte County.

Action by Wilson & Co. against Jessie Ward, to review and set aside an award of the arbitrator under the Workmen's Compensation Act, on the ground that it was excessive. Award modified, and the plaintiff appeals. Judgment affirmed.

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O. L. Miller, of Kansas City, Kan., for appellant.

J. K. Cubbison and W. G. Holt. both of Kansas City. Mo., for appellee.

PORTER, J. The appellant brought this action to review and set aside an award made by an arbitrator under the Workmen's Compensation Acts (Laws 1911, c. 218, as amended) on the ground that the arbitrator's award was grossly excessive, contrary to the statute, and void. and that the appellee never received an injury entitling her to compensation. Issues being joined, the case was tried by the court without a jury. Several witnesses were called and examined, including two surgeons appointed by the court under the provisions of the statute. The court found the facts in substance as follows:

The appellee notified the appellant that she had met with an accidental injury in the due course of her employment in the manufacturing department of the appellant's packing house, and that she demanded compensation under the statute. The notice requested appellant to consent to arbitration, and stated that, if such consent was not given. application would be made to the judge of the district court for the appointment of an arbitrator. A stipulation was signed by the appellant and the appellee agreeing upon the appointment of an arbitrator "to hear the evidence upon and report his findings as such arbitrator." The evidence was taken before the arbitrator, but was not before the district court. The arbitrator fixed the compensation for total disability for a period of 406 weeks at $10.80 per week, being 60 per cent. of appellee's wages, and awarded her a lump sum of $4,082.40.

Findings, 7, 8, 9, 10, and 11 are as follows:

"The court finds that the cause of claimant's disability did not arise out of and in the course of her employment, and that she never became entitled to compensation, unless by the arbitration and consequent estoppel of her employer, as hereinafter found.

"The disability of the claimant Jessie Ward arose out of a disease of the ovaries and Fallopian tubes, caused by infection, and the accident and injury to said claimant, as found in finding 6 hereof, neither caused accelerated, nor in any manner contributed to such disease of the ovaries and tubes, nor to the disability of said claimant.

"The court finds that the arbitrator, C. O. Littick, acted without authority in making a lump sum award, except for payments then found due, and that his claim for $150 is $50 in excess of the amount allowed by law, and that the award was grossly excessive, inasmuch as claimant is not now, and has not been for several months last past, but partially incapacitated from labor by the illness which she claims to have resulted from the accident.

"The court finds that the claimant was not, nor is not, entitled to more than the minimum of $6 per week for 416 weeks, payable as her wages were payable; that the arbitrator has claimed $50 more than allowed by the statutes.

"The court finds that at the time of this review claimant is capable of earning at least $12 per week in some suitable employment."

The court made the following conclusions of law:

"That Wilson & Co. having agreed to arbitration and appeared before the arbitrator, it is not within the power of the court to set aside the award, but that claimant Jessie Ward is entitled to an award of $6 per week for 416 weeks, payable as follows. * * *"

[1, 2] In previous decisions it has been held that, where an employee claims to have been injured, and entitled to recover under the compensation acts, it is the duty of both parties to consent to arbitration, and, if either refuse, the other may, by application to the court, compel arbi-

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tration. Goodwin v. Packing Co., 104 Kan. 747, 750, 180 Pac. 809; Boyd v. Mining Co., 105 Kan. 551, 185 Pac. 9; Roper v. Hammer, 106 Kan. 374, 187 Pac. 858. In these cases the provisions of the statute that, "unless such consent or order of appointment expressly refers other questions, only the question of the amount of compensation shall be deemed to be in issue" (Laws 1917, c. 226, § 11), has been considered and construed. It has been held that—

"This means that questions such as employment, whether or not the parties were under the Compensation Act, whether or not the employee suffered injury by accident arising out of and in the course of the employment, and like questions, are not in issue. Either party, however, shall have the right to require the arbitrator to find the character and quality of the disability and the period for which payment shall continue." Boyd v. Mining Co., supra, 105 Kan. p. 552, 185 Pac. 10.

In some of these cases there was no agreement for arbitration, and the employer was compelled to submit to one by an order of the court on the application of the claimant. In Villalobos v. Packing Co., 105 Kan. 109, 181 Pac. 599, it was said in the opinion:

"These things, then, may be considered by the court in reviewing an award: Fraud, undue influence, lack of authority, serious misconduct on the part of the committee or arbitrator, gross excess in amount, gross inadequacy, increase of disability, decrease of disability, subsequent receipt of wages equal to or exceeding those received when injured, and absence of the workman so that a physical examination cannot be made." 105 Kan. pp. 109, 110, 181 Pac. 599, 601.

The theory of the appellant is that the employer in all cases of arbitration has left to him the one defense that, although an accident happened to the claimant in the course of his employment, while both were under the Compensation Acts, yet, because such accident was so slight that it did not disable the workman for a period of one week, no compensation is due the workman, and it is said "that is this case."

It is well known that the purpose of the Legislature was to prevent litigation over claims of workmen under the Compensation Acts. Provision was made for arbitration, either by consent of the parties, or, where one of them refused to consent, then by an order of the district court compelling the objecting party to submit the question of the amount of compensation to an arbitrator. It provided, as we have seen, that other issues might be referred to the arbitrator, and, if not, then the only issue before him was to be the amount of the compensation. Against the policy of a statute compelling the employer to consent to arbitration as to the amount of the award, with no opportunity to have the decision of the arbitrator reviewed, except to the extent provided for by the statute, a strong argument can be, and is, made by counsel in his brief.

It is true that in a large percentage of such cases the right to compensation has turned upon the question whether the claimant received his injuries by an accident arising out of and in the course of his employment, and that in many cases the facts presented a difficult question of law; in some a mixed question of law and fact. But the Legislature provided a forum where all these questions might be submitted and finally determined, except for the limited review. Of course, where the arbitrator makes a conclusion of law in violation of some provision of the statute, as where he awards a lump sum judgment, or fixes excessive allowances, fees, or costs, the district court may, upon appeal, or in a direct action, correct such errors.

Counsel for appellant asks this:

"Question. Does the court mean to hold that arbitration, although resisted, may be compelled, and yet the employer shall be held to waive defenses such, for instance, as that the relationship of master and servant did not exist, or that the employer had no knowledge of the claimed acci-

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dent, and no notice was given, and that he was thereby prejudiced, or that no demand was made for compensation within the three months fixed by the statute?"

Our answer is that, whether the arbitration be compulsory or upon agreement, the same rule applies as to the issues. Either party may have referred to the arbitrator any issue involving the right of claimant to recover compensation or affecting the amount of such compensation. "Unless such consent or order of appointment expressly refers other questions, only the question of the amount of compensation shall be deemed to be in issue"—that is the language of the statute. Whatever issues are referred, the decision of the arbitrator upon them is final, except for the limited review provided in the statute. The Legislature might have provided for a full review in the district court of every question submitted to the arbitrator, or of every issue that might be raised by either party in pleadings. But this would have served to increase, instead of to reduce, litigation.

The trial court gave a wrong reason for holding that appellant could not raise the issue of whether appellee's disease was caused by an accident arising out of and in the course of her employment. The appellant was not estopped by its consent to the arbitration. It is the provision of the statute limiting the scope of a review of an arbitrator's decision which prevents the appellant from obtaining all the relief sought. The failure to have other matters referred merely deprived appellant of an opportunity for a trial of those issues before the arbitrator.

[3] The appellee by a cross-appeal makes the contention that the statute does not permit a trial before the district court de novo in the absence of fraud; that all the district court has a right to consider is the same evidence that was considered before the arbitrator. The statute does not attempt to limit the scope of the inquiry which the district court may make in determining whether there has been fraud, undue influence or misconduct on the part of the arbitrator, or whether the award be grossly excessive, grossly inadequate, or whether there has been an increase or decrease of disability, etc. It makes special provision for the appointment by the court of physicians and surgeons to examine the claimant, and to make a written report to the court of their findings, which was done in this case. There would be no use to go to all this trouble and expense of time and money if the court were limited to a consideration of the evidence taken before the arbitrator. There was not a trial de novo, as appellee contends, but a limited review provided for in the statute.

[4] Upon the court's findings of fact, it was authorized to conclude that the award was excessive and to reduce the amount.

The judgment is affirmed.

All the Justices concurring.

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BOURGEOIS v. UNION BRIDGE & CONSTRUCTION CO.
(No. 24233.)

(Supreme Court of Louisiana. Oct. 31, 1921.)

90 Southern Reporter. 17.

(Syllabus by Editorial Staff.)

MASTER AND SERVANT — COMPENSATION CASE MAY BE REMANDED FOR TAKING OF FURTHER EVIDENCE.

Where a servant secured a judgment against a master under the Workmen's Compensation Act for injuries resulting in total disability to do work, and affidavits showed that after judgment plaintiff procured and continued employment at higher wages than previous to the injury, the cause may be remanded for the taking of further evidence.

(For other cases, see Master and Servant, Dec. Dig. § 412.)

Appeal from Civil District Court, Parish of Orleans; H. C. Cage, Judge.

Suit by Paul Bourgeois against the Union Bridge & Construction Company under the Workmen's Compensation Act, in which the trial court found for the plaintiff, and the defendant appeals. Remanded for taking of further testimony.

Eugene J. McGivney and Solomon S. Goldman, both of New Orleans, for appellant.

Wm. H. Byrnes, Jr., of New Orleans, for appellee.

PROVOSTY, J. This suit is under the Workmen's Compensation Act (Laws 1914, No. 20) for total disability to do any work whatever. The trial court found for plaintiff. Defendant has filed in this court affidavits showing that 20 days after the signing of the judgment herein, which judgment is predicated upon the total incapacity of the plaintiff to do any work whatever, and 22 days after plaintiff had so sworn on the trial of the case, plaintiff secured employment at higher wages than he was earning before his injury, and has since then been earning these higher wages. Defendant asks that, in the event this court does not reverse the judgment appealed from, the case be remanded to take the evidence contained in these affidavits, which evidence, defendant adds, could not, in the nature of things, have been produced before the filing of the appeal in this court, since it was not then in existence. As this evidence would have a large influence upon the question of whether the judgment should be reversed or not, we deem it best not to try the case piecemeal, but to remand it at once for the taking of said evidence. A precedent for this remand is found in the case of Pye v. South Western Gas & Electric Co., 147 La. 537, 85 South. 232.

It is ordered that this case be remanded for the purpose of affording the defendant an opportunity of introducing further evidence on the question of the total inability of the plaintiff to do any work whatever; all proceedings in the Supreme Court to be in the meantime stayed.

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CONNER'S CASE.

(Supreme Judicial Court of Maine. Dec. 20, 1921.)

115 Atlantic Reporter, 520.

1. MASTER AND SERVANT — INDUSTRIAL ACCIDENT COMMISSION IS MERELY AN ADMINISTRATIVE TRIBUNAL.

Under the Workmen's Compensation Act, the Industrial Accident Commission is not a court of general or limited common-law jurisdiction, but an administrative tribunal, possessing only such jurisdiction, powers, and authority as are conferred on it by express legislative grant, or arise therefrom by implication, as necessary and incidental to the exercise of the powers granted.

(For other cases, see Master and Servant. Dec. Dig. § 397.)

2. MASTER AND SERVANT — INDUSTRIAL ACCIDENT COMMISSION'S PROCEDURE DEFINED.

The Industrial Accident Commission has a procedure all its own, and borrows nothing by implication from the courts of common law.

(For other cases, see Master and Servant, Dec. Dig. § 414.)

3. MASTER AND SERVANT — INDUSTRIAL ACCIDENT COMMISSION WITHOUT POWER TO GRANT REHEARING ON MERITS.

The Industrial Accident Commission, after a final decree has been signed and the time for taking an appeal has expired, has no power to reopen or rehear a case on its merits for newly discovered evidence, under Workmen's Compensation Act § 34, making the decree final in the absence of fraud and authorizing appeals, section 36, authorizing proceedings to increase, diminish, or discontinue the compensation, or any other provision of that act, nor has it any inherent power independent of the statute to do so.

(For other cases, see Master and Servant, Dec. Dig. § 414.)

4. MASTER AND SERVANT—VOID DECREE OF INDUSTRIAL ACCIDENT COMMISSION WILL BE SO DECLARED, THOUGH APPEAL NOT TAKEN IN TIME.

A decree of the Industrial Accident Commission, granting a petition for a rehearing and ordering a new hearing after the time had expired for appealing from a decree denying compensation, being void, as beyond the jurisdiction of the commissioner, the court will so declare it, when the matter is brought to its attention by appeal, though the appeal was not filed within the time prescribed by statute.

(For other cases, see Master and Servant, Dec. Dig. § 417[4½].)

Appeal from Supreme Judicial Court, Sagadahoc County, in Equity.

Proceeding under the Workmen's Compensation Act by Frank M. Conner for compensation for injuries, opposed by the L. P. Soule & Son Company, employer, and the Mutual Liability Insurance Company, Insurer. From a decree granting a petition for a rehearing and ordering a new hearing, defendants appeal. Reversed, and petition dismissed.

Argued before Cornish, C. J., and Spear, Hanson, Dunn, and Deasy, JJ.

Hinckley & Hinckley, of Portland, for appellants.
David O. Rodick, of Bar Harbor, for appellee.

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CORNISH, C. J. The claimant received an injury on October 19, 1918. On March 14, 1919, he filed with the Industrial Accident Commission a notice and application for compensation under the Workmen's Compensation Act. Answer was filed on the same day. The claimant was still in the hospital at Bath, where he had been since receiving his injuries. The chairman of the commission was present. The claimant had no attorney. The record and decree pertaining to the hearing read in part:

"Under a mutual agreement to proceed with the hearing befor the chairman, the parties entered into the following stipulation upon the record: 'It is understood and agreed by and between the parties to this hearing that the petition for adjustment of claim of the injured employee filed this day and the answer of L. P. Soule & Son Co. and the contractors, Mutual Liability Ins. Co., shall be the foundation for all proceedings in this hearing, as if regularly filed and notice thereof ordered, and the answer filed in accordance with the provisions of the statute, and that all formalities are waived.'

"After full hearing of the parties and their witnesses, the chairman makes the following finding of facts: First, that the injured employee, Frank M. Conners, on or about the 19th day of October, 1917, or at any other time while in the employ of L. P. Soule & Son Co., did not receive a personal injury by accident arising out of and in the course of his employment.

"Dated March 15, 1919."

This decree was signed by the then chairman of the commission. No appeal from this decision was taken.

On September 13, 1920, the claimant filed with the commission the petition now under consideration, asking for a rehearing on the ground of newly discovered evidence. This petition recites the facts connected with the first hearing and decree, and then alleges that since the signing of that decree the petitioner has discovered new and important evidence and witnesses; that this evidence was not presented at the previous hearing and could not have been discovered by the petitioner owing to his mental, physical, and financial condition. The petitioner then proceeds to state the names of the witnesses and the facts to which each would testify. In short, the same general form is adopted as in cases of a motion for new trial on the ground of newly discovered evidence after verdict and before judgment in an ordinary action at law in a common-law court.

The defendant filed answer, denying the power of the commission to grant this petition, but the petition was granted and a new hearing ordered, from which order an appeal to this court was duly perfected.

The important question for decision is whether, after a final decree has been signed and the time for taking an appeal has expired, the commissioner has power to grant and hold a rehearing on the merits of the case upon motion presented therefor on the ground of newly discovered evidence.

We are unable to discover that such power is inherent in the commission or has been conferred upon it by statute.

[1, 2] The Industrial Accident Commission is not a court of general nor even of limited, common-law jurisdiction, but an administrative tribunal, especially created by the Legislature to administer the Workmen's Compensation Act (adopted in this state in 1915) with the aid of the Supreme Judicial Court. P. L. 1915, c. 295; R. S. 1916, c. 50, as amended by P. L. 1919, c. 238. As such administrative arm of the Legislature it possesses only such jurisdiction, powers, and authority as are conferred upon it by express legislative grant, or such as arise therefrom by implication as necessary and incidental to the full and complete exercise of the powers granted. Levangie's Case, 228 Mass. 213, 117 N. E. 200

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Sterling's Case 233 Mass. 485, 124 N. E. 286. It has a procedure all its own, and it borrows nothing by implication from the courts of common law.

[3] No power of reopening or rehearing a case upon its merits, in which a decree has been entered, and of determining anew the liability or nonliability of the employer, is granted by the statute. That decree, in the absence of fraud, is declared to be final upon all questions of fact. Section 34.

In two instances, and in only two, is the right given to review or modify the decision of the commission. The first is by appeal to a single justice of the Supreme Judicial Court and thence to the law court, as provided in section 34. But in such an appeal questions of fact are not involved. It concerns itself simply with questions of law. The time allowed for taking such appeal was 10 days under the original statute of 1915, and is now 20 days under the amended statute of 1919. That appeal was not attempted here. The second method is by way or review under the following provision:

"At any time before the expiration of two years from the date of the approval of an agreement by the commission, or the entry of a decree fixing compensation, but not afterwards, and before the expiration of the period for which compensation has been fixed by such agreement or decree, but not afterwards, any agreement award, findings or decree may be from to time reviewed by the chairman [of said commission] upon the application of either party, after due notice to the other party, upon the ground that the incapacity of the injured employee has subsequently ended, increased or diminished. Upon such review the said chairman * * * may increase, diminish or discontinue the compensation from the date of application for review, in accordance with the facts, or make such other order as the justice of the case may require, but shall order no change of the status existing prior to the application for review." Section 36.

This provision as to review is expressly limited to cases where by the original decree a compensatory award has been made and where the petitioner asks to have such award increased, diminished, or ended because of conditions that have arisen since its making. Therefore it has no application to the pending controversy and none is contended for by the petitioner.

Further, in this reviewing provision it is declared that the chairman of the commission "shall order no change of the status existing prior to the application for review." This court has very recently defined the term "status" as here used to mean:

"The relation in which an injured person stands toward him who was his employer at the time of the accident. It goes to his right to recover compensation." Fennesey's Case, 120 Me. 251. 113 Atl. 302.

Evidently the Legislature did not intend that the original determination as to liabilitiy should be overturned by any subsequent evidence. except in cases of fraud, which vitiates all judgments.

We see, therefore, that two proceedings subsequent to the original decree are authorized, the one on appeal in matters of law, and the other in modification of damages because of subsequent facts and conditions, and the authorization of these two impliedly excludes all others according to the general rule for the interpretation of statutes.

But the petitioner claims that without such statutory authority the commission has the inherent power to grant a new trial on ground of newly discovered evidence, where justice would seem to require it.

To this we cannot give assent. In the first place, were there such inherent power, it is wrongly invoked in this case. Section 34 provides that the decree of the commission—

"shall have the same effect and all proceedings in relation thereto shall

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thereafter be the same as though rendered in a suit in equity duly heard and determined by said court, except there shall be no appeal therefrom upon questions of fact found by said commission, or its chairman."

Proceedings in equity know no such machinery as a motion for new trial on the ground of newly discovered evidence. Such a motion is cognizable only in actions at law. Moreover, in actions at law it can be employed only after verdict and before judgment. After judgment the remedy is by writ of review or writ of error.

The petitioner claims, however, that the practice contended for prevails in courts of probate, which are also creatures of the statute, and therefore by analogy this practice should prevail under the Compensation Act. Assuming that the analogy is complete, which it is not necessary to decide, the power residing in a probate court to reopen a case upon petition for rehearing is far more restricted than the petitioner would argue It can be exercised in cases of fraud or clerical mistake, or, as the court has phrased it, in case of a decree "clearly shown to be without foundation in law or fact and in derogation of legal right." Merrill Trust Co., Appellant, 104 Me. 566, 72 Atl. 745, 129 Am. St. Rep. 415. Instances of the exercise of this power may be found in the probating of a later will and revoking the decree probating an earlier, which in law had no vitality and therefore was "in derogation of legal right," Cousens v. Advent Church, 93 Me., 292, 45 Atl. 43. in revoking a decree admitting to probate a will which was forged, a palpable fraud upon the court. Merrill Trust Co., Appellant, supra; in reopening a guardian's final account. where the allowance had been obtained by fraud, Moore, Appellant, 112 Me., 119, 90 Atl. 1088. Ann. Cas. 1917A, 645; in reopening a decree of distribution inadvertently made, containing manifest clerical errors, Bergeron, Appellant, 98 Me. 415, 57 Atl. 584.

But this is the limit of the power to reopen. The probate court has no general authority so to do in every case where rights have been determined. This was carefully guarded against in the Bergeron Case where the court says:

"We do not hold that a probate court can, after the term it was made, annul or modify a decree as to a matter which was passed upon and determined in the making of such decree, or that even such a decree as this would not be ample protection to any person who had acted upon it, but simply that before a decree has been acted upon, upon application by a person interested and after notice to all persons interested, the probate court may annul or modify a previous decree containing manifest errors and mistakes, inadvertently made and which were not considered by the probate court and determined by it."

Recurring now to industrial accident cases, it should be observed that our statute notes the vitiation of all decrees of the commissioner by fraud, and fixes their finality in all other cases, in these words:

"His decision in the absence of fraud, upon all questions of fact, shall be final." Section 34.

Our attention has been called to no authorities holding that the power of rehearing is vested in the commission, except in those states where the authority is expressly conferred by statute.

In Beckmann v. Oelerich, 174 App. Div. 353, 160 N. Y. Supp. 791, cited by the chairman in his decision, where on petition a rehearing was granted, the proceeding was under section 74 of the New York Workmen's Compensation Act (Consol. Laws, c. 67), which is as follows:

"*Jurisdiction of Commission to be Continuing.* The power and jurisdiction over each case shall be continuing, and it may, from time to time, make such modification or change with respect to former findings or orders relating thereto, as in its opinion may be just."

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The power to rehear is expressly granted by this statute and was exercised under that grant. Connecticut has a somewhat similar provision, and modification of awards in that state are governed exclusively by statute. In a very recent case (1920) the court in discussing the subject say:

"The defendant attempts to liken the award to the judgment of a court. and the proceedings to modify the award to those for a new trial. There is no such similitude. The award is subject to modification at any time for the causes named in the statute, and these are radically different from causes which give ground for a new trial. The award is the creation of statute; it is subject to modification upon the grounds specified in the statute." Saddlemire v. American Bridge Co., 94 Conn. 618, 110 Atl. 63.

The decisions of Industrial Accident Boards in other states, which have been called to our attention, are also found upon examination to base the right of reopening or rehearing upon express statutory authority. and therefore are not in point in the case at bar.

On the other hand, where no such statutory provisions exist, the right of rehearing on the merits has been denied. Pocs v. Buick Motor Co., 207 Mich. 591, 175 N. W. 125; Benjamin & Johnes v. Brabban, 90 N. J. Law, 355, 103 Atl. 688; Simpson Const. Co. v. Industrial Board of Illinois, 275 Ill. 366, 114 N. E. 138.

In Hunnewell's Case, 220 Mass. 351, 107 N. E. 934, upon an application of an employee to have compensation extended beyond the time first fixed by the board, the question of its power was considered, and the court employed this significant language:

"The action of the board was not an unqualified decision to end all payments under the act. Such a decision would mean that incapacity of whatever degree arising from the injury had disappeared finally. Doubtless after such a decision the board would be without power to revive the matter. It would have become ended and be entirely a thing of the past. The doctrine of res judicata would apply to it."

Our conclusion, therefore, is that the rights of the parties are governed by the statute, and the statute knows no such power or procedure as is here invoked. It well may be that the Legislature purposely avoided such a practice. The design of the entire Workmen's Compensation Act is the speedy, inexpensive, and final settlement of the claims of injured employees. Its procedure shuns protracted and complicated litigation, and yet if the practice here asked for is recognized and adopted there would seem to be no end to litigation. If the employee can ask a rehearing on the merits in this manner, the same right must be given to the employer. and a weapon placed in his hands that by delay would thwart the very salutary purpose of the act. Then, too, there would seem to be no limitation to the time when such a petition could be filed. In short, these cases, intended to be speedily and "summarily" disposed of, might be dragged to an interminable length.

[4] As to the claimant's further point that the defendant's appeal was not filed within the prescribed period of 20 days, and therefore cannot be heard, and the decree of the commissioner must stand, it is only necessary to say that, the decree itself being void, as beyond the jurisdiction of the commissioner, the court will so declare it, whenever the matter is brought to its attention.

The entry will be:

Decree reversed.

Petition dismissed.

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GAGNON'S CASE.

(Supreme Judicial Court of Maine. Dec. 10, 1921.)

115 Atlantic Reporter, 465.

MASTER AND SERVANT—RECORD ON APPEAL UNDER COMPENSATION ACT HELD INSUFFICIENT.

Where agreed statement on appeal under the Workmen's Compensation Act (Rev. St. c. 50, § 34, as amended by Laws 1919, c. 238, § 34) is so meager that it is impossible to obtain therefrom facts necessary to a decision, and the evidence is not in the record, the appeal will be dismissed.

(For other cases, see Master and Servant, Dec. Dig. § 417[4¼].)

Appeal from Supreme Judicial Court. Franklin County, at Law.

Proceeding by Thomas Gagnon under the Workmen's Compensation Act. From a decree of a sitting justice, an appeal was taken. Appeal dismissed.

Argued before Cornish. C. J., and Spear, Hanson, Morrill. and Deasy, JJ.

James H. Carroll, of Lewiston, for plaintiff.

Weeks & Weeks. of Fairfield. for defendant.

CORNISH, C. J. Appeal from the decree of a sitting justice under R. S. ch. 50, § 34. now found in P. L. 1919, c. 238, § 34.

The question at issue is whether the employer's written acceptance covered the class of work in the performance of which the claimant was injured. The record before the law court includes the written documents and an agreed statement of facts, but not the evidence taken before the Industrial Accident Commission. The agreed statement is so meager that it is impossible to obtain therefrom the facts necessary to a proper decision of the issue involved.

The statute requirement is that—

"Upon any appeal therefrom the proceedings shall be the same as in appeals in equity procedure." Section 34.

Appeals in equity carry with them all the evidence (Caverly v. Small, 119 Me. 291, 111 Atl. 300), and it is the common practice to have the report of the evidence before the law court in this class of cases as in equity appeals. An agreed statement might perhaps be so full and complete as to cover every necessary point, but that is not the case here. Counsel in their briefs argue important facts which may have been in evidence, but they are not contained in the record before us.

We are of the opinion, therefore, that the proper entry under the circumstances is:

Appeal dismissed for want of sufficient record.

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LEMELIN'S CASE.

(Supreme Judicial Court of Maine. Dec. 23, 1921.)

115 Atlantic Reporter, 551.

1. MASTER AND SERVANT—PETITION FOR REVIEW OF COMPENSATION AGREEMENT HELD BARRED.

A petition for review of an order of an Industrial Accident Commissioner approving an agreement for compensation, which, under Workmen's Compensation Act, § 35, has the force of a judgment, is barred under section 36 if not filed within two years from the date of such approval and before the expiration of the period for which compensation was fixed by such agreement.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

2. MASTER AND SERVANT—PETITION FOR COMPENSATION BARRED BY LIMITATIONS.

Under Workmen's Compensation Act, § 39, a petition for compensation is barred if not filed within two years after the injury, though the act is liberally construed.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

On Appeal from Supreme Judicial Court, Somerset County, at Law.

Petition for compensation under the Workmen's Compensation Act by Frank Lemelin, opposed by American Woolen Company, employer, and the Employers' Liability Assurance Corporation, Limited, insurance carrier. From a decree of a sitting justice confirming the findings of the chairman of the Industrial Accident Commission awarding compensation, the employer and insurance carrier appeal. Appeal sustained, decree reversed, and petition dismissed.

Argued before Cornish, C. J., and Hanson, Dunn, Morrill, Wilson, and Deasy, JJ.

Andrews, Nelson & Gardiner, of Augusta, for appellants.

P. A. Smith, of Fairfield, for appellee.

HANSON, J. This is an appeal from a decree of a sitting justice under section 34 of the Workmen's Compensation Act, now found in chapter 238, P. L. 1919, confirming the finding of the chairman of the Industrial Accident Commission.

On May 21, 1918, Frank Lemelin, while in the employ of the American Woolen Company at the Kennebec Mills at Fairfield, Me., received a personal injury by accident arising out of and in the course of his employment. As a result of the accident, Mr. Lemelin lost his right hand at the wrist. On or about the 24th day of August, 1918, an agreement for compensation was entered into between Mr. Lemelin and the American Woolen Company, as employer, and Employers' Liability Assurance Corporation, Limited, as insurance carrier, under the provisions of which compensation was to be paid at the rate of $7.27 per week for a period of 125 weeks, beginning June 4, 1918. Said compensation was so paid as per settlement receipt. It was admitted that the payment for 125 weeks was the proper amount of compensation to be paid for the injury which he received, as specific compensation as provided by section 16 of the Workmen's Compensation Act then in force. January 18, 1921, Mr. Leme-

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lin filed a petition for award of compensation with the Industrial Accident Commission. A hearing was had on March 11th, all parties in interest appearing.

The respondents in their answer opposed the prayer of the petitioner on the following grounds:

"(1) Said petition is not filed within the time prescribed by the Compensation Act.

"(2) Agreement for compensation because of alleged accident was entered into between claimant and respondent and duly approved by the Commissioner of Labor. Action for further compensation, if any, should be by petition for review brought within the required time.

"(3) Agreement in this case provided for compensation in the sum of $7.27 per week for a period of 125 weeks, which sums have been duly paid, and during said period no further petition was filed."

Findings of fact by the chairman of the Commission:

"On May 21, 1918, the petitioner, Frank Lemelin, then a man about 66 years of age, received a personal injury by accident arising out of and in the course of his employment with the American Woolen Company, at Fairfield, as a result of which he lost his right hand at the wrist. An agreement providing specific compensation in the sum of $7.27 per week for a period of 125 weeks was entered into between the parties and approved by the Commissioner of Labor August 24, 1918. Compensation has been paid in full according to the terms of the agreement, the date of the last payment being November 18, 1920. Previous to the accident, which resulted in the loss of his right hand, Mr. Lemelin had lost the middle and ring finger on his left hand, so that he now has but two fingers and a thumb on his left hand and the stub of the right arm extending to the wrist. Mr. Lemelin is a man now 68 years old. Up to the date of the accident he had always engaged in manual labor to earn a living. His occupation for several years prior to the accident was mostly digging sewers and hard manual labor of that nature. He can neither read nor write. He has no trade or profession.

"Since the date of the accident, May 21, 1918, he has worked about two weeks altogether at a corn factory carrying baskets which he can do when he can get the work providing he can work with another man so he can carry a basket with his left hand. Other than the work done at the corn factory he has performed no manual labor for hire since the accident. He has tried to get work but could find none he could perform in his crippled condition.

"Since the last payment of compensation in November he has earned no money and has been unable to earn any entirely because of the loss of his right hand together with the crippled condition of the left.

"His average weekly wage at the time of the accident was $15.10, which entitles him, under the Workmen's Compensation Act then in force, to a weekly compensation of $7.27.

"Based on the above facts it is found that Frank Lemelin, the petitioner, is totally incapacitated for labor at the present time and has been totally incapacitated for labor since November 18, 1920, because of the injury sustained by him May 21, 1918, and that he is, therefore, entitled to compensation for total incapacity since that date.

"It is therefore ordered and decreed that the American Woolen Company, or its insurance carrier, the Employers' Liability Insurance Company, pay to the petitioner, Frank Lemelin, compensation in the sum of $7.27 per week commencing November 18, 1920, and to continue so long as the said Frank Lemelin is totally incapacitated for labor because of said injury, provided that the compensation paid as herein ordered shall

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in no event exceed the sum of three thousand nor the period for which compensation is paid exceed 500 weeks from the date of the injury.

"Dated at Augusta, Maine, April 5th, 1921.

"Arthur L. Thayer,

"Chairman, Industrial Accident Commission."

The respondents in their brief contend: (1) That the petition for compensation was not properly entertained; and (2) that there is no evidence to support a finding that petitioner suffered a compensable injury which resulted in total incapacity for work. An agreement was entered into between the employer and employee which was duly approved by the Commissioner August 24, 1918. On the face of the agreement was written these words, "Subject to review as provided by the Workmen's Compensation Act." These words added nothing to the agreement, as the statute gave the right to such review without them, as follows:

"Sec. 36. At any time before the expiration of two years from the date of the approval of an agreement by the commission, or the entry of a decree fixing compensation, but not afterwards, and before the expiration of the period for which compensation has been fixed by such agreement or decree, but not afterwards, any agreement, award, findings or decree may be from time to time reviewed by the chairman or associate legal member upon the application of either party, after due notice to the other party, upon the grounds that the incapacity of the injured employee has subsequency ended. increased or diminished."

[1] The approved agreement had the force of a judgment of a court (section 35), and this was subject to review under section 36, but only in the manner and within the time therein specified, viz.:

"At any time before the expiration of two years from the date of the approval of an agreement by the commissione. * * * but not afterwards, and before the expiration of the period for which compensation has been fixed by such agreement * * * but not afterwards," any agreement may be reviewed, etc.

[2] That is, in this case the petition for review in order to be within the statute should have been filed within two years after August 24, 1918, viz., before August 24, 1920, and within the 125 weeks, but not afterwards. Had a petition for review been filed within those periods, it would have been in season. None was filed. The petition herein is not a petition for review; it is an original petition. If it could be construed into a petition for review, which it clearly cannot, it is barred by the statutory limitation of section 36. Being an original petition for compensation, it is barred by the two-year limitation specified in section 39. It is clear that the claimant has slumbered on his rights, and this court cannot now restore them to him in the face of the positive limitations fixed by the Workmen's Compensation Act. We may construe the act liberally, but we cannot amend or add to it.

Appeal sustained.

Decree of the sitting Justice reversed.

Petition dismissed.

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BATES v. SHAFFER. (No. 7.)

(Supreme Court of Michigan. (Dec. 21, 1921.)

185 Northwestern Reporter, 779.

2. MASTER AND SERVANT — EMPLOYEE SINKING STONES ON FARM HELD A "FARM LABORER" WITHIN COMPENSATION ACT.

One engaged to sink stones on a farm *held* a "farm laborer" within the Workmen's Compensation Act, pt. 1, § 2 (Comp. Laws 1915, § 5424), making the act inapplicable to "farm laborers," though employer's principal business was the selling of merchandise, the class of the employment being determined by the character of the work.

(For other cases, see Master and Servant, Dec. Dig. § 363.)

(For other definitions, see Words and Phrases, Second Series, Farm Laborer.)

Error to Circuit Court, Hillsdale County; Guy M. Chester, Judge.

Action by Charles Bates against Earl Shaffer. Judgment for defendant, and plaintiff brings error. Affirmed.

Argued before Steere, C. J., and Moore, Wiest, Fellows, Stone, Clark, Bird, and Sharpe, JJ.

Paul W. Chase and Merton Fitzpatrick, both of Hillsdale, for appellant.

C. A. Shepard, of Hillsdale, and Julian A. Palmer, of Camden, for appellee.

SHARPE, J. The defendant is a general storekeeper in the village of Camden, in Hillsdale county. He also owns and operates a farm a few miles distant from the village. George Horr, defendant's foreman, employed plaintiff as a day laborer to sink some large stones on the farm. He had worked at it a number of days, having sunk about 40. On the day of his injury he had dug a large hole in which to sink a stone, estimated to have been about 6 by 5 by 2½ feet in size. It was his practice to call the foreman or one of the laborers to assist in getting the stone into the hole. When about ready to do so, the defendant came to the farm and went to the place where plaintiff was working. He assisted plaintiff in an effort to roll the stone into the hole, but without effect. It is plaintiff's claim that defendant said to him, "We will dig under it a little." They got down in the hole and plaintiff began digging under the stone and defendant throwing the loose dirt out. Suddenly, and without warning, the stone began to tip. Plaintiff called to defendant, "She's coming," and jumped into the corner of the hole farthest from the stone, but in its fall it struck against his legs, breaking a bone in the right one and brusing both.

At the conclusion of plaintiff's proofs, the trial court, on defendant's motion, directed a verdict in his favor. Plaintiff here reviews the judgment entered on such verdict. The assignments of error are all based on the action of the court in directing the verdict for defendant.

[1] If the rule as to assumption of risk applies, there can be no recovery. The plaintiff was employed to do a particular class of work, with which he was familiar, and the claimed instruction of defendant that he "should dig under it a little" was not understood by plaintiff as a direction that he should do other than he was in the habit of doing at such

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work under similar circumstances. His counsel now claim that a "runway" should have been dug, but, if this was needed for his protection, he should have dug it. Defendant in no way interfered in the manner of doing the work so as to render him liable for failure to provide plaintiff with a safe place to work. The danger was apparent, and was assumed by plaintiff. Piquegno v. Chicago, etc., R. Co., 52 Mich. 40, 17 N. W. 232, 50 Am. Rep. 243; Manning v. Railway Co., 105 Mich. 260, 63 N. W. 312, Welch v. Brainard, 108 Mich. 38, 65 N. W. 667; Cronin v. Russel Wheel, etc., Co., 132 Mich. 500, 93 N. W. 1070; Bauer v. American Car. Co., 132 Mich. 537, 94 N. W. 9; Bradburn v. Wabash R. Co., 134 Mich. 575, 96 N. W. 929; Harrison v. Detroit, etc., Ry. Co., 137 Mich. 78, 100 N. W. 451; Livingstone v. Saginaw Plate Glass Co., 146 Mich. 236, 109 N. W. 431.

[2] Plaintiff, however, claims that, as defendant had not elected to come under the Workmen's Compensation Act, he cannot rely on this defense. By section 2 of part 1 of the Act (2 Comp. Laws 1915, § 5424) its provisions do not apply to "farm laborers." Clearly, plaintiff was within this class. He was engaged in labor on a farm quite as much as if he had been at work picking up smaller stones and loading them on a wagon, in removing large stumps, digging ditches, or other work not directly connected with the putting in or harvesting of crops. See Shafer v. Parke, Davis & Co., 192 Mich. 577, 159 N. W. 304; Miller & Lux v. Industrial Accident Commission, 179 Cal. 764, 178 Pac. 960, 7 A. L. R. 1291, and annotations thereto. The fact that the defendant's principal business was the selling of merchandise in no way affected the nature of plaintiff's employment at the time of his injury. It is not the business of the employer, but the character of the work itself, which determines the class of the employment. Shafer v. Parke, Davis & Co., supra.

The judgment is affirmed.

BROWER v. W. H. ISGRIGG & SON ET AL. (No. 91.)

(Supreme Court of Michigan. Dec. 21, 1921.)

185 Northwestern Reporter, 664.

1. MASTER AND SERVANT — EVIDENCE HELD TO SHOW COMPENSATION CLAIMANT WORKED AS EMPLOYEE, AND NOT AS INDEPENDENT CONTRACTOR.

Where plaintiff had taken over a contract with defendant under which he was to furnish all labor necessary and do certain work in connection with a building, but there was work not provided for by the contract, and as to which plaintiff testified he was to be paid for at a time rate per hour, evidence *held* to sustain a finding that work in which he was engaged when injured was as an employee under such time rate contract, and not under the general contract as an independent contractor.

(For other cases, see Master and Servant, Dec. Dig. § 405[2].)

2. MASTER AND SERVANT — COMPENSATION CLAIMANT'S RELATION MIXED QUESTION OF LAW AND FACT.

Question of whether work being done by plaintiff at the time he wa injured was within a contract he had taken over from defendant as in dependent contractor, or was within an additional contract of employ

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ment by the hour, was one of law and fact, construction of the contract being one of law, and what plaintiff was doing, and whether such work came within the contract, was a mixed question of law and fact.

(For other cases, see Master and Servant, Dec. Dig. § 367.)

3. MASTER AND SERVANT — FINDINGS BY INDUSTRIAL BOARD CONCLUSIVE.

The facts as found by the Industrial Accident Board are conclusive on review.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Certiorari to Industrial Accident Board.

Claim by Joseph Brower, as employee, against W. H. Isgrigg & Son and the State Accident Fund. The Industrial Accident Board made an award for plaintiff, and defendants bring certiorari. Affirmed.

Argued before Steere, C. J., and Moore, Fellows, Wiest, Stone, Clark, Bird, and Sharpe, JJ.

Kerr & Lacey, of Detroit, for appellants.
Robert D. Heitsch, of Pontiac, for appellee.

WIEST, J. This case brings up the sole question of whether plaintiff was performing work as an independent contractor at the time he was injured. The Industrial Accident Board found he was not.

Plaintiff took over a contract under which he was to furnish all labor necessary and do the metal lathing in connection with a certain school building, and was to be paid for all straight work, such as ceilings and walls, 10½ cents per square yard, the price to include metal lath bent down on walls directly in connection with straight ceilings and walls, and for placing bent metal strips for other places, separate from ceilings and walls, 3½ cents per lineal foot, and for placing corner beads on stud partitions and other places, in connection with wood, 3 cents per lineal foot, and for securing the same to masonry 5 cents per lineal foot.

[1] At the time he was injured he was engaged in putting "metal sills on the window heads." Plaintiff testified that there was nothing in the contract covering that work, and he was employed to do it, and it was agreed between himself and the defendant contractor that his work in that respect should be paid for at the rate of $1.37½ per hour.

Isaac Jefferson Isgrigg, one of the partners in defendant copartnership, testified as follows:

"Q. You had some talk with Mr. Brower about certain work not being included in the contract, and that it would be necessary to do that before he did so, didn't you? A. Mr. Brower called my attention to that arrangement.

"Q. And he called your attention to the fact that there were certain parts of this work that were not covered by the whole contract? A. Yes; he mentioned that.

"Q. You talked that over with him? A. I agreed to pay him $1.37½ an hour for such things as he considered that would not come under this contract."

It is clear that all work falling within the contract first mentioned was to be performed by plaintiff as an independent contractor, but this did not bar other relations respecting work not within the contract.

Counsel for defendants urge that the question of whether the work he was so doing was within the contract was solely a question of law, and admitted of no testimony that it was not covered by the contract. It appears that the parties themselves treated the work as outside the contract.

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[2] But, regardless of that, we are of the opinion that the question of whether the work being done by plaintiff at the time he was injured was within the contract was one of law and fact; the construction of the contract being a question of law, and what plaintiff was doing, and whether such work came within the contract, a mixed question of law and fact.

[3] The facts, as found by the board, are conclusive, and admit of the law applied. It is urged that, plaintiff having engaged one Phelps to help on the hour work, such fact tends to show he was an independent contractor. Such fact sometimes is an aid upon the question, but not necessarily controlling, and, considered with the other evidence, leads us to attach no controlling importance thereto.

The award is affirmed, with costs to plaintiff.

GRATOPP ET AL. v. CARDE STAMPING & TOOL CO. ET AL.
(Nos. 77–80.)

(Supreme Court of Michigan. Dec. 21, 1921.)

185 Northwestern Reporter, 675.

1. MASTER AND SERVANT—FINDINGS OF INDUSTRIAL ACCIDENT BOARD CONCLUSIVE ON CERTIORARI.

In proceedings for compensation for injuries, involving a dispute as to which of two insurers was liable for the compensation, where the Industrial Accident Board found that one of the insurers was paid the premium for carrying the risk during the period in question, and the other was not, the facts so found were conclusive on certiorari.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

2. MASTER AND SERVANT—NEW ELECTION, DESIGNATION AND APPROVAL NOT REQUIRED ON CHANGE OF COMPENSATION INSURERS.

Under Pub. Acts 1919, No. 64, pt. 1, § 6, requiring an employer, in electing to come under the act, to designate one of four methods provided in part 4, § 1, for the payment of compensation, where an employer designated the method and named a particular insurance company, and had the election and designation duly approved by the board, it was not required to have another election, designation, and approval in order to change insurers.

(For other cases, see Master and Servant, Dec. Dig. § 383.)

3. MASTER AND SERVANT—CHANGE OF COMPENSATION INSURANCE MUST BE TO COMPANY AUTHORIZED TO CARRY RISK.

Under Pub. Acts 1919, No. 64, pt. 1, § 6, and part 4, § 1, where an employer has elected to insure its liability for compensation, and has designated a particular insurance company, a change of insurers should be to a company legally entitled to make the contract.

(For other cases, see Master and Servant, Dec. Dig. § 383.)

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4. MASTER AND SERVANT—COMPENSATION MUST BE INSURED IN SINGLE COMPANY.

When an employer adopts the method of carrying his risk under Pub. Acts 1919, No. 64, in an insurance company, the statute contemplates that he shall insure all his liability for all his businesses in one insurance company, not in two or more.

(For other cases, see Master and Servant, Dec. Dig. § 383.)

5. MASTER AND SERVANT—COMPENSATION INSURER NOT LIABLE AFTER CANCELLATION OF INSURANCE, WHERE EMPLOYER HAS PROCURED OTHER INSURANCE.

Pub. Acts 1919, No. 64, pt. 4, § 1, requiring insurance policies thereunder to provide that any termination or cancellation shall not be effective for 10 days after notice thereof to the Industrial Accident Board, is for the benefit of employees, and will not be construed to hold a company which has canceled its policy, where the employer has permitted no lapse, but has at once provided another insurer which has accepted the premium, and filed its acceptance with the board.

(For other cases, see Master and Servant, Dec. Dig. § 383.)

Certiorari to Industrial Accident Board.

Consolidated proceedings under the Workmen's Compensation Act by Herman Gratopp and others to recover compensation for injuries, opposed by the Carde Stamping & Tool Company, employer, and the General Accident, Fire & Life Assurance Corporation, Limited, and the Employers' Liability Assurance Corporation, Limited, insurers. Compensation was awarded to be paid by the first-mentioned insurer, and it brings certiorari. Affirmed.

Argued before Steere, C. J., and Moore, Wiest, Fellows, Stone, Clark, Bird, and Sharpe, JJ.

Kerr & Lacey, of Detroit, for appellant General Acc. Assur. Corp.

Frederick T. Witmire, of Detroit, for appellant Employers' Liability Assur. Corp.

Cook & Cook, of Saginaw, for appellant Carde Stamping & Tool Co.

George C. Watson, of Capac, for appellee O'Connor.

CLARK, J. The four plaintiffs suffered accidental personal injuries arising out of and in the course of their employment with the defendant employer. The cases have been consolidated. The accidents were on July 7, 9, 13, and 16, 1920.

The question is which of the defendant insurance companies should pay compensation. The Employers' Liability Assurance Corporation, hereinafter called the Employers, was on the risk prior to July 6th, when it it canceled its policy, and on July 17th wrote thereof to the Industrial Accident Board. The letter was received July 19th. The board replied that the policy would become terminated 10 days following the receipt of the notice, this in accordance with section 1, pt. 4. Act 64, Public Acts of 1919.

On July 6th the General Accident, Fire & Life Assurance Corporation, hereinafter called the General Accident, issued to the employer its policy carrying the risk, dated July 1st, was paid the premium, and filed on July 15th its notice of acceptance with the board. On July 27th, the General Accident gave notice to the board that it was on that day giving to the employer notice of cancellation of its policy, and on that day the board gave notice to the employer to show cause why its acceptance under the act should not be revoked.

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On July 28th the board received a letter from the Employers that its letter of July 17th was error, and that it had issued a new policy as of July 6th, covering the risk, and its certificate to that effect, dated July 28th, was filed with the board July 29th. But another certificate was filed by the Employers dated August 6th, and it was said in a letter of October 7th that by an error such policy was written to date from July 6th instead of August 6th.

[1] The board found that for carrying the risk during the period in question the General Accident received the premium and the Employers did not, and awarded compensation to be paid by the General Accident, and it has brought the case here for review. The facts found by the board are here conclusive.

[2-4] Section 6 of part 1 of the act requires the employer, in making his election to come under the act, to designate one of the four methods provided by section 1 of part 4 of the act for payment of compensation. The employer having designated the method and having named the Employers as the company carrying the risk, and having had his election and designation duly approved by the board, was not required to have another election, designation, and approval in order to accomplish a change of insurers. The change should be to a company legally entitled to make the contract. When the employer adopts the method of carrying his risk in an insurance company, the statute contemplates that he shall insure all his liability for all of his businesses in one insurance company, not two or more.

[5] A condition of such insurance policy required by section 1 of part 4 of the act is:

"That it will file with the Industrial Accident Board, at Lansing, Michigan, at least ten days before the taking effect of any termination or cancellation of this contract or policy, a notice giving the date at which it is proposed to terminate or cancel this contract or policy; and that any termination of this policy shall not be effective as far as the employees of the insured covered thereby are concerned until ten days after such notice of such proposed termination or cancellation is received by the said Industrial Accident Board."

It is because of this section that counsel for the General Accident seek to place the liability for the accidents upon the Employers. This provision is for the benefit of the employee by affording time to an employer to procure other insurance to replace that canceled. It will not be construed to hold a company which has canceled its policy where the employer has permitted no lapse, but has at once provided another insurer, as was done here. The General Accident was on the risk during the time in question. It accepted the premium. It filed its acceptance with the board. It should pay. See Brown v. Bouscher, 207 Mich. 594, 175 N. W. 129.

The award is affirmed.

HUBBARD v. REPUBLIC MOTOR TRUCK CO. ET AL. (No. 23.)

(Supreme Court of Michigan. Dec. 21, 1921.)

185 Northwestern Reporter, 715.

MASTER AND SERVANT — FINDING OF COMPENSABLE INJURY BY SCRATCH HELD UNWARRANTED.

Evidence in support of a claim for a workman's death from septic poisoning, developing after a scratch on his hand, *held* not to sustain a

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finding of the Industrial Accident Board that the scratch was an accidental personal injury arising out of and in the course of his employment of spreading cotter pins.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Certiorari to Industrial Accident Board.

Proceeding for compensation under the Workmen's Compensation Act (Pub. Acts [Ex. Sess.] 1912, No. 10) by B. C. Hubbard, guardian of Kenneth Raymond Ford and others, minors, opposed by the Republic Motor Truck Company, employer, and the Travelers' Insurance Company, insurer. The Industrial Accident Board made an award to claimant and defendants bring certiorari. Award vacated.

Argued before Steere, C. J., and Moore, Wiest, Fellows, Stone, Clark, Bird, and Sharpe, JJ.

William A. Bahlke, of Alma, for claimant.

Vandeveer & Foster, of Detroit, for respondents.

CLARK, J. Was the death of James Weeks due to an accidental personal injury arising out of and in the course of the employment? The board found that it was and made an award, which defendants review here on certiorari.

The employment ended Saturday noon, May 15, 1920. The following Monday forenoon a scratch upon Mr. Weeks' hand was observed, and there was testimony of swelling and of red streaks upon the hand. Later a doctor was consulted, who found a developed case of septic poisoning. The scratch and the resulting infection caused the death. Based upon the condition and appearance of the hand on Monday forenoon, as related by witnesses, there was medical testimony that the scratch had been suffered not less than 48 hours and not more than 6 days prior thereto. This brought the time of injury within the last week of the employment. There was testimony that a part of the employment was spreading cotter pins, which was likely to produce scratches upon the hands; that Mr. Weeks and another employee had been so scratched several times in such work. There was no testimony that Mr. Weeks had suffered a scratch in such employment during the last week thereof, or at any other definite time. There was testimony that he did many and various chores about his home, including gardening and housework, and that he kept and cared for a cow. A finding that the scratch was an accidental personal injury arising out of and in the course of the employment rests upon conjecture and cannot be sustained.

Plaintiff relies on the cases of Buhse v. Whitehead & Kales Iron Works, 194 Mich. 413, 160 N. W. 557, and McRae v. Morgan & Wright, 205 Mich. 493, 171 N. W. 394. But in those cases there was evidence that accidental personal injury was actually received in the course of the employment, and this may be said of Kinney v. Cadillac Motor Car Co., 199 Mich. 435, 165 N. W. 651. See Ginsberg v. Burroughs Adding Machine Co., 204 Mich. 130, 170 N. W. 15; Chaudier v. Stearns & Culver Lumber Co., 206 Mich. 433, 173 N. W. 198, 5 A. L. R. 1673; Guthrie v. Detroit Shipbuilding Co., 200 Mich. 355, 167 N. W. 37; Draper v. Regents of University of Michigan, 195 Mich. 449, 161 N. W. 956.

The award is vacated.

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KING ET AL. v. PENINSULAR PORTLAND CEMENT CO. ET AL. (No. 55.)

(Supreme Court of Michigan. Dec. 21, 1921.)

185 Northwestern Reporter, 858.

1. MASTER AND SERVANT — COMPENSATION CLAIMANT NOT APPEALING FROM ARBITRATION DECISION HELD PROPERLY BEFORE ACCIDENT BOARD.

Where widow and children sought compensation under the Workmen's Compensation Act for death of husband and father, it cannot be said the widow was not properly before the Accident Board because she was denied compensation on the arbitration hearing and did not appeal, under Comp. Laws, § 5464; the appeal being taken by the employer and insurer carrier.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

3. MASTER AND SERVANT—POSTHUMOUS CHILD ENTITLED TO COMPENSATION AS "DEPENDENT."

Posthumous children are entitled to compensation due as the result of death of a parent under the Workmen's Compensation Act in view of Comp. Laws 1915, § 11807; such a child being totally "dependent" upon parents for nourishment.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

(For other definitions, see Words and Phrases, First and Second Series, Dependent.)

4. MASTER AND SERVANT — FINDING OF DEPENDENCY WITHIN COMPENSATION ACT SUSTAINED.

In a proceeding under the Workmen's Compensation Act, evidence *held* to support finding that child born one month after the marriage, and child born three months after death of employee, were the children and the dependents of the deceased employee, in view of Pub. Acts 1919, No. 64, pt. 2, § 6.

(For other cases, see Master and Servant, Dec. Dig. § 405[5].)

5. MASTER AND SERVANT—FINDINGS OF INDUSTRIAL BOARD UNDER COMPENSATION ACT CONCLUSIVE.

Findings of Industrial Board in a proceeding under the Workmen's Compensation Act cannot be disturbed on certiorari if they have evidence to support them.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Certiorari to Industrial Accident Board.

Proceeding by Marie King and others under the Workmen's Compensation Act to obtain compensation for the death of Burley Aughinbaugh, opposed by the Peninsular Portland Cement Company, the employer, and the Michigan Mutual Liability Company, the insurer. The Industrial Accident Board awarded compensation, and the employer and the insurer bring certiorari. Award affirmed.

Argued before Steere, C. J., and Moore, Wiest, Fellows, Stone, Clark, Bird, and Sharpe, JJ.

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Beaumont, Smith & Harris, of Detroit (Hal H. Smith, of Caro, and Albert E. Meder, of Detroit, of counsel), for appellants.

Cummins & Nichols, and Paul G. Eger, all of Lansing, for appellees.

STONE, J. The writ of certiorari herein brings before this court from the Industrial Accident Board the record in the claim for compensation of Marie King, Margaret Aughinbaugh, and Joseph Aughinbaugh, against the defendants, as total dependents of Burley Aughinbaugh, who was killed May 19, 1920, while employed by the defendant the Peninsular Portland Cement Company at Cement City, Mich. Marie King was the wife of deceased. The other two applicants claim compensation as his children by Marie King. The only question in controversy is the dependency of the above-named applicants, or that of any of them. The matter was heard on arbitration on March 10, 1921, and compensation was awarded to the applicants Margaret and Joseph at the rate of $14 per week for a period of 300 weeks, but was denied the applicant Marie King on the ground that she was not a dependent within the meaning of the law. From this award the defendants have appealed to the full board, alleging that the board erred in the following particulars:

(a) By holding as matter of law that either applicant was conclusively presumed to have been dependent upon the deceased on May 19, 1920.

(b) By holding as matter of law that either applicant as a matter of fact, was dependent for support upon the earnings of deceased on May 19, 1920.

(c) By holding as matter of law that either Margaret or Joseph was a member of the family of deceased on May 19, 1920.

(d) By holding as matter of law that either Margaret or Joseph was a lineal descendant of deceased.

(e) By holding as matter of law that either applicant was either totally or partially dependent for support on decedent on May 19, 1920.

(f) By holding as matter of law that Marie King was properly before it, so that an award could be made in her favor.

(g) By holding that it had authority to reject testimony not objected to at the arbitration or hearing on review.

(h) By ordering that either applicant was entitled to any compensation from either of the defendants.

[1] It appears that Marie King did not appeal from the arbitration finding, and we are met at the threshold of the case by the proposition that Marie King was not properly before the Accident Board. We do not think there is any merit in this proposition, but that it is disposed of by the case of Margenovitch v. Newport Mining Co., 213 Mich. 272, 181 N. W. 994, in which we said:

"If either party files an appeal, the Industrial Accident Board is the power by the statute to review the decisions of the committee on arbitration. 2 Comp. Laws 1915, § 5464."

"This section evidently contemplates a de novo hearing before the Industrial Accident Board on appeal with the power to make decision therein. without regard as to whether such decision affirms, reverses, increases or decreases the award made by the arbitrators, and without regard to the question as to whose appeal it may have been."

[2] Marie Aughinbaugh (now King) was married to the decedent on April 25, 1918. She and the deceased lived together as husband and wife from the time of their marriage until January, 1920. Joseph was born May 31, 1918, a little more than a month after said marriage. The child Margaret was August 28, 1920, a little more than three months after the death of decedent. There was evidence to the effect that during the time the parties lived together as husband and wife the decedent sup-

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ported his wife and said child Joseph; that in January, 1920, decedent went to Disko, Ind., where he secured a job, the wife remaining in Wabash, Ind.; that decedent continued to live in Disko for one month, when he went to Decatur, Ind., where he remained about three months, removing from there to Cement City, Mich., only six days before he was killed; that the boy Joseph was placed with a Mrs. Hauck by his mother about one month before the death of his father while she was employed in a hotel; after remaining with Mrs. Hauck about a week and a half the mother again took him; she kept him with her for about a week, when he again returned to Mrs. Hauck, where he remained until after the death of his father; that during the three months the deceased lived in Decatur he wrote a number of affectionate letters to his wife and requested her to join him with the boy Joseph. He also sent her $5 on two occasions. Three of these letters were offered in evidence. The Board found that it was apparent from these letters and other evidence that the deceased did not consider that he was living apart from his wife and child. It did appear under a rigorous cross-examination that Marie admitted that she did not join her husband because she intended to marry one Joseph King, and the evidence shows that she did marry King about 21 days after her husband's death. It appears that defendants secured a statement from the widow in January, 1921, in which she admitted that the deceased was not the father of either of the children; and on cross-examination she admitted that this statement was true. The defendants claim that because this testimony was admitted without objection, it should be controlling in determining the status of the children. The Board held that it was contrary to public policy to allow parents to testify to the illegitimacy of their children, and for that reason the Board rejected the testimony of the mother relative to the parentage of her children. The rule seems to be well established that neither the father nor the mother can testify to the illegitimacy of the child. See Egbert v. Greenwalt, 44 Mich. 245, 6 N. W. 654, 38 Am. St. Rep. 260; Rabeke v. Baer, 115 Mich. 328, 73 N. W. 242, 60 Am. St. Rep. 567; People v. Case, 171 Mich. 282, 137 N. W. 55.

It was held distinctly in the last-cited case that the presumption of legitimacy cannot be overcome by the testimony of either the husband or wife.

In the Baer Case the following language was quoted with approval from 1 Jones on Evidence, § 96:

"It is well settled, on grounds of public policy, affecting the children born during the marriage, as well as the parties themselves, that the presumption of legitimacy as to children born in lawful wedlock cannot be rebutted by the testimony of the husband or wife to the effect that sexual intercourse has or has not taken place between them. * * * The rule not only excludes direct testimony concerning such intercourse, but all testimony of such husband or wife which has a tendency to prove or disprove legitimacy. * * * The rule rests, not only on the ground that it tends to prevent family dissension, but on broad grounds of public policy. * * * Nor does it depend upon the form of action, or the parties. On the contrary, it obtains whatever the form of legal proceedings, or whoever may be the parties." 2 L. R. A. (N. S.) 619, note; Wallace v. Wallace, 137 Iowa, 37, 114 N. W. 527, 14 L. R. A. (N. S.) 544, 126 Am. St. Rep. 253, 15 Ann. Cas. 761.

We think the Board did not err in its holding upon this question.

[3] As to the child Margaret, born after the death of decedent, it has been repeatedly held that posthumous children are entitled to compensation due as the result of the death of a parent. By the terms of section 11, 807; Comp. Laws 1915, it is provided that posthumous children are considered as living at the death of their parents. Catholic Benefit Ass'n v. Firnane, 50 Mich. 82, 14 N. W. 707; Chambers v. Shaw, 52 Mich.

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18, 17 N. W. 223; Knorr v. Millard, 57 Mich. 268, 23 N. W. 807; McLain v. Howald, 120 Mich. 274, 79 N. W. 182, 77 Am. St. Rep. 597.

A child en ventre sa mere is totally dependent upon its parents for nourishment.

In accordance with the general presumption that a posthumous child is to be regarded as born already, if it be for his benefit, such child may rank as a dependent, Williams v. Ocean Coal Co., Ltd. (1907) 2 K. B. 422; 76 L. J. K. B. 1073; 97 L. T. 150; 23 T. L. R. 584; 9 W. C. C. 44; 6 N. & C. C. A. 260.

In New Jersey it is held that a posthumous illegitimate child is dependent upon its father for support, within the meaning of the Workmen's Compensation law of that state. Klimchak v. Ingersoll Rand Co., 39 N. J. Law J 275.

The Board held that Margaret was the legitimate child of the deceased under the evidence; and that both children being under 16 years of age were, under the statute. conclusively presumed to be dependents. Section 6, p. 2, Act No. 64, Pub. Acts 1919.

[4, 5] Referring to the record, while much criticism might be indulged in when considering the testimony of the applicant Marie King we are unable to say that there was no evidence to support the several findings of the Board. Were we weighing the testimony and passing upon the facts, we might reach a different conclusion than that arrived at by the board. This we cannot do. The Board concluded its findings in the following language:

"After a careful examination of the entire files in the case, we find:

"(1) That Marie King was the wife of Burley Aughinbaugh on May 19, 1920, and that she was living with him at the time of his death.

"(2) That Joseph Aughinbaugh was the son of Burley Aughinbaugh, and that he was living with Burley Aughinbaugh on May 19, 1920, and that he was less than 16 years of age.

"(3) That Margaret Aughinbaugh is the posthumous child of Marie Aughinbaugh-King and Burley Aughinbaugh, and that she was born August 28, 1920.

"It therefore follows that the decision of the arbitration committee, in so far as it refers to Margaret and Joseph Aughinbaugh, should be affirmed, and that the decision, in so far as it refers to Marie-King, should be reversed, and that Marie King, Margaret Aughinbaugh, and Joseph Aughinbaugh, are held to be total dependents of Burley Aughinbaugh. An order to that effect will be duly entered."

The order of the Industrial Accident Board is therefore affirmed.

PUNCHES v. AMERICAN BOX BOARD CO. ET AL. (No. 33.)

(Supreme Court of Michigan. Dec. 21, 1921.)

185 Northwestern Reporter, 758.

MASTER AND SERVANT—EVIDENCE HELD TO SHOW COMPENSABLE INJURY TO TEAMSTER.

Where an employer permitted a hired team driven by its employees to be kept in its yards and cared for by its employees, and later an employee, driving the team with the knowledge and acquiescence of the foreman, took it to his own barn each night, and was killed while driving the team to work one morning, evidence *held* sufficient to support a find-

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ing that he died as the result of an accidental personal injury arising out of and in the course of his employment.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Certiorari to Michigan Industrial Accident Board.

Proceeding under the Workmen's Compensation Act (Pub. Acts Extra Sess. 1912, No. 10) by Sylvia Punches for compensation for the death of her husband, Jideon Punches, opposed by the American Box Board Company, employer, and the Michigan Employers' Casualty Company, insurer. Compensation was awarded, and the employer and insurer bring certiorari. Affirmed.

Argued before Steere, C. J., and Moore, Wiest, Fellows, Stone, Clark, Bird, and Sharpe, JJ.

Brown & Kelley, of Lansing, for appellants.

Cornelius Hoffius and Dorr Kuizema, all of Grand Rapids, for appellee.

STONE, J. In this proceeding the defendants and appellants seek to reverse the findings of the Industrial Accident Board, that decedent was within the course of his employment at the time of the accident which resulted in his death, and that the accidednt to decedent arose out of his employment.

Plaintiff claims compensation as the only dependent of Jideon Punches, her deceased husband, who she claims died at Grand Rapids on September 19, 1920, as the result of an accidental personal injury sustained by him while in the employ of defendant American Box Board Company on September 8, 1920. On arbitration the plaintiff was awarded compensation at the rate of $14 a week for a period of 300 weeks. From this award defendants appealed to the board. Some additional testimony was submitted to the board and the award was affirmed. The defendant American Box Board Company was engaged in the manufacture of corrugating and fiber shipping containers, at Grand Rapids. Mich. In its business it had occasion to use a team of horses for the purpose of drawing straw, paper, and other articles from place to place in its yards. One William Barry was the owner of a team, and the yard foreman, Arthur T. Barnes (of whose authority to act for said defendant there seems to be no question), engaged Barry to furnish his team to do this work. It was the original arrangement between Barnes and Barry that the latter was to drive his team, but, as Barry was suffering from rheumatism, Barnes agreed to let some of his men drive the team. Said defendant began using the team in April, 1920. For about three weeks Barry brought his team to defendant's yard mornings, and came for it in the evening, but when the weather became warmer, Barry, who was still suffering from rheumatism, desired to let his team remain overnight in defendant's yards. Accordingly the team was placed in a shed on the premises at night, and was fed and cared for by different employees of said defendant; Barry furnishing the feed and hay, and occasionally coming to the plant to see about his team. At first no particular employee was charged with the duty of driving the team or caring for it, but Barnes, the foreman, appears to have taken some interest in having the team properly cared for.

About June 28th the decedent entered the employ of said defendant as a laborer in the yards. It appears to have become the practice that the employee who first arrived at the yards in the morning would feed the team. As decedent usually came to work early, and was the only employee who came past the shed where the team was kept, he usually

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fed the team in the morning. He was familiar with the handling of horses, and in the course of time came to do most of the driving of the team, and was the most regular in caring for it. The men began their work at 7 o'clock a. m. During the summer the shed where the team had been kept was removed, and the owner brought a canvas which was stretched over poles, and the team was for a time kept under this canvas. Some five or six weeks before his death decedent began taking the team to his home, about a mile from his place of work, where he had a barn. Barnes, the foreman, testified that he had no recollection of having given decedent any express authority to take the team to his barn nights, but that he learned of the practice about the time it began and made no objections. There was some testimony to the effect that Barnes had admitted that he expressly consented to decedent's request that he be permitted to keep the team in his barn as a matter of convenience, but this testimony was contradicted by Barnes. The decedent kept the team in his barn nights for a period of some weeks, fed the horses from feed furnished by Barry (but some of which had been ordered delivered at decedent's place by Barnes), and decedent cared for the horses there, and drove them onto the job in the morning, with knowledge of the foreman, and without any objection from him.

It appears that decedent voluntarily quit the employ of the said defendant, about two weeks before the accident, but on the morning of the day before the accident he returned to work "at his old job," and drove the team and took it to his home in the evening, at the close of his work. During the time decedent did not work, the team was driven by other employees, and was cared for upon the premises of said defendant, in substantially the same manner as had been the practice earlier. It would seem that Barnes did not know that decedent had taken the team to his barn on the night before his accident, that no instructions had been given as to the care of the team on September 7th, and that decedent, who returned to his old job of driving the team, took it to his home at the end of the day, as he had previously done, without consulting the foreman. It appears from the evidence that on the morning of September 8th decedent fed the team at his home about 5:30 o'clock, and at about 15 minutes of 7 he hitched the horses to the wagon and started toward the place of his employment. About 5 minutes after 7 o'clock the team ran up to said defendant's yards, and upon investigation decedent was found lying near the driveway, along which it was customary for him to drive in going to and from his work. The planks which formed the wagon box, by being placed loosely upon the bolsters, were found strewn along the ground between the point where decedent was found and the point where the team was stopped. Some of decedent's ribs were broken, and had punctured his lungs, and he died from his injuries on the next day. We think it appears that decedent fell, or was thrown from the wagon, while on his way to his work, and thus sustained the injuries which caused his death.

It is the claim and theory of plaintiff that it was a part of the duties of decedent to care for this team; that with the approval and consent of said defendant, through its foreman, decedent had taken this team to his home for the purpose of caring for it; and that, when driving the team from the place where it was being kept to the place of work, he was in the employ of said defendant, and that the accident thus sustained by him arose out of and in the course of his employment.

As we understand the claim of defendants, it is that decedent had taken the team to his home, either for his own personal convenience or for the convenience of the owner. and that his relations to the Box Board Company were the same as that of any other employee going to his work; i. e., that his employment did not begin until he reached his place of employment. That there was competent legal evidence to support the claim

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of the plaintiff, we quote from the testimony of Foreman Barnes. who was called by plaintiff for cross-examination under the statute. Among other things he testified as follows:

"Q. That was his [Punches'] business to do that, to feed the team at home there? A. Yes, sir.

"Q. And the team was supposed to be fed before it came down in the morning, before he started to work with it? A. Yes, sir.

"Q. And he was to look after the harness and keep that in shape, whatever was necessary? A. Yes, sir.

"Q. And the wagon? A. Nothing to do with the wagon.

"Q. Well, keep it greased, etc., I presume? A. Yes, sir. * * *

"Q. Had Mr. Punches been laid off for a week or so shortly before this accident? A. I think he was off a week or thereabouts.

"Q. And he had just got to work again, did he? A. Yes, sir.

"Q. Had his old job of handling this team? A. Yes, sir.

"Q. And he expected to come to work that morning, the fatal morning of the accident, with his team? A. Yes, sir.

"Q. And, of course, the team was supposed to be fed when they came down to work? A. Yes, sir. * * *

"Q. You looked after that, too; you made the rules and orders as to how the team should be taken care of when the team was left there on the place? A. Yes, sir.

"Q. At first you put them there in the shed? A. Yes, sir.

"Q. Later on he [Punches] was the regular man, was he, on the team? A. Yes, sir; he was the most regular man.

"Q. You picked him out because he was a steady man and because he knew something about teams? A. Yes, sir.

"Q. He had been a teamster, I believe? A. Yes, sir.

"Q. And so you preferred him? A. Yes, sir.

"Q. And he became the regular teamster there with that team? A. Yes, sir. * * *

"Q. After that time, then, he took charge of that team; took them home? A. Yes, sir; I think thereabouts; somewhere about that time. * * *

"Q. Did you give any orders to Dykstra for the delivery of feed to Punches' home? A. I think he drove down there, the boy did, and threw it off on the ground, the same as was usual. I told him to take it on to the house. * * *

"Q. Whom did you give that order to? A. Mr. Punches, I guess.

"Q. To get feed? A. To get feed; yes, sir.

"Q. And to take it up to his house? A. Yes, sir. * * *

"Q. You had, as you testied before, complete charge of the hiring of these horses, did you not? A. Yes, sir.

"Q. When they were needed to be hired? A. Yes, sir.

"Q. And you had complete charge of their disposition, too; what was to be done with them? A. Yes, sir.

"Q. And as to their housing and feeding and all of that? A. Yes, sir.

"Q. The company did not bother about these things, but left it to you? A. Yes, sir.

"Q. So that you had full authority to do that? A. Yes, sir. * * *

"Q. You at least did take enough interest in the team to see that they looked as though they had been fed? A. Yes, sir; and cleaned up and taken care of, and that is all it was. * * *

"Q. You understand that the general proposition—that these things were being done, and if they had not been done, it would have made a difference; you would have noticed it because you watched to see that it was done; is that right? A. Yes, sir. * * *

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"Q. Did you ever tell Mr. Punches it is his duty to feed that team before he went to work? A. Before he went to work?

"Q. Yes; did you ever tell him that was a part of his duty? A. He knew enough for that without being told.

"Q. I understand; but did you ever tell him to feed that team at his house? A. I don't know as I did in so many words; no, sir. * * *

"Q. You first said that you were willing that Punches have the team over to his house? A. I say so now; I was willing; yes, sir."

The decedent was paid 55 cents an hour, and he worked 10 hours each day on the premises of said defendant. We quote with approval the following, from the finding of the Industrial Accident Board:

"This is not a case where an employee went out of the scope of his employment to do the work of another, without the knowledge and consent of his employer. The foreman, according to his own testimony, had assumed the responsibility of seeing that this team received the necessary care. He permitted the decedent to drive the team because he was familiar with horses, and permitted him to attend to the team for the same reason. Driving and tending this team was the work decedent was paid for. He had taken the team to his home for the purpose of feeding and caring for it. While bringing the team to work in the morning, after feeding and caring for it, he was accidentally injured.

"It is our opinion that this accident arose out of and in the course of his employment. Authority to do a certain piece of work does not necessarily rest upon express command of the employer. Where an employer, with full knowledge of the circumstances, permits an employee to do part of his work outside of his regular hours, or off the employer's premises, he should not be heard to say that he is not responsible for the work or for accidents that may arise out of the work. The employer, through his foreman, consented to the decedent's practice of taking the team to his home, and caring for it, caused feed to be sent to his home that the team might be cared for there, and in our opinion, the decedent was in the employ of the employer when necessarily caring for the team, and taking it to and from his barn. McMinn v. C. Kern Brewing Company, 202 Mich. 414; Malone v. Detroit United Railway, 202 Mich. 136; Rowe v. Leonard Warehouses et al., 206 Mich. 493; Honnold's Workmen's Compensation, pp. 350–352."

"After careful consideration of the entire record in this case, we find:

"1. That the decedent, Jideon Punches, died as the result of an accidental personal injury, arising out of and in the course of his employment, with the respondent, American Box Board Company;

"2. That the applicant, Sylvia Punches, is entitled to receive and recover compensation from the respondents, American Box Board Company and Michigan Employers' Casualty Company, at the rate of $14 a week for a period of 300 weeks from and after September 8, 1920.

"The above being the only material issue in controversy, it follows that the award on arbitration should be affirmed, and an order to that effect will be duly entered."

To the point that decedent was doing something useful and helpful to his employer, see cases cited in Spooner v. Detroit Saturday Night Co., 187 Mich. 125, 131, 132, 153 N. W. 657, L. R. A. 1916A, 17. We are of opinion that there was evidence to support the findings of fact of the board.

In Homan v. Power Co., 200 Mich. 206–208, 166 N. W. 860, 861, speaking for the court, Justice Fellows said:

"If the finding of the ultimate facts upon which the award is based finds support in the testimony, it is our duty to accept such finding as final, in the absence of fraud"—citing cases.

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This holding has been announced by this court, in similar but varying language, many times. Ward v. Heth Brothers, 212 Mich. 180–197, 180 N. W. 245.

The order of the Board is affirmed, with costs.

SEBO v. LIBBY, McNEIL & LIBBY ET AL. (No. 56.)

(Supreme Court of Michigan. Dec. 21, 1921.)

185 Northwestern Reporter, 702.

MASTER AND SERVANT—INJURY TO GARDENER STOPPING RUNAWAY TEAM HELD "IN COURSE OF EMPLOYMENT."

Where one employed as a gardener at his employer's plant was killed in attempting to stop a drayman's team that ran away from a receiving platform while cans of cream delivered in the employer's business were being unloaded, *held*, that the accident arose out of and in the course of deceased's employment within the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

(For other definitions, see Words and Phrases. First and Second Series, Course of Employment.)

Certiorari to Industrial Accident Board.

Claim by Julia Sebo for compensation under the Workmen's Compensation Act (Pub. Acts Ex. Sess. 1912, No. 10) for the death of her husband against Libby, McNeil & Libby, employer, and Ocean Accident & Guaranty Corporation, Limited, insurer. Compensation was awarded by the Industrial Accident Board and defendants bring certiorari. Affirmed.

Argued before Steere, C. J., and Moore, Wiest, Fellows, Stone, Clark, Bird, and Sharpe, JJ.

Searl & Searl, of St. Johns, for claimant.

Vandeveer & Foster, of Detroit, for respondents.

CLARK, J. Plaintiff's husband, Louis Sebo, was employed by Libby, McNeil & Libby Company, hereinafter called the defendant, at its plant in Perrinton. The plant, standing several rods back from the highway, had on its front a platform for receiving cans of milk and cream. Leading to this platform from the highway was a semicircular driveway, having the diameter along the margin of the traveled portion of the highway. Within the driveway was a lawn in which were beds of shrubs and flowers and about a part of the margin of which was a hedge, to care for all of which Mr. Sebo was employed as a gardener. Two employees of a public drayman were unloading for defendant cans of cream from a wagon to which a team was hitched. The wagon and team were the property of the drayman. The cans had come by express. Defendant paid the express and cartage charges. The cream had been bought by defendant at Elsie, and the record shows that it was owned by defendant, though it is not so conceded. It was worth about $600. While the cans were being unloaded, the team became frightened and began to run away, the men in charge being left at the platform. Just where Mr. Sebo was at this time is in dispute, but defendant claims that according to the most

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credible testimony he was raking the lawn near the horses, and that when they started he dropped his rake, rushed to the horses, and grasped a rein or bit or part of the harness to which he clung for a moment. Losing his hold, he fell, receiving injuries from which he died.

The board found that the accident arose out of and in the course of the employment and awarded compensation, which defendant reviews on certiorari, contending that such finding is erroneous.

Mr. Sebo may not have known whether the cream belonged to his employer or not, nor its value. But whether he did or not, and whether the cream was the property of the defendant or not, the delivery of it to the plant was the business of the employer. Mr. Sebo acted in an emergency, upon sudden impulse, to prevent a runaway upon his employer's property, and it may be inferred that the act was to prevent loss to the employer and that it was in furtherance of the employer's business. The finding of the board, therefore, must be sustained.

It was held by the Court of Session, Scotland, in Devine v. Caledonian Railway Company, vol. 1, Fifth Series, 1105 (quoting from syllabus):

"A case for appeal under the Workmen's Compensation Act, 1897, in an arbitration for compensation on account of the death of A., stated that A., a carter in the employment of the defenders, a railway company, was waiting with his horse and cart at one of the defender's goods stations, when the horse 'from some nexplained cause' started off, and A. in endeavouring to stop it received injuries from which he died. The defenders pleaded that the accident to A. had not arisen 'out of' his employment in the sense of section 1 of the act; or otherwise that the act did not apply, in respect that quoad A. the defenders were carrying on the business of carriers (to which the act did not apply), and not that of a railway.

"Held, that the accident arose out of and in the course of the employment of the deceased on or in or about a railway within the meaning of the Workmen's Compensation Act, 1897."

And it was said in London & Edinburgh Shipping Company v. Brown, 42 Scottish Law Reporter, 357:

"It appears to me that there can be no doubt that the deceased workman was at the time when working immediately before the accident employed on, in, or about the factory, the work which was being done having been the unloading of a ship and the placing of her cargo upon the quay alongside. Therefore the only real question in the case is whether it can be held that he was in the course of his employment at the time when the accident to him occurred which caused his death. The circumstances are, that while at the side of the vessel he was suddenly informed that a fellow workman was unconscious in the forehold, that he at once tied a handkerchief over his mouth and got himself lowered to try to rescue the other man, and was himself suffocated.

"Is he to be held in these circumstances to have acted in his employment? I think it must be fairly held that that question may be answered as it was answered in the court below. I cannot doubt that in a sudden emergency where there is danger a workman does not go out of his employment if he endeavours to prevent its taking effect. For example, if in a yard where a man is working, a horse suddenly runs off and there is danger to others, I would hold that if the man did his best to stop the horse and met with an injury, he suffered that injury in the course of his employment. It was a right thing to do in the interests of the safety of those in the yard, and therefore in the interests of his master."

See Donnelly v. H. C. & A. I. Piercy Contracting Co., 222 N. Y. 210, 118 N. E. 605; Devine v. Pfaelzer, 277 Ill. 255, 115 N. E. 126, L. R. A. 1917C. 1080, 16 N. C. C. A. 171; Dragovich v. Iroquois Iron Co., 269 Ill. 478, 109 N. E. 999, 10 N. C. C. A. 487; and see review of Miner v. Tele-

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phone Co., 83 Vt. 311, 75 Atl. 653. 26 L. R. A. (N. S.) 1195, and McQuibban v. Menzies, 37 Scottish Law R. 526, in Spooner v. Detroit Saturday Night Co., 187 Mich. 125, 153 N. W. 657, L. R. A. 1916A, 17.

Cases involving intentional and willful misconduct cited by counsel are not controlling. Nor shall we review the many interesting cases cited respecting an act merely incidental to the employment, as distinguished from an act done in an emergency.

The award is affirmed.

WALKER v. CITY OF PORT HURON. (No. 49.)

(Supreme Court of Michigan. Dec. 21, 1921.)

185 Northwestern Reporter, 754.

MASTER AND SERVANT—SPECIAL OFFICER IN PARK HELD "EMPLOYEE" WITHIN COMPENSATION ACT.

Industrial Accident Board *held* justified in finding that one appointed "special officer" in a park by the commission of parks and public property of the city of Port Huron, which is under a commission form of government, was an "employee" of the city and not an official thereof, within the meaning of the Workmen's Compensation Act, pt. 1, § 7 (2 Comp. Laws 1915, § 5429), though he took the oath of office; the commissioner appointing him having nothing to do with the police department, and no such position as "special officer" being provided for by the charter or ordinances of the city.

(For other cases, see Master and Servant, Dec. Dig. § 364.)

(For other definitions, see Words and Phrases, First and Second Series, Employee.)

Certiorari to Industrial Accident Board.

Proceeding by William R. Walker under the Workmen's Compensation Act to recover for personal injuries, opposed by the City of Port Huron, the employer. Award of compensation, and the employer brings certiorari. Award affirmed.

Argued before Steere, C. J., and Moore, Wiest, Fellows, Stone, Clark, Bird, and Sharpe, JJ.

Burt D. Cady, of Port Huron, for respondent and appellant.

John B. McIlwain, of Port Huron, for applicant and appellee.

SHARPE, J. The city of Port Huron is operating under a commission form of government. By its charter, its corporate powers are distributed among five departments: (1) Public officers. (2) Accounts and finance. (3) Public safety. (4) Streets and public improvements. (5) Parks and public property. The commission is authorized to determine the powers and duties of the several departments, to appoint officers and employees, and to prescribe their duties. The charter requires all officers to take the constitutional oath of office before entering upon their duties. The commission is also empowered to preserve the public peace, public health, and good order of the city. The charter provides:

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"The chief of police, policemen, regular or extra, who shall be appointed from time to time, shall possess and exercise the same powers which township constables exercise and possess under the general laws of the state, subject to such limitations as may be prescribed by ordinance." Section 50, c. 7.

The claimant was hired by James E. Green, commissioner of parks and public property, to perform certain duties in a park of the city during the summer of 1918. Mr. Green testified that he went to claimant's home in 1920 and "asked him if he wanted the police job back in the park, and he said yes. * * * I told him to go down and get sworn in, and I told him when to go upon the job." He was then asked:

"Q. Did you inform the applicant, William R. Walker, of what his duties would be as special officer in Pine Grove Park? A. Why, no; I don't know that I did. I presume he understood it from being there before."

Mr. Walker testified that his duties were—

"To look after the people generally around there, to see that they did not get injured, take care of the kids going down on the breakwater to see that they did not get down there too thick and fall in the river, something of that kind; at nights, when they were using the water through the park, I used to shift the hose around in different places wherever he told me he wanted it done, or cut off any streams that he wanted at certain times."

He was then asked:

"Q. When you say 'he,' who do you mean? A. The foreman.

"Q. Mr. Gahnz? A. Yes; to look after the parking of automobiles on the lawns.

"Q. Anything to do with the shrubbery? A. Nothing more than to see that people did not pick the flowers and pick the seeds in the fall of the year.

"Q. Was there any particular name given to you? A. No, I don't know. You could call me a watchman or something of that kind."

Claimant went to the city clerk's office and took the constitutional oath, in which he was designated as a "special officer, Pine Grove Park, for the city of Port Huron." He entered upon his duties and, a few days thereafter, was injured. He presented a claim and an allowance was made to him under the Workmen's Compensation Act. Section 7 of part 1 of the Act (2 Comp. Laws 1915, § 5429) excepts "any official of * * * any city" from its provisions.

Was claimant an official of the city? The facts do not seem to be in dispute. The question whether the claimant was an officer or an employee must be determined by the applicable provisions of the charter and ordinances and the duties claimant was engaged to perform. The fact that he took the oath of office, while persuasive, is not controlling. McNally v. City of Saginaw, 197 Mich. 106, 112, 163 N. W. 1015. In La Belle v. Grosse Pointe Shores, 201 Mich. 371, 167 N. W. 923, it is said:

"It is elementary that there must be an office before there can be an officer. * * * An official of an incorporated village * * * means one who holds a village office, an official place or position in the village, created for him either by general or local legislation."

Mr. Mechem, in his work on Public Officers (Section 5), says:

"A public office * * * is never conferred by contract, but finds its source and limitations in some act or expression of the governmental power. When, therefore, the authority in question was conferred by a contract, it must be regarded as an employment and not as a public office."

Mr. Green testified:

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"Q. The policemen are under the chief of police? A. All that belongs to the police department.

"Q. And the chief is under the commissioner of public safety? A. Yes, sir.

"Q. Now, the police force of the city of Port Huron is not under your direction, is it? A. No.

"Q. You have nothing to do with the police force have you? A. No."

Defendant relies on Blynn v. City of Pontiac, 185 Mich. 35, 151 N. W. 681. In that case, it appeared that the office of policeman was created by the charter and that Blynn was regularly appointed to fill the position. In the case before us, it does not appear that any such position as "special officer" is provided for by the charter or ordinances of the city of Port Huron, or that the commissioner of parks and public property had any authority to appoint members of the police force. We think the board was justified in its conclusion that—

"The applicant was an employee of the city of Port Huron, within the meaning of the act, and, therefore, entitled to recover compensation."

The award is affirmed.

DONOVAN v. DULUTH ST. RY. CO. (No. 22500.)

(Supreme Court of Minnesota. Nov. 25, 1921.)

185 Northwestern Reporter, 388.

(Syllabus by the Court.)

MASTER AND SERVANT—COMPENSATION CLAIM HELD WITHIN NEW ENLARGED LIMITATION.

The compensation act of 1913 contained no limitation of the time for bringing suit. The amendatory act of 1915 limited the time to "one year after the occurrence of the injury." The act of 1919 amended certain portions of the 1915 act "to read as follows"; and the phrase quoted above was made to read "one year after the employer has made written report of the injury to the commissioner of labor of the state." The law all the time required the filing of such report. None was filed. The plaintiff was injured on October 1, 1918, and brought her action in January, 1921. It is *held* that the 1919 limitation was a substitute for the 1915 limitation; that the 1915 amendment commenced running on October 1, 1918; that it had not run on April 22, 1919, when the 1919 amendment was approved; that it did not run afterwards; that the 1919 amendment operated to enlarge the 1915 limitation; that it applied to actions on which the 1915 limitation had not run; and that the plaintiff's cause of action was not barred when her action was commenced.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

Brown, C. J., dissenting.

Appeal from District Court, St. Louis County; H. A. Dancer, Judge.

Action by Ruth M. Donovan against the Duluth Street Railway Company under the Workmen's Compensation Act. From an order of the district court, sustaining a demurrer to the complaint, plaintiff brings certiorari. Order reversed.

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Andrew Nelson and John Cedergren, both of Duluth, for appellant.
Finlayson & Watts, of Duluth, for respondent.

DIBELL, J. Certiorari to review an order of the St. Louis district ourt sustaining a demurrer to the complaint in a workmen's case. The uestion is whether the proceeding was barred by the statute of limitaions.

The first compensation act was enacted in 1913. Laws 1913, c. 467 (Gen. St. 1913, §§ 8195–8230). It contained no limitation of the time for instituting a proceeding to recover compensation. The amendatory act of 1915 (Laws 1915. c. 209, § 8 [Gen. St. Supp. 1917, § 8214—1]) added a section. designated section "20A," limiting the time for the bringing. of a proceeding by the injured employee to "one year after the occurrence of the injury." Laws 1919, c. 363, § 1, amended section 20A "to read as follows"; and the limitation above quoted was made to read "one year after the employer has made written report of the injury to the commissioner of labor of the state." The law then required, as it does now, that the employer file a report of accidents with the commissioner of labor. G. S. 1913, § 3892.

The plaintiff was injured on October 1, 1918. She instituted this proceeding in January, 1921. The defendant filed no report with the commissioner of labor. The one year limitation fixed by the 1915 act commenced running on October 1, 1918, the date of the injury. It had not run on April 22, 1919, the date of the 1919 amendment. If it continued to run after that date the bar was complete when plaintiff's action was commenced in January, 1921. The 1915 limitation if applicable, bars the action. If the limitation fixed by the 1919 amendment applies the action is not barred.

When a statute is amended "to read as follows" the amendatory act is a substitute for the act amended. State v. Routh, 61 Minn. 205, 63 N. W. 621; Rundlett v. City of St. Paul, 64 Minn. 223, 66 N. W. 967; Shadewald v. Phillips, 72 Minn. 520, 75 N. W. 717; State v. Jones, 98 Minn. 6, 106 N. W. 963; State v. District Court, 134 Minn. 131, 158 N. W. 798. In the first case cited Chief Justice Start said that the amendatory statute so reading "repeals everything contained in the original statute not reenacted, and the amended statute is to be construed, as to any action had after the amendment as if the statute had been originally enacted in the amended form." This thought has been expressed in varied language from case to case.

The 1915 limitation had not run against plaintiff's cause of action at the time of the amendment of 1919. It did not continue running after that. The 1919 amendment was a substitute for it and changed the limitation. In 1 Wood on Limitations (4th Ed.) § 59, this is stated to be the rule:

"If before the statute bar has become complete the statutory period is changed, and no mention is made of existing claims, it is generally held that the old law is not modified by the new, so as to give to both statutes a proportional effect; but that the time past is effaced, and the new law governs. * * * In other words, the statute in force at the time the action is brought controls, unless the time limited by the old statute for commencing an action has elapsed, while the old statute was in force, and before suit is brought, in which case the suit is barred, and no subsequent statute can renew the right or take away the bar."

So, where the time within which an action is foreclosed was changed from 10 years to 15 years the new limitation was held to apply to all cases where the former statute had not run before it took effect. Bradley v. Norris, 63 Minn. 156, 65 N. W. 357. The rule seems in harmony with what is said in Burwell v. Tullis, 12 Minn. 572 (Gil. 486), and Holcombe v. Tracy, 2 Minn. 241 (Gil. 201). Neither State v. General Accident, etc.,

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Corp., 134 Minn. 21, 158 N. W. 715, Ann. Cas. 1918B, 615, nor State v. District Court, 138 Minn. 213, 164 N. W. 812, is opposed. There the court had under consideration a statute which gave a limitation where there was none before. Its operation was postponed. This indicated an intended operation upon existing causes of action. The opinion of the court was directed to the general rule that a limitation statute is prospective, when rights will be cut off by it; and it was held that, in the particular situation, notwithstanding the statute was to become operative in the future and not presently, it did not affect existing causes. The court did not have to do with the well enough settled rule that an extension of the limitation period operates in favor of causes of action against which the limitation has not run. These cases hold that the limitation in the act of 1915 did not operate retroactively upon a cause of action occurring prior to its passage and so destroy it. Nor is Beach v. Gendler, 182 N. W. 607, opposed. There the 1915 limitation had run before the 1919 amendment. A statute of limitation is not a matter of substantive right but of remedy. It is not at all unusual to extend the time for bringing suit, and to apply the new statute to causes against which the old statute is running. It is quite another thing to shorten the period and apply the statute retroactively and thereby cut off or unreasonably limit existing rights.

Order reversed.

Brown, C. J. (dissenting). I see no way of distinguishing this case, either in its controlling facts or the principles of law applicable thereto. from State ex rel. General Accident Insurance Co. v. District Court, 134 Minn. 21, 158 N. W. 715, Ann. Cas. 1918B, 615, and State ex rel. Berwind Fuel Co. v. District Court. 139 Minn. 213. 164 N. W. 812, and therefore respectfully dissent. At the time the cause of action in the General Accident Insurance Co. Case arose the compensation law contained no limitation for the commencement of actions thereunder; the time was unlimited. But the act was amended in 1915 in various respects including the addition of a new section by which the right of action was limited to one year from the date of injury. It was held in that case that the statute had prospective operation only. and did not apply to existing rights of action; that such statutes are to be given a retrospective operation only when a legislative intent to that effect clearly appears. The rule there applied was followed in the Berwind Fuel Co, Case, where the court took occasion to summarize and state the rules generally applied in construing limitation statutes by the different courts of this country. concluding with the direct holding that this court had adopted the rule of prospective operation. Prior to those cases there was perhaps some uncertainty in previous rulings upon the question (Burwell v. Tullis, 12 Minn. 572, [Gil. 486]; 1 Notes to Minn. Cases. 477). but the decisions then rendered definitely and without qualification adopted the rule stated. a rule which finds support in the authorities elsewhere. It controls the case at bar. Plaintiff's cause of action existed at the time of the amendment of 1919, and was, under that rule, unaffected thereby; it had six months to run after the adoption of that act.

None of the cases cited from this court to sustain the present decision involved the construction of limitation statutes, and therefore are not in point. In each the court applied the familiar rule that an amendment of a statute "to read as follows" is in legal contemplation a new and independent enactment as respects the new matter contained therein. Or, as expressed by Mr. Justice Hallam in State v. District Court, 134 Minn. 131. 158 N. W. 798. the amended statute can have no other or different construction or effect than would have been given an independent enactment on the subject. citing St. Paul. M. & M. Ry. Co. v. Broulette, 65 Minn. 367, 67 N. W. 1010. In this respect the amendatory act of 1919,

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as to the new matter therein. is precisely of the same independent character as the act of 1915, to be given the same forward operation and effect. Stein v. Hanson, 99 Minn. 387, 109 N. W. 821.

KATZENMAIER v. DOEREN. (No. 22368.)

(Supreme Court of Minnesota. (Dec. 23, 1921.)

185 Northwestern Reporter. 938.

(Syllabus by the Court.)

1. MASTER AND SERVANT—JUDGMENT DENYING WORKMEN'S COMPENSATION CLAIM HELD NO BAR TO ACTION FOR NEGLIGENCE NOT IN ISSUE.

A judgment in favor of a defendant in a workmen's compensation proceeding cannot be pleaded in bar to an action predicated on the alleged negligence of defendant. which was not a material issue in the former.

(For other cases, see Master and Servant, Dec. Dig. § 411.)

2. MASTER AND SERVANT — JUDGMENT DENYING WORKMEN'S COMPENSATION CLAIM HELD NOT AN ESTOPPEL IN ACTION ON NEGLIGENCE.

Neither could the judgment be pleaded as an estoppel, because none of the findings on which it was rendered determined the questions of defendant's negligence or plaintiff's contributory negligence.

(For other cases, see Master and Servant, Dec. Dig. § 411.)

Appeal from District Court, Ramsey County; Frederick N. Dickson, Judge.

Action by Fred Katzenmaier against John Doeren. From an order sustaining a demurrer to the answer, defendant appeals. Affirmed.

Moore, Oppenheimer. Peterson & Dickson. of St. Paul, for appellant.

Emil W. Helmes. of St. Paul. for respondent.

HOLT, J. From an order sustaining a demurrer to a defense made in the answer, defendant appeals.

The action is to recover damages for an injury claimed to have been sustained on February 2. 1914. when plaintiff fell on a cement walk leading from a public street into defendant's factory in St. Paul. where plaintiff was employed. It is alleged that defendant carelessly and negligently permitted the walk to become covered by large and dangerous formations of ice, upon which plaintiff slipped. There is also an allegation that, when plaintiff slipped and fell, he walked upon defendant's premises as part of his services for him.

The defense in the answer to which the demurrer was sustained. is. in effect, that plaintiff, in July, 1914. commenced an action in the district court of Ramsey county to recover compensation for the same injury now in suit, and that defendant therein answered that the injury was not caused by an accident arising out of and in the course of plaintiff's employment with defendant. which said action was tried and the court made

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findings of fact and ordered judgment. The findings are set out in full. and it is alleged that pursuant thereto judgment was entered that plaintiff take nothing. The defendant pleads the judgment as a bar and as an estoppel.

[1] It is plain that the judgment was rendered in a compensation proceeding. Where the parties in an ordinary action for damages are within the Workmen's Compensation Act, and. upon the trial, facts are found which show that plaintiff is not entitled to damages, but is clearly entitled to compensation from a defendant employer. the court may give that relief. Such was the case of Mahowald v. Thompson-Starret Co., 134 Minn. 113, 158 N. W. 913, 159 N. W. 565. But the reverse does not hold true. Negligence is the foundation for a recovery in the ordinary action for damages. It is of no consequence in a workmen's compensation proceeding. In the latter there are matters which become decisive for or against a recovery. but which may not be of much significance in the ordinary personal injury action. This finding in the former proceeding was decisive against plaintiff therein:

"That on the morning of February 2, 1914, and at the time of the fall, plaintiff had not performed any services or work for defendant, nor had his services as such workman or employee begun."

The finding has no bearing on the question of defendant's alleged negligence in this action.

The ultimate fact of negligence, upon which a recovery in this action must rest. being not at all important in the compensation proceeding. it is clear that the judgment in the latter can be neither res judicata nor a bar here. West v. Hennessey, 58 Minn. 133. 59 N. W. 984; Woodman v. Blue Grass Land Co., 98 Minn. 87. 107 N. W. 1052; State ex rel. Breckenridge v. District Court. 136 Minn. 151, 161 N. W. 388. 13 A. L. R. 1097. In the last-cited case the subject is fully discussed. and it is held that a judgment in a negligence action is not a bar to the maintenance of a workmen's compensation proceeding for the same injury.

[2] Nor is any finding pleaded available as an estoppel in this action. The only finding at all hinting at an issue of negligence is one to the effect that when plaintiff fell a servant of defendant was clearing the snow from the walk, but had not reached the point where plaintiff fell. This, as well as the findings that plaintiff did not prove that he fell on the ice, that he did not prove that he did not fall because of his physical infirmities, and that he did not prove. that he did not fall because of the general conditions due to the snowfall, clearly do not create an estoppel here.

The court did not err in sustaining the demurrer.

The order is affirmed.

PETERSON v. O'NEIL ET AL. (No. 22466.)

(Supreme Court of Minnesota. Dec. 23, 1921.)

185 Northwestern Reporter. 948.

(Syllabus by the Court.)

1. MASTER AND SERVANT — WORKMEN USING PATHWAY ALONG RAILROAD TRACK HELD WITHIN COMPENSATION ACT.

A workman, whose duty required him to collect the signal lanterns placed on the work and carry them to the toolhouse, was within the pro-

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tection of the Workmen's Compensation Act (Gen. St. 1913. §§ 8195–8230) while on his way to the toolhouse, although he did not follow the public streets, but took a generally traveled and shorter route along a railway track.

(For other cases. see Master and Servant. Dec. Dig. § 375[1].)

2. MASTER AND SERVANT—COMPENSATION NOT WAIVED BY SETTLEMENT WITH THIRD PARTY.

By making a settlement with the railway company. he did not waive his right to compensation from his employer, except to the extent of the amount actually received under the settlement.

(For other cases, see Master and Servant Dec. Dig. § 354.)

Appeal from District Court, Hennepin County; C. S. Jelley, Judge.

Proceeding by Frank Peterson against Michael J. O'Neil and another, as copartners, under the Workmen's Compensation Act. Judgment awarding compensation. and defendants bring certiorari. Affirmed.

Walter L. Chapin, of St. Paul, for relators.

John R. Coan and A. O. Devold, both of Minneapolis, for respondent.

TAYLOR, C. Certiorari to review a judgment of the district court of Hennepin county awarding compensation to plaintiff, under the Workmen's Compensation Act (Gen. St. 1913, §§ 8195–8230), for injuries sustained while in the employ of defendants.

[1] The Compensation Act gives compensation to an employee for injuries "caused by accident arising out of and in the course of employment," but declares that this provision does not "cover workmen except while engaged in, on, or about the premises where their services are being performed, or where their service requires their presence as a part of such service at the time of the injury." G. S. 1913, § 8230 (i).

Defendants contend that at the time of the accident plaintiff had departed from the premises where his services should have been performed and received his injuries at a place where his services did not require him to be. and for that reason is not entitled to compensation.

The defendants are contractors and plaintiff was one of their employees. In the spring and summer of 1920 they were engaged in constructing a sewer in the village of Walnut Grove in Redwood county, and it was one of the duties of plaintiff to place signal lanterns on the work each evening and gather them up and return them to the toolhouse each morning. The Chicago & Northwestern Railway runs through the village in an east and west direction. Dewey street runs east and west one block north of the railroad right of way. North street runs east and west along the north side of the right of way. Eighth street runs north and south, and crosses the railroad at the west end of the depot grounds and intersects North street and Dewey street. The depot is on the north side of the main track and in the second tier of blocks east of Eighth street. What is called the house track or loading track passes north of the depot and as it extends west to Eighth street is about 30 feet north of the main track. Teams engaged in loading and unloading freight passed between this track and the main track in going to and from Eighth street. Pedestrians also traveled between these tracks in going to and from the depot. Defendant's toolhouse was on Dewey street in the third tier of blocks east of Eighth street. On the morning of June 23d, plaintiff collected the lanterns which had been placed on work in Eighth street south of the railroad, and with six on each arm started for the toolhouse. He proceeded north on Eighth street until he had crossed the main track and then turned and proceeded east toward the depot walking

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along and a few feet north of the main track. When some 40 feet from the east line of Eighth street, he stepped close to the track to avoid a puddle of water and as he did so was struck by the pilot beam of a locomotive coming behind him from the west, and sustained the injuries for which he seeks to recover. He was deaf and had not heard the train, but admits having seen it coming when he was at Eighth street, but says he did not think it was so near.

Defendants insist that he ought to have continued on Eighth street to North street or Dewey street, and then have turned down one of these streets to the toolhouse, and that leaving this safe route and taking the dangerous route along the railroad track was such a departure from the proper route that he was not within the protection of the Compensation Act at the time of the injury. Plaintiff states that he had traveled this same route every day because it was a public passageway and shorter than the other. The photographs show a well-defined pathway; and the trial court, on ample evidence, found that it was generally used by pedestrians. The trial court further found "that the injuries sustained by the plaintiff arose out of and in the course of his employment by the said defendants," and we think this conclusion was fully justified by the evidence. He was performing his duty in carrying the lanterns from the work to the toolhouse, and taking a commonly traveled and shorter route than the public streets was not a departure from the place where his service required him to be within the meaning of the statute. At least the finding is not without evidence to support it, and therefore cannot be disturbed by this court. State ex rel. Niessen v. District Court, 142 Minn. 335, 172 N. W. 133; State ex rel. v. District Court, 129 Minn. 502, 153 N. W. 119, L. R. A. 1916A, 344; State ex rel. v. District Court, 141 Minn. 61, 169 N. W. 274. Defendants rightly place no reliance on the case of State ex rel. Miller v. District Court, 138 Minn. 326, 164 N. W. 1012, L. R. A. 1918F, 881, where a messenger boy was injured while stealing a ride on a passing truck.

[2] It appears that plaintiff had made a settlement with the railway company by which he received the sum of $450 and released the railway company from all claims on account of the injuries received. The railway company was not under part 2 of the Compensation Act. The statute (section 8229, G. S. 1913) provides that where a third party, not under part 2 of the act, is legally liable in damages for the injury the employee may proceed against such third party, but that the amount actually received from such third party shall be deducted from the compensation payable by the employer. That the proper deduction was made in this case is not questioned. But a subsequent paragraph of the same section provides that, if the employee receives or recovers compensation from his employer, the employer shall be subrogated to his rights against such third party.

Defendants urge that plaintiff, by releasing the railway company, deprived them of their right of subrogation, and thereby released them from liability. They argue that if an employee may, without the consent of the employer, make a settlement with the third party without waiving his rights against the employer, it opens the door for a collusive settlement with the party who caused the injury to the detriment of the employer. They make no claim, however, that the present settlement was collusive. Plaintiff replies: First, that the statute authorized him to make the settlement without waiving his claim against defendants except to the extent of the amount which he received in the settlement; and, second, that he had no legal claim against the railway company and merely accepted the amount which the company consented to pay for a formal release from him.

The statute, after providing that the employee may proceed against a third party not under the act notwithstanding the liability of the employer under the act, continues:

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"But in such case, if the action against such other party is brought by the injured employee, * * * and judgment is obtained and paid, or settlement is made with such other party, either with or without suit, the employer shall be entitled to deduct from the compensation payable by him, the amount actually received by such employee."

This statute clearly means that the employee may make a settlement with the third party and retain the right to collect from his employer any excess, payable under the act, over and above the amount actually received under the settlement. Mathison v. Minneapolis Street Ry. Co., 126 Minn. 286, at page 296, 148 N. W. 71, L. R. A. 1916D, 412; Podgorski v. Kerwin, 144 Minn. 313, 175 N. W. 694. And the provision subrogating the employer to the rights of the employee against the third party cannot apply to those cases in which the employee himself has enforced his rights against such third party. The employer probably would not be bound by a settlement fraudulently or collusively made to deprive him of the benefit intended to him by the statute, but that question is not involved in this case.

The judgment is affirmed.

MULHALL v. NASHUA MFG. CO. (No. 1748.)

(Supreme Court of New Hampshire. Hillsborough. Nov. 1, 1921.)

115 Atlantic Reporter, 449.

2. MASTER AND SERVANT — THEORY OF COMPENSATION ACT STATED.

The theory of the Workmen's Compensation Act is that risk of injury should be borne in the first instance by the employer, and ultimately by the consumer of product of industry; compensation provided being in no sense considered as damages.

(For other cases, see Master and Servant, Dec. Dig. § 346.)

3. MASTER AND SERVANT—COMPENSATION ACT LIBERALLY CONSTRUED.

The Workmen's Compensation Act is to be construed liberally in order to fully and adequately effectuate the purpose of its enactment.

(For other cases, see Master and Servant, Dec. Dig. § 348.)

4. MASTER AND SERVANT — COMPENSATION CLAIM NOT BARRED BY LIMITATION IF EMPLOYER IS NOT PREJUDICED.

A claim for compensation under Workmen's Compensation Act, § 5, is not barred by failure to make claim within six months from the occurrence of the accident, unless the employer is prejudiced by the delay, in view of sections 4 and 6.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

6. MASTER AND SERVANT — NOTICE OF ACCIDENT SUFFICIENT COMPENSATION CLAIM.

A sufficient notice of the accident is a sufficient claim for compensation under the Workmen's Compensation Act, § 5.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

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9. MASTER AND SERVANT—LIMITATION IN COMPENSATION ACT FOR EMPLOYER'S BENEFIT.

While the Workmen's Compensation Act may be said to have been enacted for the benefit of the employee, the provision of section 5, limiting the time within which a claim can be made under it, was designed for the benefit of the employer and not the employee.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

10 MASTER AND SERVANT—EVIDENCE HELD TO SHOW ESTOPPEL TO CLAIM PREJUDICE FROM DELAY IN FILING COMPENSATION CLAIM.

In a proceeding under the Workmen's Compensation Act, evidence *held* sufficient to sustain a finding that employer was estopped by acts of agent of insurer from claiming prejudice from failure of injured employee to file notice of accident or claim within six months, in view of sweeping character of authority given insurer by policy.

(For other cases, see Master and Servant, Dec. Dig. § 405[1].)

11. MASTER AND SERVANT—ESTOPPEL TO PLEAD LIMITATION AS DEFENSE TO COMPENSATION CLAIM.

A claimant under the Workmen's Compensation Act may assume that agents of insurer have authority to employ the usual and ordinary means of accomplishing that for which the agency was created, which was the investigation and settlement of claims, and where the claimant, relying upon their assurances, deferred presentation of claim for compensation, the employer is estopped to plead limitation as a defense.

(For other cases, see Master and Servant, Dec. Dig. § 399.)

12. MASTER AND SERVANT — DEDUCTION FOR MEDICAL TREATMENT GIVEN COMPENSATION CLAIMANT QUESTION FOR TRIAL COURT.

The provision in Workmen's Compensation Act, § 6, that in "fixing the amount of weekly payment, regard shall be had to any * * * benefit * * * received from the employer during the period of his incapacity" only requires the court to weigh the benefit as evidence, and does not require an accounting, and whether due regard for benefits received in the shape of service by employer's physician requires that it should be allowed in fixing the amount of weekly payments is a question of fact for the trial court.

(For other cases, see Master and Servant, Dec. Dig. § 385[17].)

13. MASTER AND SERVANT — COMPENSATION COMPUTED FROM DATE OF ESTOPPEL.

The provision in Workmen's Compensation Act, § 6(2), providing that no payment shall be due, or payable to injured employee for any time prior to the giving of the notice required by section 5, has no application where prejudice in the delay in making notice is not shown, but if the court finds that the want of notice in the statutory sense is prejudicial to the employer, then the question of estoppel to claim prejudice, and when it took effect, becomes material, in which event compensation can be computed only from the time when notice was given, or, what is equivalent, to date when estoppel became effective.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

Young, J., dissenting.

Transferred from Superior Court, Hillsborough County; Branch, Judge.

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Proceeding by Jane Mulhall under the Workmen's Compensation Act to obtain compensation for personal injuries, opposed by the Nashua Manufacturing Company, the employer. There was an award of compensation and the case is transferred from the superior court on employer's exceptions. Case discharged.

Bill in equity to determine the amount of compensation due plaintiff under the Workmen's Compensation Act. Trial by the court. Decree for the plaintiff.

The plaintiff was injured while in the employ of the defendant, on August 8, 1919. The accident arose out of and in the course of the plaintiff's employment, and was not caused in part or in whole by any serious or willful misconduct on her part. No formal notice of the accident was given to the defendant, nor was any claim for compensation made by the plaintiff until March 20, 1920, when the following letter was sent to the defendant by plaintiff's counsel:

"March 20, 1920. Nashua Mfg. Co., Nashua, N. H.—Gentlemen: On Friday, August 8, 1919, Jane Mulhall of 12 Church Street, Nashua, N. H., was injured in the spool room of your mill. Your doctors have attended her to date. She is still disabled. Your insurance company up to now has delayed adjustment of the matter. Wherefore this paper gives you notice that Miss Mulhall claims compensation for said injury under the act. Yours truly, Thos. J. Leonard for Jane Mulhall."

The employer was in no way prejudiced by the want of a notice of the accident, inasmuch as its agents were immediately informed, and the plaintiff was sent to the defendant's infirmary for treatment. The evidence tended to prove that the plaintiff was under the daily observation and treatment of the defendant's mill doctor for a year after the accident. The court finds that the plaintiff is entitled to compensation for the full term of 300 weeks from the date of the accident; that the average weekly earnings of the plaintiff when at work on full time during the preceding year was $15 per week; and that she is therefore entitled to compensation in the sum of $2,250.

The defendant excepted to the denial of its motion to dismiss the bill because no claim for compensation was made within six months from the occurrence of the accident. The defendant also excepted to the following findings of fact as against the law and the evidence, namely; (1) That the defendant is estopped to set up the defense of the failure of the plaintiff to make a claim for compensation within the statutory period of six months; (2) that the plaintiff is entitled to the sum of $2,250 as compensation; (3) that justice does not require that any deduction shall be made on account of the treatment given plaintiff by the mill doctor. The defendant further excepted to the denial of its motions that the decree in favor of the plaintiff be vacated and the verdict set aside.

Thomas J. Leonard, Doyle & Doyle, and Marshall D. Cobleigh, all of Nashua, for plaintiff.

Lucier & Lucier and Alvin J. Lucier, all of Nashua, for defendant.

SNOW, J. "No proceedings for compensation under this act shall be maintained unless notice of the accident as hereinafter provided has been given to the employer as soon as practicable after the happening thereof, * * * and unless claim for compensation has been made within six months from the occurrence of the accident. * * * but no want or defect or inaccuracy of a notice shall be a bar to the maintenance of proceedings unless the employer proves that he is prejudiced by such want, defect, or inaccuracy. Notice of the accident shall apprise the employer

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of the claim for compensattion under this article, and shall state the name and address of the workman injured, and the date and place of the accident. * * *." Laws 1911, c. 163, § 5.

The defendant concedes that the plaintiff is excused for her failure to give it notice of the accident, as required by section 5, since the court has found that it was not prejudiced thereby, but contends that plaintiff's failure to make a claim for compensation within six months from the occurrence of the accident is a bar to her recovery. Defendant's position raises the question whether or not it was the legislative intent thus to distinguish between the requirements as to the giving of notice of an accident on the one hand and as to the making of a claim for compensation on the other, by making the former excusable and the latter absolute.

[1] In ascertaining the meaning of any statute, the circumstances under which the language is used, the evil to be remedied, the object sought to be attained, and the general policy and theory upon which the legislation proceeds are material to be considered. Barker v. Warren, 46 N. H. 124, 125; Hale v. Everett, 53 N. H. 9, 126, 193, 16 Am. Rep. 82; Brimblecom v. O'Brien, 69 N. H. 370, 46 Atl. 187; Stanyan v. Peterborough, 69 N. H. 372, 374, 46 Atl. 191; Opinion of Justices, 72 N. H. 605, 607, 55 Atl. 943; State v. National Bank, 75 N. H. 27, 32, 70 Atl. 542, 21 Ann. Cas. 1204; Clough v. Railroad, 77 N. H. 222, 230, 90 Atl. 863.

Workmen's Compensation Acts have been adopted by all the nations of Western Europe and by a majority of the American states, including all those that have any considerable industrial development. These statutes have been enacted in response to public sentiments and beliefs, widely prevalent, that the burdens, delays, inadequate relief and unequal operation of the common-law remedies as applied to industrial accidents rendered them unsuited to modern conditions. The evils of the common-law remedies, which were not noticeable in the days of small and scattered shops, few employees, and simple tools, became intolerable in the days of crowded factories, equipped with complicated and dangerous machinery. The changes incident to this industrial development had not only largely increased the opportunities for avoidable injury, but had multiplied the dangers of inevitable accidents.

"The application of the principles of the common law to suits for personal injuries sustained in hazardous employments resulted in many cases in injustice; * * * it filled the courts with litigation; it became the fruitful source of perjury; it engendered bitterness between employer and employee; it resulted in * * * economic waste, and it turned out an army of maimed and helpless people as dependents upon the charity of friends or the public. * * * The loss has fallen upon those least able to bear it. * * *" American Coal Co. v. Allegany County Com'rs, 128 Md. 564, 574, 98 Atl. 143, 146, 147. "The remedy to the * * * workman has been uncertain, slow and inadequate. * * * Injuries * * * formerly occasioned have been frequent and inevitable. * * *" State v. Clausen, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466. "The terrible economic waste, the overwhelming temptation to the commission of perjury, and the relatively small proportion of the sums recovered which comes to the injured parties" by common-law actions "condemn them as * * * inadequate to meet the difficulty." Borgnis v. Falk Co., 147 Wis. 337, 133 N. W. 215, 37 L. R. A. (N. S.) 489. The common-law system of dealing with actions by employees against employers for personal injuries is inconsistent with modern industrial conditions, uneconomic, unwise, and unfair. Peet v. Mills, 76 Wash. 437, 136 Pac. 685, L. R. A. 1916A, 358, Ann. Cas. 1915D, 154; American Coal Co. v. Allegany County Com'rs, supra. "It resulted, it was widely believed, in injustice both to the employer who was sometimes the victim of unjust or excessive claims and to the employee who had to bear the

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necessary risks of the business and who was often delayed in the enforcement of a just claim and burdened with the expenses of a protracted litigation. The danger was ever present that an employee or his family might become dependent upon public support because no relief could be given for injuries to employees or for the death resulting from such injuries. This old and unsatisfactory system of negligence law was the evil to which the Legislature addressed itself when it enacted the Compensation Act." Shanahan v. Monarch Engineering Co., 219 N. Y. 469, 477, 114 N. E. 795, 797.

[2] Beginning in Germany in 1884, in England in 1897, and in the American states in 1910, legislative bodies have attempted to solve this distinctly modern problem by the substitution of the compensation principle in the place of liability for negligence. The theory of the legislation is that the risk of injury, not due to the willful misconduct of the workman, should be borne in the first instance by the employer and ultimately by the consumer of the product of the industry. This is the practical operation of the statutes, whether optional or compulsory, since the employer may protect himself by adding the premium paid for insurance, and the cost of administering the law, to the overhead charges of his business as a basis for determining the cost and the price of his product, thus transferring the burden to the consumer. Western Indmenity Co. v. Pillsbury, 170 Cal. 686, 151 Pac. 398, 401; Adams v. Iten Biscuit Co., 63 Okl. 52, 162 Pac. 938, 940; Chandler v. Indus. Com., 55 Utah, 213, 184 Pac. 1020, 1021, 8 A. L. R. 930; Deaver v. Napier, 139 Minn. 219, 166 N. W. 187; State v. Clausen, 65 Wash. 195, 117 Pac. 1101, 1113, 37 L. R. A. (N. S.) 466.

"The compensation provided for in the act is in no sense to be considered damages. * * * The right to compensation arises out of the relation existing between employer and employee; * * * the costs and expenses of conducting the business, * * * including compensation for injuries to employees, * * * must be taxed to the business. The theory of the Compensation Act is that the whole cost and expense of conducting the business * * * is added to the cost of the articles that are produced and sold, and hence, in the long run, such costs and expenses are borne by the public." Chandler v. Indus. Com., supra; Fassig v. State, 95 Ohio St. 232, 116 N. E. 104, 105. "It was the intention of this act to make the business bear the burden of incidental and accidental injuries without regard to the question of negligence, either on the part of the employer or the employee. In the long run the public, and not the persons immediately involved, except to the extent that they are members of society at large, pay the bills." Wick v. Gunn (Okl.) 169 Pac. 1087, 1089, 4 A. L. R. 107. "The basic principle of the act is that the cost of the injuries incidental to modern industry should be treated as a part of the cost of production. The act was framed with that end in view." Duart v. Simmons (Mass.) 121 N. E. 10, 12; In re Gagnon (Mass.) 117 N. E. 321. "The general purpose of this act undoubtedly is to transfer the burdens resulting from industrial accidents, regardless of who may be at fault, from the individual to the industry, and finally distribute it upon society as a whole, by compelling the industry, in which the accident occurs through the employer, to contribute to the support of those who were actually and lawfully dependent upon the deceased for their sustenance during his lifetime." Scott's Case (Me.) 104 Atl. 794, 797.

The intent of the Workmen's Compensation Act was "to afford its protection to all * * * employers and employees who might voluntarily choose to make its provision for compensation for injury a part of their contracts of employment. It assumed that accident is incident to employment, and purposed to charge its cost, in the case of every injury not caused by the willful and serious misconduct or intoxication of

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the injured employee, to the industry in which it occurred" * * * and to "include it among the items charged to operation." Kennerson v. Thames Towboat Co., 89 Conn. 367, 375, 94 Atl. 372, 376. "Prior to the enactment of the Workmen's Compensation Act the consequential and financial losses to workmen engaged in industrial activities were borne by the workmen themselves, by their dependents, or by the state at large. The Legislature by the passage of this act indicated its belief that this loss should be borne by the industries causing them or more accurately by the consumers of the products of the industry causing the loss." In re Duncan (Ind. App.) 127 N. E. 289, 291.

The statutes are products of the "social and economic idea" that the "burden of repairing the efficiency of the human machines" like the "depreciation and destruction" of other machinery should be borne by the consumer through the employer. Lewis & Clark County v. Industrial Accident Board, 52 Mont. 6, 155 Pac. 268, 270, L. R. A. 1916D, 628. The purpose is to require "every consumer of any product of human industry as directly as practicable, to pay his ratable proportion" of the cost, including the repair of the efficiency of the human factor, which is as legitimately an element of "the fair money cost" as the repair of machinery or cost of materials. City of Milwaukee v. Miller, 154 Wis. 652, 144 N. W. 188, 191, L. R. A. 1916A, 1, Ann. Cas. 1915B, 847.

All of these statutes "are based upon the * * * principle that the proper regulation of such hazardous occupations and the payment of just occupation for injuries received therein is a matter of public concern," since otherwise the injured employee and his dependents may become public charges. Adams v. Iten Biscuit Co., supra.

These declarations of legislative purpose underlying this class of legislation, so widely and uniformly expressed, and so repeatedly reiterated in practically every jurisdiction where there has been occasion for judicial expression, represent no passing wave of popular emotion, but reflect a deep-seated public conviction that the new conditions require a new system of compensation for industrial accidents which will equalize and distribute the burdens and distress incident thereto more justly and with greater speed, certainty, and economy.

[3] While the statutes that have been enacted in response to this conviction are radical in that they create a liability regardless of fault, and in that they abolish or materially modify the long-established doctrines of contributory negligence, of assumption of risk, and of negligence of a fellow servant, they are highly remedial, in that they offer to the employee as a substitute for the common-law action a certain and sure remedy applicable to all cases of injury not due to his willful misconduct. Nor are they burdensome to the employer, since his present liability is limited to a fractional part of the loss of earnings of the employee for a limited period and the ultimate burden is transferred to those who enjoy the product of the industry. The statute, being remedial, is to be construed liberally in order to "fully and adequately effectuate the purpose of its enactment." Barber v. Company 79 N. H. 311, 312, 108 Atl. 690; Lizotte v. Company, 78 N. H. 354, 357, 100 Atl. 757; Scott's Case, supra; In re Sullivan, 218 Mass. 141, 105 N. E. 463, L. R. A. 1916A, 378; Appeal of Hotel Bond Co., 89 Conn. 143, 93 Atl. 245, 247; Shanahan v. Monarch Engineering Co., 219 N. Y. 469, 114 N. E. 795, 798; Combination Rubber Mfg. Co. v. Court Common Pleas (N. J.) 115 Atl. 138, 139; Virginia & Rainy Lake Co. v. Dist. Ct., 128 Minn. 43, 150 N. W. 211, 213.

"Neither employer nor workman, unless he so choose, comes within the act. When both so elect, the act becomes a part of the contract of employment." Appeal of Hotel Bond Co., 89 Conn. 143, 93 Atl. 245, 248. The Legislature offered incentives to both parties to accept the provisions of the act. Sullivan Machine Co. v. Stowell, 114 Atl. 873, 874; Boody

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v. Company, 77 N. H. 208, 209, 90 Atl. 859, L. R. A. 1916A, 10; Ann. Cas. 1914D, 1280.

"It was not made compulsory in its application, but inducements were held out to facilitate its voluntary acceptance by both employers and employees. It is manifest from the tenor of the whole act that its general adoption and use * * * by all who may embrace its privileges is the legislative desire and aim in enacting it. The act is to be interpreted in the light of its purpose, and, so far as reasonably may be, to promote the accomplishment of its beneficient design." Young v. Duncan, 218 Mass. 346, 349, 106 N. E. 1, 3; In re Cox, 225 Mass. 220, 114 N. E. 281, 282, 283.

An interpretation of the statute which would narrow the opportunity of either party to avail himself of the benefits of its provisions would be inconsistent with the spirit and purpose of the legislation.

[4] One of the more important aims of this legislation is to secure to the injured workman, or to his dependents, compensation by direct payments "under certain fixed rules without lawsuit and without friction." Borgnis v. Falk Co., supra; Brenner v. Brenner, 127 Md. 193, 96 Atl. 287; American Coal Co. v. Allegany County Com'rs, supra. This is to be accomplished by a "procedure at once simple and inexpensive." Kennerson v. Thames Towboat Co., supra. Certainty of relief to all injured employees not guilty of willful misconduct is assured in the place of uncertain relief to a limited number. Appeal of Hotel Bond Co., supra. With these objects in mind, it cannot be presumed that the Legislature intended to set up a rigid limitation which would defeat the purpose of the act in respect to injured workmen and their dependents, who, from their unfamiliarity with business affairs and legal requirements, fail to make a claim within a limited time, where the employer is in no way prejudiced by such failure. Such a result would be in the teeth of the legislative design to liquidate through the employer the statutory compensation for such a claim and distribute it as a part of the cost of production. To the extent that claims for compensation, authorized by the statute, fail to be presented, the underlying purpose of the statute fails. The object of the limitations, with respect to notice of the accident and the making of a claim for compensation, was not to create technical defenses to otherwise valid claims. The intention of the Legislature was to cut off fraudulent claims and to protect the employer if he has been prejudiced by the employee's negligence in seasonably presenting his claim.

[5, 6] A "construction which would make the prohibition of proceedings to secure compensation * * * absolute and unyielding would lead to a harsh and rigid rule which might easily work injustice." Accordingly in Schmidt v. O. K. Baking Co., 90 Conn. 217, 222, 96 Atl. 963–965, recourse was had to the terms of the parent act and to the general policy of the framers of the law in interpreting the language used. New Hampshire was one of the first (1911) of the American states to adopt a valid Workmen's Compensation Act. Some of its features are unmistakably molded after the British act of 1906. This is particularly true as to the clause providing for notice of the accident and for the making of a claim for compensation. The variance in these features of the two acts consists principally in the conditions under which the employee may be excused from the otherwise apparently strict requirements of the statute. Except as to the burden of proof, the New Hampshire act in substance follows the British act in excusing the employee in case of "the want of or any defect or inaccuracy in" the notice of the accident if it be found that the employer would not be prejudiced thereby. The British act, however, went further, and excused the employee, without regard to the resulting prejudice to the employer if "such want, defect or inaccuracy was occasioned by mistake, absence from the * * * kingdom, or other reasonable cause." By separate clause it likewise excused the employee, without regard to the resulting prejudice to the em-

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ployer, for failure to make a claim within the statutory requirement "if it be found that the failure was occasioned by mistake, absence from the * * * kingdom, or other reasonable cause." The British act thus clothed the court with broad and elastic powers to protect the employee against his oversight both with respect to notice of the accident and as to the making of claim for compensation. It was the unmistable policy of the parent act to deal liberally with the employee unused to business and ignorant of his legal rights and duties. It relieved him from technical requirements for any reasonable cause when justice in the particular case might so require.

An examination of the provisions of the New Hampshire act discloses that the Legislature did not intend to depart so far from the general policy of the parent act as to make the failure of the employee to make a claim for compensation within the statutory period an absolute bar to recovery. It is evident from the language used that the intent was to make the excuse for the employee's fault, whether it consisted in omission seasonably to give notice of the accident or failure to make a claim for compensation within the statutory limitations, or both, depend alike solely upon the fact whether the employer had been prejudiced thereby. The objectionable clause which included "accident * * * absence * * * and other reasonable cause" among the grounds of excusable failure was omitted and, instead thereof, the Legislature sought to extend the excuse of "want or defect or inaccuracy of a notice of the accident" when the employer was not prejudiced thereby to a like "want or defect or inaccuracy" in the making of a claim for compensation. This was accomplished by providing that "notice of the accident shall apprise the employer of the claim for compensation under this article," thus making the claim for compensation an essential part of the notice of the accident, and subject to all the provisions with respect thereto. In his efforts to consolidate the provisions with respect to notice of the accident and the making of a claim for compensation, and otherwise to abbreviate this section of the statute, the legislative draftsman lost something of the logical order of the ideas expressed, but his purpose is none the less evident. If, in the first sentence, the words "notice of the accident" had been defined to include the apprisal of the employer of the claim for compensation, then clearly the language "no want or defect or inaccuracy of a notice shall be a bar," etc., would apply to that part of the notice relating to the making of a claim equally well and as certainly as to all other parts of it. There is nothing in the language or the subject-matter which tends to the conclusion that the Legislature intended that the word "notice," wherever it appeared, should be given any other than the meaning later defined in the same section. The order in which the provisions occur is immaterial if only their meaning and relation are clear. Barker v. Warren, supra; Stanyan v. Peterborough, 69 N. H. 372, 373, 46 Atl. 191; State v. Railroad, 70 N. H. 421, 429, 48 Atl. 1103. It is as though the section read:

"No proceeding for compensation under this act shall be maintained unless notice of the accident, which shall apprise the employer of the claim for compensation under this article and shall state the name and address of the workman injured and the date and place of the accident, has been given the employer as soon as practicable, and not more than six months from the occurrence thereof, * * * but no want or defect or inaccuracy of such notice shall be a bar to the maintenance of proceedings unless the employer proves that he is prejudiced by such want, defect or inaccuracy."

A sufficient notice of the accident is a sufficient claim for compensation.

The language of section 4 and section 6 corroborates this interpretation. In neither of these sections is any mention made of the making of

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a claim for compensation. But section 4 makes "the giving of the notice hereinafter prescribed" a bar to the maintenance of an action at common law or under any other statute, while section 6 (2) sets up "the giving of the notice required by section 5 in this act" as a prerequisite to the payment of compensation. The Legislature would not have failed to set up the making of claim for compensation as a like "bar" and a like prerequisite in section 4 and section 6, respectively, had it intended in section 5 to provide for such making of a claim by an act separate and distinct from the giving of notice of the accident. To the objection of counsel that, unless the limitation is a condition precedent, the claim for compensation may be made at any time within six years, it is sufficient to say that if the employer is not prejudiced by the delay, he is not injured by it, and upon this issue the statute expressly gives him the right to be heard and to the dispassionate judgment of the trial court.

[7] "As these statutes [Workmen's Compensation Acts] constitute an entirely new departure in the law of employer's liability, it is not surprising that there are numerous conflicting decisions, many of which are due to the inconsistencies and crudities of the acts themselves and many are due to the varying views taken by the different judges before whom the questions arose." See Glass, W. C. L. 27, 28. So far as the authorities cited by the defendant hold that these acts are to be strictly construed because they are in derogation of the common law, or because of other rules of construction peculiar to other jurisdictions, they are not applicable in this state. Some Legislatures have anticipated this difficulty and ingrafted into their Compensation Acts a provision that "the rule that statutes in derogation of the common law are to be strictly construed shall have no application to this act; but this act shall be so interpreted and construed as to effectuate its general purpose." Acts Md. 1914, c. 800, § 60. Such a provision is unnecessary in a jurisdiction where common-law rules and practice no longer prevail when and to the extent that they are no longer compatible with our circumstances or applicable to changed conditions. Cole v. Lake Co., 54 N. H. 242, 286; Harris v. Webster, 58 N. H. 481, 484; Brooks v. Howison, 63 N. H. 382, 386, 387; Ricker's Betition, 66 N. H. 207, 210, 29 Atl. 559, 24 L. R. A. 740; Opinion of Justices, 66 N. H. 629, 651, 33 Atl. 1076. No such sanctity attaches to the common law of this state as to require a less liberal construction of an enactment in its derogation, if such enactment be made pursuant to principles which have come to be as universally recognized, and which are equally as essential to the administration of justice, as are common-law principles. Legislative enactments, embodying principles so generally adopted and so clearly supported by unmistakable public sentiment, should have no less liberal construction because they are the outgrowth of modern conditions incident to industrial development than has been accorded to laws made pursuant to principles similarly recognized and supported under conditions existing in 1784.

"The changed social, economic, and governmental conditions and ideals of the time, as well as the problems which the changes have produced, must * * * logically enter into the consideration, and become influential factors in the settlement of problems of construction and interpretation." Borgnis v. Falk Co., 147 Wis. 327, 349, 133 N. W. 209, 216, 37 L. R. A. (N. S.) 489. "The common rule as to the construing legislation in derogation of the common law strictly against a purpose to change it has little or no application to efforts to create a new system for dealing with personal injuries to employees. History leaves no fair room for doubt as to the purpose being to approach the ideal of affording compensation for loss in substantially all cases of accidental injury to employees in the course of their employment. Therefore the legislative language, where open to construction, should be read liberally in favor

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of that purpose." Sadowski v. Thomas Furnace Co., 157 Wis. 443, 449, 146 N. W. 770, 773.

It has been found that the defendant was in no way prejudiced by the want of notice of the accident. There was evidence on which this finding could be made, using the word "notice" in the sense in which it is herein interpreted. If so used, or if the defendant failed to sustain the burden of proving prejudice which was placed upon him by section 5, the award will stand as if the statutory notice had been seasonably given. But as the case appears to have been tried on defendant's theory that the statute required the making of a claim distinct from the giving of the notice of the accident, and as it does not therefore conclusively appear that the court in its finding used the word "notice" as herein interpreted, and as upon further consideration it may be found that the defendant was prejudiced by plaintiff's failure seasonably to make a claim for compensation, it becomes important to consider whether the further finding "that the defendant is estopped to set up as a defense the failure of the plaintiff to make a claim for compensation within the statutory period of six months" can be sustained. The defendant contends that this finding is not supported by the law or the evidence.

Is this finding supported by the law? While the Workmen's Compensation Act may be said to have been enacted for the benefit of the employees, the provision limiting the time within which a claim can be made under it was designed for the benefit of the employer. Conditions in contracts of insurance which limit the right of action by the insured, being for the benefit of the insurer, may be waived by the latter. Perry v. Insurance Co., 67 N. H. 291, 296, 33 Atl. 731, 68 Am. St. Rep. 668; Davis v. United States Health & Accident Insurance Co., 73 N. H. 425, 62 Atl. 728; Maynard v. United States Health & Accident Insurance Co., 76 N. H. 275, 276, 277, 81 Atl. 1077; Kelsea v. Insurance Co., 78 N. H. 422, 425, 101 Atl. 362. So statutory provisions enacted for the benefit of individuals may be so far waived by those for whose benefit they were enacted that they are estopped to insist upon their protection. Hanover v. Weare, 2 N. H. 131, 132; Patrick v. Farmers' Insurance Co., 43 N. H. 621, 623, 80 Am. Dec. 197; Lyman v. Littleton, 50 N. H. 42; Tasker v. Kenton Ins. Co., 58 N. H. 469, 470; Levi v. Insurance Co., 75 N. H. 551, 552, 78 Atl. 617; Flynn v. Orient Insurance Co., 77 N. H. 431, 92 Atl. 737; Kelsea v. Insurance Co., supra.

[10] Does the evidence support the finding of estoppel? The defendant held a policy of insurance with the American Mutual Liability Insurance Company, by the terms of which the insurance company contracted "to pay promptly to any person entitled thereto under the Workmen's Compensation Law, and in the manner therein provided, * * * any sum due * * * such person because of the obligation for compensation * * * imposed upon the employer" by the law. The policy, in addition to a contract of indemnity, in terms, provides that these obligations are "the direct obligations and promises of the company [insurer] to any injured employee covered hereby * * * and to each such employee * * * the company is hereby made directly and primarily liable. * * * This contract is made for the benefit of such employees * * * and is enforceable against the company by any such employee in his name or in his behalf at any time and in any manner permitted by law, whether claims or proceedings are brought against the company alone or jointly with this employer." The company undertakes "to serve this employer * * * upon notice of such injuries by investigation thereof and by settlement of any resulting claims in accordance with law," and "to defend in the name and on behalf of this employer any suits or other proceedings * * * instituted against him on account of such injuries."

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The acceptance by the defendant of the contract with the insurance company to serve it in the investigation of injuries to employees, the settlement of resulting claims, and the defense of proceedings for the recovery of compensation under this statute constituted the insurance company the agent of the defendant to thus investigate, settle, or defend claims arising within the terms of the contract. The sweeping character of the authority of the insurance company under such agency is emphasized by the direct and primary liability assumed by it. The insurance company was clothed with authority to do, through its agents, whatever the defendant could have done by way of such investigation, settlement within the limits of its policy, and defense of plaintiff's claim.

The evidence tends to show that, pursuant to the terms of its contract with the defendant, the insurance company, through its agent, West, assumed the charge and control of the investigation and preparation for defense of the defendant's liability, if any, to the plaintiff; that under the supervision and direction of the agent, one of his men whom he styles an "adjuster or investigator" was employed on the case, and reported to West, who knew what was going on; that the adjuster about eight weeks after the accident called upon and took the statement of the plaintiff, and then told her to wait until she saw how she got along, that "he didn't want any lawyer to be brought in, and they would pay her for six years;" that the company would be fair with her and put it at $8 per week; that, not hearing from the adjuster for three or four months from the date of the accident, plaintiff employed counsel, who arranged with the agent by telephone for a conference; that, the agent failing to keep the appointment, plaintiff's attorney, on a day or two before the expiration of the six months from the accident, again called the agent on the telephone, saying, "It was about time we filed a notice with the Nashua Manufacturing Company of the injury," to which the agent replied, "You don't need to file that notice; we will waive the filing of the notice with the company; we know all about the injury;" that plaintiff's attorney told the agent, "We were going to claim compensation;" that in the conversation, plaintiff's attorney had in mind the notice of claim for compensation required by the statute to be given within six months after the injury, and the agent knew of this statutory requirement; that, relying on the assurance of the agent, the plaintiff did not seasonably file such statutory notice as she otherwise would have done; that the letter of March 20, 1920, was sent to the defendant by plaintiff's counsel in line with his talk with the agent.

Whatever may have been the real intention of the agent, his conduct was calculated to leave the impression in the mind of plaintiff's attorney that he was excused from making a formal claim for compensation, since there was no other act required by the statute to which a six months' limitation applied. But defendant claims that West was not such an agent as to waive the rights of the defendant or his own company. West testified that he was the agent of the insurance company; that he investigates claims, settles some that are within his authority, and submits others to his superiors. The limits of his authority do not appear in the evidence. He admitted that the investigation of plaintiff's accident was made under his supervision by his adjuster or investigator; that he told plaintiff's attorney that there was no need of filing a notice; that he knew all about it. He does not claim to have exceeded his authority in this. Whenever the employer would be prejudiced by its want, notice of the accident was, under defendant's interpretation of the statute, as clearly prerequisite to the maintenance of proceedings as was the making of a claim for compensation. It would be rather a finely drawn limitation of authority which permitted the agent to excuse the former and forbade him to waive the latter. The issue does not, however, depend upon any nice distinctions as to the precise limitations of the authority of

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the agent, but rather upon the question whether the agent was acting within the apparent scope of his authority. It cannot be said as a matter of law that a reasonably prudent man would not, under the circumstances, have accepted, and acted upon, the agent's assurance. Backman v. Charlestown, 43 N. H. 125, 132; Deming v. Railroad, 48 N. H. 455, 472, 2 Am. Rep. 267; Daylight Burner Co. v. Odlin, 51 N. H. 56, 60, 12 Am. Rep. 45; Flanders v. Putney, 58 N. H. 358; Flint v. Railroad, 73 N. H. 141, 147, 59 Atl. 938; Atto v. Saunders, 77 N. H. 527, 528, 529, 93 Atl. 1037.

[11] What is true of the precluding effect of West's conduct could also be found to be true as to the earlier conduct of his adjuster. There is no evidence that subsequent to the day of the accident the defendant by its officers or employees had any communication with the plaintiff or her attorney, except in the visits of its mill doctor. It could be found from this, together with the evidence of the acts and statements of the representative of the insurance company, that the company was performing its contractual duty to serve the insured in the investigation and settlement of plaintiff's claim. The insurance company permitted its adjuster to call upon the plaintiff. to require her to sign a statement, to dissuade her from employing an attorney, to discuss with her the amount of her wages as a basis for computing the compensation due her under the statute, and to give her assurance that the company would be fair and pay her a sum in excess of the compensation provided by statute. This was conduct calculated to induce the plaintiff to forbear the employment of counsel and to defer giving the statutory notice apprising the employer of her claim for compensation. It could be found upon the evidence that the plaintiff relied and acted upon the conduct and representation of the adjuster, and that in so doing she acted as a reasonable person. It is not a question whether the agent or his adjuster had specific authority to waive a statutory provision, but rather a question whether the insurance company placed these men in positions of apparent authority to deal with the plaintiff and her attorney in the matter, and whether, upon their representations and conduct, the plaintiff was reasonably led to believe that the statutory requirements were waived. The plaintiff and her attorney had a right to assume that these agents were clothed with authority to employ the usual and ordinary means of accomplishing that for which the agency was created. Bohanan v. Railroad, 70 N. H. 526, 528, 49 Atl. 103; Goodale v. Wheeler, 11 N. H. 428, 429. The suspension of technical requirements is, not infrequently, a means employed to prolong negotiations in order to secure amicable settlements.

The plaintiff relying and acting upon the assurances of defendant's agent, having deferred the presentation of her claim for compensation, the defendant is estopped to set up such limitation as a defense. Hale v. Union Mutual Fire Insurance Co., 32 N. H. 295, 300, 64 Am. Dec. 370; Horn v. Cole, 51 N. H. 287, 291, 292, 12 Am. Rep. 111; Appleton v. Insurance Co., 59 N. H. 541, 545, 47 Am. Rep. 220; Carpenter v. Britton, 61 N. H. 430, 431; Dunn v. Insurance Co., 69 N. H. 224, 226, 39 Atl. 1075; Lally, Adm'x, v. Prudential Insurance Co. of America, 75 N. H. 188, 189, 72 Atl. 208; Clark v. Parsons, 69 N. H. 147, 157, 39 Atl. 898, 76 Am. St. Rep. 157; Ball v. Aid Association, 64 N. H. 291, 293, 9 Atl. 103; Barney v. Keniston, 58 N. H. 168, 169; Stevens v. Dennett, 51 N. H. 324, 333.

[12] The statute provides that—

"In fixing the amount of the weekly payment, regard shall be had to any payment, allowance or benefit which the workman may have received from the employer during the period of his incapacity."

Section 6. The plaintiff testified that she received emergency treatment from the mill doctor and nurse on the day of the accident, and that the mill doctor, who was employed by defendant, attended her every day

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for a year from the date of the accident; that on his advice she had x-ray pictures taken and consulted and submitted to the treatment of expert physicians who applied plaster casts and other supports. It does not appear that the defendant paid for any of the expenses incident to this treatment outside of the attendance of the mill doctor. The ordinary charge of physicians for house visits was $2 a visit until April 13, 1920, when it was increased to $3. The defendant excepts to the finding that "justice does not require that any deduction shall be made on account of the treatment given her by the mill doctor," and to the refusal of the court to find that the plaintiff "must account for 300 visits, at $3 a visit, of the mill doctor." The defendant contends that the provision, "Regard shall be had," is mandatory and not discretionary. It is a sufficient answer to this position to say that the provision, "In fixing the amount of the weekly payment, regard shall be had to any * * * benefit * * * received from the employer," is not equivalent to saying that any benefit received from the employer shall be deducted from the weekly payments. The one requires the court to weigh the benefit as evidence, while the other would require an accounting for the benefit. Had the latter been the purpose of the Legislature, it is reasonable to suppose that more apt words would have been used to express the intention.

Counsel for defendant conceded in argument that the mill doctor was employed by the defendant at a stipulated annual salary, and that no additional payments were made to him on account of his attendance upon the plaintiff. Section 7, c. 163, Laws 1911, provides that—

"Any workman entitled to receive weekly payments under this act is required, if requested by the employer, to submit himself for examination by a duly qualified medical practitioner or surgeon provided and paid for by the employer, at a time and place reasonably convenient for the workman, within two weeks after the injury, and thereafter at intervals not oftener than once in a week. If the workman refuses to submit to such examination, or obstructs the same, his right to weekly payments shall be suspended until such examination has taken place, and no compensation shall be payable during or for account of such period."

It does not appear that the plaintiff requested the attendance of the mill doctor. So far as such treatment was a benefit to the plaintiff, it would seem that it was one which the plaintiff received in common with all employees of the defendant as a part of the facilities which the defendant voluntarily furnished. There was no evidence that employees were charged for such treatment. It does not appear how far the attendance of the mill doctor was for the benefit of the plaintiff under section 7. Whether due regard for such benefit as the plaintiff received required that it should be allowed for in fixing the amount of the weekly payments, and, if so, to what extent, was a question of fact for the trial court.

[13] The defendant excepts to the finding that the plaintiff is entitled to $2,250 as compensation. Section 6 (2) provides that—

"No such payment shall be due or payable for any time prior to the giving of the notice required by section five of this act."

But notice is material under section 6 (2) only in the cases where it is "required by section five." As section 5 does not require a notice unless the employer proves that he was prejudiced by the want of it, this provision of section 6 (2) has no application when prejudice is not shown. If the court fails to find that the defendant was prejudiced by the want of notice as herein interpreted, there will be no occasion to apply or consider the limitation in section 6 (2). If the court finds that the want of notice in the statutory sense is prejudicial to the defendant, then the question of estoppel, and when it took effect, becomes material. In the event of such finding of prejudice, compensation can be computed only

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from the time when notice was given, or what is here equivalent, namely, the date when the estoppel became effective.

The question whether, if the estoppel set up dependent upon facts occurring more than six months after the accident, the statutory bar to a proceeding provided in section 5 could be avoided is not presented in this case, and is not considered.

As the case stands, the burden of establishing that the defendant was not prejudiced by the plaintiff's failure to give notice of the accident or to claim compensation does not appear to have been sustained and the exceptions might be overruled without further order. But, in view of the uncertainty as to the meaning of the finding, justice may require further hearing as to the fact. The order is therefore:

Case discharged.

Young, J., dissents; the others concur.

TERRY v. GENERAL ELECTRIC CO.

(Court of Appeals of New York. Nov. 22, 1921.)

133 Northeastern Reporter, 373.

MASTER AND SERVANT—STATE INDUSTRIAL COMMISSION WITHOUT POWER TO REOPEN PROCEEDING AND AWARD "COMPENSATION" AFTER CLAIMANT'S DEATH.

Where a claim for compensation was allowed and paid, and the proceeding closed, claimant having returned to his work, in which he continued for some weeks until he quit and went to work for another employer at reduced wages for some months, and then returned to his home and died from tuberculosis accelerated by the injury, the action of the State Industrial Commission in reopening the proceeding on its own motion, and making an award of "compensation" to his estate on the original claim, without finding that there were any dependents, was not authorized by Workmen's Compensation Law, § 22, and section 33, as amended by Laws 1919, c. 498; for the right to compensation being extinguished by death, "compensation" being payable to the injured employee, and "benefits" to his dependents.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

(For other definitions, see Words and Phrases. First and Second Series, Compensation.)

Appeal from Supreme Court, Appellate Division, Third Department.

Proceedings under the Workmen's Compensation Act for compensation for George H. Terry, deceased, employee, opposed by the General Electric Company, employer, in which the State Industrial Commission made an award of compensation to Catherine Terry, administratrix. From an order of the Appellate Division (198 App. Div. 961, 189 N. Y. Supp. 957), one of the justices dissenting, affirming the award, the employer appeals. Order reversed, and proceeding dismissed.

Richmond D. Moot, of Schenectady, for appellant.

Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, of counsel), for respondent.

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McLAUGHLIN, J. On the 20th of January, 1917, George H. Terry, while in the employ of the appellant, slipped upon a sidewalk upon its premises and fractured one of his ribs. He filed a claim for compensation with the State Industrial Commission, which was allowed, and he was paid the amount awarded to him until February 18, 1917. Five days thereafter Terry returned to the appellant, and was put to the same kind of work and paid the same wages as when injured. On March 17, 1917, the Commission ordered the proceeding closed. Terry continued to work until the 22d of the following June, when he voluntarily quit, and three days later accepted a position as janitor with another employer. He continued in the latter employment until the 6th of the following October when, by reason of his physical condition, he left, returned to his home, and died on the 6th of January, 1918. The Industrial Commission found that the injuries which he received on the 20th of January, 1917, "so accelerated and lighted up a pre-existing tubercular condition as to cause him to be disabled between the dates hereinabove referred to and subsequently caused his death." After his death the Commission, of its own motion, opened the proceeding relating to the claim originally filed by him. Several hearings were had, the last on December 13, 1920, when proof was given that on that date letters of administration upon Terry's estate had been duly granted by the Surrogate's Court of Schenectady county to his widow, the respondent herein. On the same day the Commission made an "award of compensation" against the appellant to the administratrix, amounting in all to $308.75. The award purported to be full compensation from the time Terry left the employment of the appellant until he accepted the position of janitor, decreased earnings based upon the alleged difference between his wages as janitor and what he would have received had he continued in his employment with the appellant, and full compensation from the time he gave up his employment as janitor to his death. An appeal was taken by the electric company from the award thus made, and the same was affirmed by the Appellate Division, one of the justices dissenting. An appeal to this court followed.

There is no finding by the Commission that any claim was filed with it except the one filed by Terry, for which compensation was awarded, and the proceeding closed. Nor was there any finding that there were any dependents. It was not until nearly three years after Terry's death that the Commission made the award to the administratrix. It was then too late. An award for compensation could not be made after his death. Matter of Casmey v. Parks' Sons Co., Inc., 229 N. Y. 623, 129 N. E. 933.

The question presented in no way involves the power of the Commission, upon new facts and changed conditions, during the lifetime of a claimant, to reopen a proceeding, increase, diminish, or terminate an award theretofore made as provided in section 22 of the Workmen's Compensation Law (Consol. Laws, c. 67). Here the question is simply the power of the Commission, after the death of the claimant, of its own motion, to reopen the proceeding and make an award payable to his estate.

The statute defines what is meant by compensation. It means "money allowance payable to an employee or to his dependents as provided for in this chapter, and includes funeral benefits provided therein." Compensation Law, § 3, subd. 6. Had an award been made to Terry prior to his death, for compensation which was then due, but had not been paid, a different question would be presented. In such case the amount awarded and directed to be paid, not exceeding $250, would be payable, not to his estate, but to the persons specified in the statute. Section 33 of the Compensation Law, as amended by chapter 498 of the Laws of 1919, specifically provides that—

"In case of the death of an injured employee to whom there was due at the time of his or her death any compensation under the provisions

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of this chapter, not exceeding the sum of two hundred and fifty dollars, the amount of such compensation shall be payable to the surviving wife or husband, if there be one, or, if none, to the surviving child or children of the deceased under the age of eighteen years, and if there be no surviving wife or children, then to the dependents of such deceased employee or to any of them as the Commission may direct."

This award is not made to the widow or any of the persons specified in the statute, nor could it be, because nothing was due Terry on an award for compensation when he died. The award made to him had been fully paid and satisfied. The statute, in its entire scope, intends that compensation, when awarded, is to be paid only to injured workmen. It is based on the assumption that there is at the time the award is made, a living claimant whose earning power has been diminished by an impairment of his capacity to work. A distinction is made between compensation and benefits. The former is to be paid to the injured employee and the latter to those persons dependent upon him in the event of death resulting from the injuries. This distinction is not only apparent when the whole act is considered, but especially in section 33, which contains a provision that compensation shall be paid only to employees and benefits only to dependents of such employees. To insure the payments to the persons intended, the section contains a provision that—

"Claims for compensation or benefits due under this chapter shall not be assigned, released or commuted except as provided by this chapter, and shall be exempt from all claims of creditors and from levy, execution and attachment or other remedy for recovery or collection of a debt, which exemption may not be waived."

Here, the award for compensation was made payable, as above indicated, to the administratrix of Terry's estate, and as such becomes the property of his estate, subject, like other funds, to the payment of all claims which may be legally made against it. The right to compensation was extinguished by Terry's death. The Commission therefore had no power to make the award in question.

It follows that the order of the Appellate Division and the determination of the Commission should be reversed, and the proceeding dismissed, with costs in this court and in the Appellate Division against the State Industrial Commission.

Hiscock, C. J., and Hogan, Cardozo, Pound, Crane, and Andrews, JJ., concur.

Ordered accordingly.

BEAGLE v. GROFF ET AL.

(New York Supreme Court. Appellate Division, Third Department. November 16, 1921.)

191 New York Supplement, 307.

1. MASTER AND SERVANT — MINOR EMPLOYEE, CLAIMING COMPENSATION, NOT A "DEPENDENT," EXEMPT FROM LIMITATIONS.

Under Workmen's Compensation Act, § 28, an injured minor employee must file his claim for compensation within one year; section 116, providing that no limitations shall run against a minor dependent, not applying, relating only to a person dependent for support on a deceased employee, in view of section 16.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

(For other definitions, see Words and Phrases, First and Second Series, Dependent.)

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2. MASTER AND SERVANT—NOTICE OF COMPENSABLE INJURY AND CLAIM ESSENTIAL.

Workmen's Compensation Law, §§ 18, 20, require both notice of injury and notice of claim, and if the notice of injury contains no demand or insistence on payment of compensation or death benefits, there must also be made a claim for compensation.

(For other cases. see Master and Servant, Dec. Dig. § 398.)

Appeal from State Industrial Commission.

Proceeding by Chester Beagle under the Workmen's Compensation Law to obtain compensation for personal injury, opposed by George Groff, employer. and the Fidelity & Casualty Company of New York, the insurance carrier. An award of compensation was made by the State Industrial Commission, and the employer and insurance carrier appeal. Award reversed, and claim dismissed.

Argued before John M. Kellogg, P. J., and Cochrane, Henry T. Kellogg, Kiley, and Van Kirk, JJ.

Nadal, Jones & Mowton, of New York City (E. P. Nowton, of New York City, of counsel), for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, of counsel), for the Commission.

HENRY T. KELLOGG, J. [1] The claimant is a minor, who filed his claim three years after the accident. It is provided in section 28 of the Workmen's Compensation Law (Consol. Laws, c. 67) as follows:

"The right to claim compensation under this chapter shall be forever barred unless within one year after the accident, or, if death result, therefrom, within one year after such death, a claim for compensation thereunder shall be filed with the commission."

There is no provision of the Compensation Law excepting the claim of an infant from the effect of this limitation. other than that which is contained in section 116 of the Law. That section reads:

"No limitation of time provided in this chapter shall run as against any person who is mentally incompetent or a minor dependent so long as he has no committee, guardian or next friend."

The word "dependent." as used in the Compensation Law, has a definite and unequivocal meaning. He is a person dependent for support upon a deceased relative, on account of whose death in the course of his employment a recovery of death benefits is sought to be made from the employer. Workmen's Compensation Law. § 16. A "minor dependent" is a brother, sister. or grandchild, under the age of 18 years, of a deceased person thus killed, upon whose support he or she was dependent. Workmen's Compensation Law, § 16, subd. 4. This claimant is not seeking recovery of death benefits for the death of another upon whom he was dependent, but claims compensation for injuries inflicted upon himself. He is, therefore, in no sense a claimant who has the character of a "minor dependent." and, consequently, is not within the exception made by section 116.

It is said that this is a narrow construction of the section. On the contrary, it is a correct reading of legislative words which themselves, without ambiguity express a narrow legislative intent. Any other reading completely eliminates the word "dependent" from the section, and, under the transparent garb of interpretation, in reality constitutes judicial legislation.

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[2] It is also said that the employee's notice of injury was in itself a sufficient claim, and that, having been filed within one year after the accident, the bar of the statute cannot be invoked. The Compensation Law calls for both a notice of injury and a notice of claim. The former must state the name and address of the employee, as well as the time, place, nature, and cause of his injury. Workmen's Compensation Law, § 18. As to a notice of claim the Compensation Law provides only as follows:

"At any time after the expiration of the first fourteen days of disability on the part of an injured employee, or at any time after his death, a claim for compensation may be presented to the employer or to the commission."

On the one hand, the notice of injury must state the details of the accidental injury, but need not assert a claim of recovery. On the other hand, it is not required by section 20 that the notice of claim shall reiterate all the facts which must have been stated in the prior notice. The characteristic, therefore, of a notice of claim, is its demand or insistence upon payment of compensation or death benefits by the employer. The notice of injury in this case contains no such demand, and therefore the only claim for compensation was made in the notice of claim, which was filed at a date too remote from the accident. The claim is accordingly barred.

The award should be reversed, and the claim dismissed. All concur

COOK v. WEST SIDE TRUCKING CO. ET AL.

(New York Supreme Court, Appellate Division, Third Department. November 16, 1921.)

191 New York Supplement. 346.

1. MASTER AND SERVANT—STATE TREASURER'S RIGHT TO ALLOWANCE UNDER WORKMEN'S COMPENSATION LAW NOT BARRED BY FAILURE TO FILE CLAIM.

Under Workmen's Compensation Law, § 15, subd. 7, providing that "the insurance carrier shall pay to the state treasurer for every case of injury causing death in which there are no persons entitled to compensation the sum of one hundred dollars," the treasurer's right to the $100 and the power of the commission to grant it is not barred by the failure to file a claim under section 28 as the allowance is not compensation (section 3, subd. 6).

(For other cases, see Master and Servant. Dec. Dig. § 398.)

2. MASTER AND SERVANT — NEW OBJECTION ON APPEAL FROM AWARD TO STATE TREASURER UNDER WORKMEN'S COMPENSATION LAW NOT CONSIDERED.

Where in informal proceedings before the State Industrial Commission to procure an award of $100 to the state treasurer by reason of the death of an employee, the insurance carrier and the employer made only two objections to the award, no evidence being produced, on appeal from the allowance of the $100 they could not urge a third objection; the other two objections being untenable.

(For other cases, see Master and Servant. Dec. Dig. § 417[4].)

Henry T. Kellogg, J., dissenting.

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Appeal from State Industrial Commission.

Claim by the State Treasurer, under the Workmen's Compensation Law, arising out of the death of Richard Cook, against the West Side Trucking Company, employer, and the Ætna Life Insurance Company, insurance carrier. From an award of $100 to State Treasurer by the State Industrial Board. the Employer and insurance carrier appeal. Affirmed.

Argued before John M. Kellogg, P. J., and Cochrane. Henry T. Kellogg, Kiley, and Van Kirk, JJ.

T. Carlyle Jones. of New York City, for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel). for respondents.

JOHN M. KELLOGG, P. J. The proceedings were very informal. No evidence was taken. The determination stands upon the discussion between the counsel and the commission and the concessions made therein. Upon the first hearing the appellants' attorney stated there was a dependent widow. The commissioner stated that there was a widow, but she was not dependent. The appellants' attorney said that he was advised there was an action brought by her against the New York Railways Company, and suggested that the matter stand over for further information, which course was adopted.

At the next hearing the commissioner asked the attorney for the appellants, "What is the position of the carrier in the case?" to which their attorney replied that he "objected to any award upon the ground that no claim was filed within the year by any dependent." He stated that there was a mother living, and a brother, and that he had communicated with them. and they informed him that they had turned the matter over for prosecution of a suit against a third party. The question was discussed, and the commissioner said that an order would be made for $100 to the state treasurer. The appellants' counsel then objected to any award on the ground that no claim for compensation had been made by any person entitled to compensation, and. furthermore, that the death came through the agency of a third person. and there is a possibility of a third person suit. He continued:

"Of course, information in possession of the commission does not warrant them in assuming a third party suit was commenced; but according to investigation we find the matter has been turned over for prosecution of a third party suit. Inasmuch as there was no suit filed, or any claim filed, I don't think the commission has any jurisdiction.

"Commissioner Archer: Is that all?

"Appellants' Attorney: That is all I have."

The commissioner then declared the case closed.

[1] Subdivision 7 of section 15 of the act (Consol. Laws, c. 67) provides;

"The insurance carrier shall pay to the state treasurer for every case of injury causing death in which there are no persons entitled to compensation the sum of one hundred dollars."

The direction by the commission to pay the treasurer is not an award of compensation, but it is the direction to the carrier to pay the amount which the statute directs it to pay. The treasurer's right to the money, and the power of the commission to grant it, is not barred by the failure to file a claim under section 28. The allowance is not compensation (Workmen's Compensation Law. § 3, subd. 6); or death benefits (Id. § 16; Edsall v. Edsall. 179 App. Div., 481. 165 N. Y. Supp. 967. State Industrial Commission v. Newman, 222 N. Y. 363, 118 N. E.

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794). It cannot be known with certainty whether there is a party entitled to compensation until the lapse of the year during which a claimant may file a claim.

[2] The other objection taken at the trial admits that there is nothing before the commission with reference to a third party action. The only objections raised at the hearing are untenable, and, as we have seen, counsel stated that there was no other objection to the award. "All questions of dependency shall be determined as of the time of the accident." Workmen's Compensation Law, § 16, last sentence. But the fact that the mother, the only relative surviving who might by any possibility be entitled to death benefits as a dependent, makes no claim for compensation within the time allowed by law. is some evidence that she was not a dependent. As we have seen; however, no evidence was given in the case. The determination rests upon the course of the trial, and when the counsel stated that he raised but two objections, each of which proved untenable, he is not now in a position to raise a third objection on appeal. All objections except the two stated are waived, and cannot be considered here. The determination should therefore be affirmed.

Award affirmed. All concur (Van Kirk, J., on the ground of waiver), except.

HENRY T. KELLOGG, J. (dissenting). This case is governed by the language of subdivision 7, section 15. of the Workmen's Compensation Law, which reads as follows;

"The insurance carrier shall pay to the state treasurer for every case of injury causing death, in which there are no persons entitled to compensation, the sum of $100.00."

The association in the same sentence of the expression "there are no persons" with the expression "causing death," the one containing a verb in the present tense and the other a verb in the form of a present participle, is significant. It leads inevitably to the conclusion that the moment for determining whether "there are" persons entitled to compensation is synchronous with that moment when death follows the "injury causing" it, and the "case of injury causing death" springs into being. If the Legislature had intended that the absence of "persons entitled to compensation" was to be determined by the failure of any such persons to file claims it would have employed, instead of "there are," the future tense of the same, or some other verb, such as "shall be," or "shall prove to be." In any event there is no word used in the subdivision which furnishes any ground upon which a relationship between the present of "there are" and the moment when the year ends for filing claims can be established. Reading that portion of the subdivision under consideration to mean "in which there shall prove to be no persons entitled to compensation," the end of the period during which possible claims might be filed would not arrive until the lives of possible claimants had terminated. Claims filed after the year period is ended are entirely valid, unless the defense of the statute of limitations is affirmatively raised by the insurance carrier. Section 28, Workmen's Compensation Law.

It is said that the insurer will always raise the defense, so that for all intents and purposes claims not filed within a year are dead. The premises of this argument are not well laid. The amount payable to a claimant in a particular case might by ready calculation be determined in advance at a less sum than the sum of $1,000 now payable to the state treasurer under subdivisions 7 and 8 of section 15. In such case an insurance carrier would never raise the objection of the statute of limitations. Again, a deceased employee might be killed by the negli-

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gence of a third party, in which case an insurer might reimburse itself for any moneys paid to a claimant under an award. For that reason an insurer would find it advantageous not to raise the bar of the statute. The Industrial Commission found in this case that the deceased left a mother him surviving, but that she had not filed a claim for compensation, although one year had elapsed from the date of the death of the deceased. If at the time of the accident she were dependent upon the deceased for her support, then she was in my judgment, a person "entitled to compensation." As there was no proof that she was not dependent, it seems to me that the condition precedent upon which an award to the state treasurer depends has not been fulfilled, and that the award should not have been granted.

I favor a reversal.

CRISO v. EDGEWATER SAWMILLS CO. ET AL.

(New York Supreme Court, Appellate Division, Third Department. November 16, 1921.)

191 New York Supplement, 316.

1. MASTER AND SERVANT — DRAFTS HELD NOT "MONEYS PAID," PRECLUDING RETROACTIVE MODIFICATION OF COMPENSATION AWARD.

Workmen's Compensation Law, § 22, authorizing review and modification of awards. and providing that no such review shall affect such award as regards any "moneys already paid," was intended to prevent a recovery by an insurer of any moneys actually paid a claimant under an award subsequently vacated or decreased, and was not intended to relieve an insurer, which paid under the original award, from any obligation to pay an increase, and the power of the commission to modify awards retroactively is not limited, if the moneys have not actually been paid, and "moneys" are not paid by delivery of drafts which are not cashed.

(For other cases. see Master and Servant, Dec. Dig. § 419.)

2. MASTER AND SERVANT—STATUTORY WAGE BASIS OF COMPENSATION HELD TO APPLY ONLY TO DEATH BENEFITS.

Workmen's Compensation Law, § 16, providing that any excess of wages over $100 a month shall not be taken into account in computing compensation "under this section," applied exclusively to death benefits.

(For other cases, see Master and Servant, Dec. Dig. § 385[1].)

Appeal from State Industrial Commission.

Proceeding by Louis Criso under the Workmen's Compensation Act to obtain compensation for personal injuries, opposed by the Edgewater Sawmills Company, employer, and the Travelers' Insurance Company, insurance carrier. There was an award of compensation, and the employer and insurance carrier appeal. Award modified, so as to provide that, before any payments are made to the claimant, drafts held by him shall be returned to the insurance carrier, and as so modified, unanimously affirmed.

Argued before John M. Kellogg, P. J., and Cochrane, Henry T. Kellogg, Kiley, and Van Kirk, JJ.

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Benjamin C. Loder, of New York City (William B. Davis, of New York City, of counsel), for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, of counsel), for respondent.

HENRY T. KELLOGG, J. The claimant was a minor of the age of 16 years when he met with an accidental injury, resulting in the loss of his right hand. The Industrial Commission made an award based upon wages actually received at the date of the accident. One year later it reconsidered the case, and upon proof submitted determined that under normal conditions the wages of claimant would have increased. Accordingly, exercising the powers conferred by subdivision 5 of section 14 of the Workmen's Compensation Law (Consol. Laws. c. 67), it made a modified award, to take effect as of the date of the accident, on the basis of a wage of $25 per week. Intermediate the two awards the appellant insurer sent to claimant drafts totaling the amount due to claimant under the first award for a period of 36 weeks. None of these drafts were cashed by claimant, although he failed to return them to the appellant.

[1] The appellants argue that under section 22 of the Workmen's Compensation Law, as construed by Matter of Salotar v. Neuglass & Co., 228 N. Y. 508, 126 N. E. 922, the commission had no power to modify the award as to installments previously payable. That section, after providing for the review and modification of awards previously made, places the following limitation thereupon;

"No such review shall effect such award as regards any moneys already paid."

The obvious purpose of this section was to prevent a recovery by an insurer of any moneys actually paid a claimant under an award subsequently vacated or decreased. A less obvious purpose was to relieve an insurer, which had paid under the original award, from any obligation to pay an increase. Matter of Salotar v. Neuglass & Co., supra. We think that the literal meaning of the words "any moneys already paid" should be given effect, and that, if moneys, as in this case, have not actually been paid, the power of the commission to modify awards retroactively is not limited.

[2] The appellants, also, argue that, under the last paragraph of section 16 of the Workmen's Compensation Law, the commission could not make a weekly wage of $25 the basis of an award, since that sum exceeds a wage of $100 per month. The paragraph in question, as it stood when this accident occurred, read as follows;

"Any excess of wages over one hundred dollars a month shall not be taken into account in computing compensation *under this section*."

The provision does not apply, for the reason that "this section" is section 16, which applies exclusively to death benefits, and they are not involved here. The award should be affirmed.

Awartl modified, so as to provide that, before any payments are made to the claimant under said award, the drafts held by him shall be returned to the insurance carrier, and, as so modified, unanimously affirmed. All concur.

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JEFFREYES v. CHARLES H. SAGER CO. ET AL.

(New York Supreme Court, Appellate Division, Third Department. November 16, 1921.)

191 New York Supplement, 354.

MASTER AND SERVANT — POISONING OF HAND BY CONTINUOUS DIPPING IN SOLUTION HELD NOT AN "ACCIDENT." WITHIN WORKMEN'S COMPENSATION LAW.

The poisoning of fingers from dipping the hand in a solution in the development of photographic plates in the course of employment, which dipping occurred some 500 times each day during a week, *held* not an "accident," for which compensation could be awarded; an "accident" being an event which takes place without foresight and expectation, and which occurs on the instant. rather than something which continues, progresses, or develops.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

(For other definitions, see Words and Phrases. First and Second Series. Accident—Accidental.)

John M. Kellogg, P. J., and Kiley, J., dissenting.

Appeal from State Industrial Commission.

Claim by Hila Dobson Jeffreyes for compensation under the Workmen's Compensation Law (Consol. Laws, c. 67) against the Charles H. Sager Company, employer. From an award by the State Industrial Board. the employer and the Travelers' Insurance Company, insurance carrier, appeal. Award reversed, and claim dismissed.

Argued before John M. Kellogg, P. J., and Cochrane, Henry T. Kellogg. Kiley, and Van Kirk, JJ.

Benjamin C. Loder, of New York City (William D. Davis. of New York City, of counsel), for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel). for respondents.

HENRY T. KELLOGG, J. The claimant was employed by a photographer in the development of photographic plates. It was necessary for her. more than 500 times each day, to dip plates, held in her left hand, into a poisonous chemical solution. Having performed this work continuously for more than a week. her fingers became red and swollen. She then went to a physician, who gave her treatment. Eventually the end of the little finger of her left hand became mummified, gangrene set in. and an amputation thereof, becoming necessary, was performed. The pathological cause of her injuries was the contraction of the blood vessels of her finger through the gradual action of the chemical solution.

In my opinion there was no accident involved for two reasons; First, the contract made by claimant between her hand and the solution was voluntary and intentional. In Matter of Woodruff v. R. H. Howes Construction Co., 228 N. Y. 276, 127 N. E. 270, the claimant developed a frog felon on the palm of his right hand as the result of the continuous pounding of his hand upon the head of a screwdriver. An award was reversed, for reasons of which the following was one:

"This testimony was insufficient to show that the injury was caused by accident. An accidental event takes place without one's foresight or

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expectation; an event that proceeds from an unknown cause, or is an unusual effect of the known cause. and therefore not expected."

In our case the one event, namely. the coming into contact of the hand and the solution, was expected, and therefore not accidental. Secondly, the injuries resulted from no occurrence which is referable to any particular moment of time which is definitive. The word "accident" is derived from the Latin verb "accidere," signifying "fall upon, befall, happen, chance" (Century Dictionary), and denotes an event which occurs upon the instant, rather than something which continues. progresses. or develops. In Marshall v. East Holywell Coal Co., Ltd.. 7 W. C. C. 19, it was held that a "beat hand" or "beat knee," a miner's injury, caused by the gradual process of continual friction. was not an accident. Collins, M. R., said that "the accidental must be something which is capable of being assigned to a particular date." Mathews, L. J., said:

"It seems to me that it would be as reasonable to call the occurrence an accident as to say that it was an accident when a man ceased to be able to work because he was worn out by long hard work."

In Steel v. Cammell, Laird & Co.. Ltd.. 7 W. C. C. 9, it was held that lead poisoning, being due to a gradual process, could not be accidental in its origin. One of the reasons assigned by the court for its decision was the fact that the statute required a notice of an accident to be given within a stated period after it occurred, and that from this it was to be inferred that the accident contemplated must be one having a definite moment of origin. The same conclusion can be drawn from our statute requiring a notice of an accident to be given within 30 days thereafter. It seems to me, therefore, that as the injuries in this case arose from the application of a poisonous solution during the working hours of claimant for a period of more than seven days, and as the application was voluntarily made, she received no accidental injury for which an award could properly be granted.

The award should be reversed, and the claim dismissed.

Cochrane and Van Kirk, JJ.. concur.

John M. Kellogg, P. J. (dissenting). The claimant sustained serious injuries, which arose out of and in the course of the employment. The only question here is: Were the injuries accidental, within the meaning of the Workmen's Compensation Law? The employer who conducted a drug store, in connection therewith was developing and manufacturing films. The claimant had been employed for about a week before September 30, 1919, in developing the films in a solution which contained dangerous chemicals. It was necessary for her to dip the fingers of the left hand in the solution. She developed from 500 to 800 films per day, many of which required the insertion of the fingers in the liquid several times. Before September 30th she noticed that her fingers were tender, and as she was leaving for lunch on that day, about 11:30 a. m.. while drying her hands, she "noticed that the flesh was broken through, sort of a rash," and that her fingers were tender, a red streak around the nails, and that the nails were discolored. She did not know that there was any abrasion or scratch upon her hand before that time. She stopped work, but white spots developed upon the fingers and broke, leaving scars, and the trouble progressed, with the result that her finger was amputated, and she suffered and will suffer other serious consequences from the poisoning. She had not been informed. and did not know, that the solution was poisonous

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The metol solution for developing films is a German preparation; sometimes it causes poisoning of the hand. The photographer who was sworn upon the subject swears that in his experience of 18 years he has known of two persons who were poisoned, and of others who were affected about as the claimant was on September 30th, and had to quit work and had no further trouble. Many people can use the solution without any inconvenience. In some cases it may cause inflammation of the fingers around the nails, making them very tender, and soon the skin would come off, as though something rubbed it, and poisoning may result. "Elon" is the trade-name of a substitute American solution, which uses parmidophenol hydrochloride in place of metol. It is less refined than the metol and is much stronger. The solution which the claimant was using was found to be six times stronger than indicated by the formula upon the bottle. The attending physician says that the claimant was poisoned by the solution, and that he treated another person who was poisoned in the same way.

In using the solution, if a person is affected by it, the skin is irritated. and the blood vessels contracted; the contraction of the blood vessels is the most serious part of it. The solution is more penetrating down to the blood vessels than poison ivy is. In poison ivy the skin itself is inflamed, but it does not go through the skin. Metol poisons more gradually, but is practically the same. It may develop in two or three days, while poison ivy would not develop until after 24 hours. The metol is much more penetrating. The most common germicide in use is bichloride of mercury; it takes the skin off. It is not being used now by surgeons, because of its effect upon them and the patients. The solution used here was stronger than the ordinary germicide. Before September 30th claimant had suffered no inconvenience from her fingers, and there was nothing noticeable in their condition.

The commission has found that, by the immersion of the fingers in the solution, the dangerous chemicals entered the pores of the skin of the fingers and penetrated the tissues and flesh underneath, and because of the peculiar poisonous action of the dangerous chemicals the blood vessels of the fingers were contracted. particularly the blood vessels of the little finger of the left hand and as a result the injuries for which compensation was granted resulted.

Concededly the claimant and her employer did not anticipate that she was liable to suffer any damage or inconvenience on account of the use of the solution, and the first injury from it was apparent at 11:30 on September 30th. The result coming from such an unexpected source and in the manner in which it did, was an accident.

"An accident is an event which takes place without one's foresight or expectation; an event that proceeds from an unknown cause or is an unusual effect of the known cause, and, therefore, not expected." Matter of Woodruff v. R. H. Howes Construction Co., 228 N. Y. 276, 127 N. E. 270.

In that case the employee, who had a frog felon in the palm of his hand, resulting from the continued use of a screwdriver, was denied compensation because there was no evidence that the felon resulted in the manner in which he thought it did. It did not appear that the use of the screwdriver was the cause of the injury. The case leaves us to assume that. if it had so appeared, compensation would have been sustained.

"'Probably it is true to say that, in the strictest sense and dealing with the region of physical nature, there is no such thing as an accident' [citing authority]. But our point of view, in fixing the meaning of this contract. must not be that of the scientist. It must be that of the average man [citing authorities]. Such a man would say that the dire result, so tragically out of proportion to its trivial cause, was something unfore-

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seen. unexpected. extraordinary, an unlooked-for mishap, and so an accident. This test—the one is applied to the common speech of men—is also the test to be applied by courts." Lewis v. Ocean Accident & Guarantee Corporation, Limited, of London. England, 224 N. Y. 18, 21, 120 N. E. 56, 57 (7 A. L. R. 1129).

In Matter of Gray v. Semet Solvay Co., 232 N. Y. ——, 133 N. E. ——, the claimant's husband was a patrolman of the defendant's plant, where chemical preparations were manufactured. Chemical odors and fumes were constantly emitted from it. He complained of illness July 15, 1918, and died in September, 1918. The medical evidence indicated that the cause of death was mineral poisoning. or serous meningitis from the toxemia due to the poisonous fumes where he worked. The award was sustained, as death resulted from an accidental injury. We must assume that the case is properly reported and that the decision was placed upon the facts stated.

In Pursell v. G. Levor & Co., 193 App. Div. 920, 183 N. Y. Supp. 955, an employee was bleeding skins for a tanner. Some of the dye got on his hands. and, in rubbing perspiration from his forehead, the dye entered a fissure or scratch in his skin. Compensation was sustained.

In Keenan v. H. D. Roosen Co., 187 App. Div. 962, 174 N. Y. Supp. 908, fumes from a tank over which the employee was working aggravated the pneumonia which he had, and death followed. and death benefit was sustained.

In Kelley v. States Metals Co., 184 App. Div. 918, 170 N. Y. Supp. 1090, while cleaning one of the tanks in the factory, the employee was overcome by the fumes, and, as a result, died of degenerative changes in his kidneys and liver, and death benefit followed.

In Plass v. Central New England R. Co., 169 App. Div. 826. 155 N. Y. Supp. 854, it was held that a poisoning by poison ivy was within the act. Id., 221 N. Y. 472. 117 N. E. 952, and 226 N. Y. 449, 123 N. E. 852.

In Hart v. Wilson & Co., 227 N. Y. 554, 124 N. E. 898, a wool puller suffered from eczema of the hands, and the tetanus germ entered the system through the cracks in the skin, causing death. and death benefits followed.

In O'Dell v. Adirondack Electric Power Co., 223 N. Y. 686, 119 N. E. 1063, the employee, while stringing wires in an ash cellar under the boiler room, became ill from coal gas on August 5. 1916, and November 6. 1916, he died from pulmonary tuberculosis. The evidence indicated that the gas poisoning was the cause of the disease which caused his death, and compensation was awarded for an accidental death.

In Eldridge v. Endicott & Johnson Co., 189 App. Div. 53. 177 N. Y. Supp. 863. we held, by a divided court, that an employee who had a slight cut on the neck from a razor, and became afflicted with anthrax on the following day while unloading hides, and died of anthrax, had suffered an accidental injury.

In Richardson v. Greenberg. 188 App. Div. 248, 176 N. Y. Supp. 651, the employee was leading a horse afflicted with glanders, and he contracted the disease. and died from the effects of it. By a divided court we held there was no accident, and the prevailing and dissenting opinions say much which may be of interest here. In this court it was assumed that the glanders germ entered the system of the emplyoyee while he was leading the horse, and the question upon which the disagreement arose was whether there was an accidental injury. The practical difference between the Greenberg and the Eldridge Case before our court was: In the former, the germ entered through a crack in the skin; in the latter, it was inhaled. The former was held accidental; the latter, not. The Court of Appeals (228 N. Y. 21. 126 N.

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E. 254) reversed the Eldridge Case upon the ground that there was no evidence that the anthrax germ passed from the hides the employee was handling into his person; that the court could not take judicial notice of the nature of the skins, whether susceptible to anthrax, or to the method or likelihood of inoculation by the employee. The court did not pass upon the question whether, if the germ which caused his inoculation came from the hides it would be an accident; but, in view of the cases we have referred to, it seems that that question has been settled, and that the Greenberg Case does not stand in the way of compensation here. The evidence shows that the poisoning here is similar in its nature and effect to that of poison ivy, and, as we have seen, such poisoning is accidental.

Chapter 538, § 1, of the Laws of 1920, added article 2-A to the Workmen's Compensation Law. The history of the article, and of the cases covering the injuries therein referred to, makes it quite clear that the article was added to the law to remove certain doubts which the interpretation by the courts of the Workmen's Compensation Law, as it theretofore existed, had created in certain cases, and may be considered as a legislative interpretation of the former law. Section 49-b of the article reserves the right of employees with respect to diseases which otherwise might be construed as accidental injuries. The spirit of the amendment fairly invites the present award. It is a mistake to consider that the claimant is suffering from an occupational disease; her injuries come from poisoning inflicted upon her in the course of and which arose out of her employment. The award, when applied to the evidence, justifies and compels the conclusion that at first the poisonous liquid caused the fingers to become tender by wearing away of the outer skin, thereby permitting the poison thereafter to enter the system through the skin, as so worn away, and the accident was the unexpected entry through the skin of the poison at places where the occupation had destroyed the protection which the outer skin otherwise would have afforded the claimant.

I favor an affirmance.

Kiley, J., concurs.

JENCZEWSKI ET AL. v. ALUMINUM CO. OF AMERICA.

(New York Supreme Court, Appellate Division, Third Department. December 28, 1921.)

191 New York Supplement. 392.

1. MASTER AND SERVANT — INJURIES DURING DISOBEDIENCE OF ORDERS NOT COMPENSABLE.

In the absence of explanatory circumstances, an employee injured in a passageway which he was forbidden to enter was outside of the sphere of his duties, so as to defeat recovery under the Workmen's Compensation Law.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

2. MASTER AND SERVANT — GENERAL FINDING OF INJURY IN EMPLOYMENT HELD INSUFFICIENT TO SUSTAIN COMPENSATION AWARD.

In proceedings under Workmen's Compensation Law to recover for death of an employee, injured in a passageway in which he was not required to go in returning from a toilet to his work, involving the issue

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as to whether he had disobeyed orders in using the passageway, the Industrial Board's general finding that the accidental injuries "arose out of and in the course of his employment," without a specific finding on the question as to whether he was violating instructions when he met death. is insufficient to sustain an award.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

Appeal from State Industrial Board.

Proceeding under the Workmen's Compensation Law (Consol. Laws, c. 67) by Wladyslowa Jenczewski and others for compensation for death of an employee, opposed by the Aluminum Company of America, employer and self-insurer. Award for claimants by State Industrial Board, and employer and self-insurer appeals. Award reversed, and matter remitted to the board.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Van Kirk, JJ.

Cohn, Chormann & Franchot, of Niagara Falls (Edward E. Franchot. of Niagara Falls, and Paul P. Cohen, of Buffalo, of counsel), for appellant.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel). for State Industrial Board.

Watts, Hunt & Findlay, of Niagara Falls (William L. Hunt, of Niagara Falls, of counsel), for claimants.

COCHRANE, J. In the plant of the appellant are four parallel lines of pots used for reducing aluminum ore to metallic aluminum. Each line consists of a passageway, and on each side of the passageway is a row of pots. The deceased was a pot tender. The place of his work was in line 3. He was found dead between pots 38 and 39 in line 2. The cause of his death was clearly established as contact with a current of electricity, due to a defective electrical appliance. The question for determination is whether the accident arose out of and in the course of the employment. About 15 minutes before the finding of his body, the deceased was seen entering a toilet. The board has found that "on returning from the toilet in some unknown manner [he] passed between pots 38 and 39 in line 2 of pots, and by reason of defective insulation between said pots 38 and 39" he was killed.

In going to the toilet he would pass out of line 3, where he was at work, into an aisle or passageway at right angles to the different lines passing lines 2 and 1; the toilet being in the latter line. The place of his death was 62 feet from the center of the aisle or passageway extending at right angles to the different lines. In other words, he was that distance out of his natural course in returning from the toilet to the place of his work. The pots on line 2 were not in use the day of the accident, and none of the employees were at work in that line. No duty of the deceased required him to be there. It is not claimed that he could reach line 3 by passing between pots 38 and 39, where his dead body was found, nor in any other way than by retracing his steps the said 62 feet.

[1, 2] It was strongly contended by the appellant before the board, and much evidence was given on the point, that the employees were under orders not to enter a line where they were not working. There was evidence to the contrary, and thus a question of fact was presented for the determination of the board. It does not appear, however, from the findings, that such question has been determined. Its importance consists in the fact that. if the deceased was in this respect disobeying orders, it would seem, in the absence of explanatory circumstances, that

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he was outside of the sphere of his duties, and that an award could not for that reason be made. Yodakis v. Smith & Sons Carpet Co., 193 App. Div. 150, 183 N. Y. Supp. 768, affirmed 230 N. Y. 593, 130 N. E. 907. The board has merely made a general finding that the accidental injuries "'arose out of and in the course of his employment." As stated in Lorchitsky v. Gotham Folding Box Co., 230 N. Y. 8, 128 N. E. 899. this "is a mere conclusion and an award ought not to rest upon so general and inadequate a basis."

Whether or not the deceased was disobeying instructions is a question which either has been evaded by the board or else its importance has not been appreciated. Before the appellant is required to pay an award, it is entitled to have that question squarely decided. It is manifestly unfair to make an award without informing the party against whom it is made in what manner the question which may be the turning point in the case has been decided. The findings here are in general extremely vague. We are told that "in some unknown manner" the deceased passed between pots 38 and 39 and met his death, and yet, although the occasion of his being there seems to have been unknown to the board, the latter had no difficulty in passing to the conclusion that the injuries "arose out of and in the course of his employment." Before this award is sustained, I think there should be specific findings on the apparently crucial question as to whether the deceased was violating instructions when he met his death.

The award should be reversed, and the matter remitted to the board. All concur.

JURMAN v. HEBREW NAT. SAUSAGE FACTORY ET AL.

(New York Supreme Court, Appellate Division, Third Department. November 16, 1921.)

191 New York Supplement. 339.

MASTER AND SERVANT — LUNCHROOM EMPLOYEES HELD "WORKMEN REGULARLY EMPLOYED," WITHIN COMPENSATION LAW.

Employees in combination delicatessen and lunchroom business. consisting of cook, waiter, general utility man, and a counter man, who cut meats at the counter and sold articles from it to customers, and for an hour every day acted as waiter at the lunch tables, were "workmen regularly employed," within Workmen's Compensation Law, § 2, group 45. making an employment hazardous where four or more workmen or opeatives are regularly employed, though counter man's work of cutting and handling food at the counter be considered as clerical work, but a fifth employee, a cashier, was not a workman.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

Appeal from State Industrial Commission.

Proceeding by Samuel Jurman under the Workmen's Compensation Law to obtain compensation for personal injuries, consisting of an injury to claimant's right eye, caused by the explosion of a bottle of soda, which he was getting from a refrigerator for a customer. The claim was opposed by the Hebrew National Sausage Factory, the em-

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ployer, and the Travelers' Insurance Company, insurance carrier. There was an award of compensation by the State Industrial Commission, and the employer and insurance carrier appeal. Award unanimously affirmed.

Argued before John M. Kellogg, P. J., and Cochrane, Henry T. Kellogg, Kiley, and Van Kirk, JJ.

Benjamin C. Loder, of New York City (William B. Davis and E. C. Sherwood, both of New York City, of counsel), for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, of counsel), for respondent.

HENRY T. KELLOGG, J. The one question in the case is whether or not "four or more workmen or operatives" were "regularly" employed, so that, under group 45 of section 2 of the Workmen's Compensation Law (Consol. Laws, c. 67), the employment was hazardous. The employer conducted a combination delicatessen and lunchroom business. There were 10 tables in a room at which customers were served with lunch every noon hour. Of the delicatessen business we know only that there was maintained a counter from which sausages, ham, meats, and potato salad were sold. Five persons were regularly employed. They have been described as a cashier, a cook, a waiter, a counter man, and a general helper. In Matter of Europe v. Addison Amusements, 231 N. Y. 105, 131 N. E. 750, it was said:

"Generally speaking, a workman is a man employed in manual labor, whether skilled or unskilled, an artificer, mechanic, or artisan, and an operative is a factory hand, one who operates machinery."

In Westbay v. Curtis & Sanger, 198 App. Div. 25, 189 N. Y. Supp. 539, it was held that messengers, telegraphers, telephone operators, cashiers, stenographers, and bookkeepers in a stockholder's office were not "workmen" or "operatives," under group 45. We may safely conclude, therefore, that in this employment the employee who was classed as a cashier, and whose regular, if not sole, duty was to receive money, was not a "workman or operative."

It is otherwise of the cook and the waiter, not only because their work must have been essentially manual, but for a special reason arising from the wording of the provisions of group 45. Employments are there made hazardous where there are engaged "four or more workmen or operatives regularly, in the same business or in or about the same establishment, * * * except farm laborers and domestic servants." This express exception of domestic servants out of the workmen class shows that the Legislature regarded the service of all such persons to be that of "workmen," for it is self-evident that none can be taken from a class who do not, without such taking, belong to it. It is true that the work of this cook and waiter, because not performed in a private home, was not domestic. However, it was identical in character with that of domestic cooks and waiters. Consequently the Legislature has clearly indicated that the nature of their services is that of "workmen." The helper was also described as "a general utility man." Apparently he helped the waiter, the cook, and the counter man. He was a man of all work, and therefore a "workman."

The counter man presents a more difficult question. We know that he cut meats at the counter and sold articles from it to customers. If his work was simply that of cutting and handing over food, together with charge checks to be delivered to the cashier, his work was, perhaps, more manual than it was clerical. However, it is a proven fact that for an hour every day he acted as waiter at the lunch tables. This was not as if he were a clerk, who incidentally and intermittently did waiter's work. Rather was he a clerk at one time (if ever such) and

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a waiter at another. It is just as clear that he was thus employed "regularly" as a waiter as that lunch was "regularly" served in the room each day. It seems to us, therefore. that this employee may be counted. so that it can justly be said that in this employment there were four "workmen" "regularly" employed, and that the employment was within the Workmen's Compensation Law.

The award should be affirmed. All concur.

KELLY v. NICHOLS ET AL.

(New York Supreme Court, Appellate Division, Third Department. December 28, 1921.)

191 New York Supplement, 445.

MASTER AND SERVANT — EVIDENCE HELD NOT TO SHOW COMPENSABLE INJURIES TO AGED ELEVATOR OPERATOR.

In a proceeding under the Workmen's Compensation Law by an electric freight elevator operator 69 years old, who lost consciousness and fell against the shaft doors, when he pulled on the cable to start the elevator downward, where it was shown that the elevator was in perfect order, and physicians testified that, in their opinion, he sustained an apoplectic stroke or a fit of epilepsy at the moment he pulled the cable. *held*, that the inferences of fact conclusively established that his injuries did not arise out of his employment.

(For other cases. see Master and Servant, Dec. Dig. § 405[4].)

John M. Kellogg, P. J., and Woodward, J., dissenting.

Appeal from State Industrial Commission.

Proceeding for compensation under the Workmen's Compensation Law (Consol. Laws, c. 67) by Thomas Kelly, employee, opposed by J. W. T. Nichols, employer, and the insurance carrier. From an award for claimant. the employer and insurance carrier appeal. Reversed, and claim dismissed.

Argued before John M. Kellogg. P. J., and Woodward, Cochrane, Henry T. Kellogg, Kiley, and Van Kirk, JJ.

B. L. Pettigrew, of New York City (Walter L. Glenney, of New York City, of counsel), for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, of counsel), for State Industrial Commission.

HENRY T. KELLOGG. J. The claimant was employed to operate a freight elevator in the plant of his employer. The motive power was electricity, and the elevator was started and stopped by pulling up or pulling down upon a cable extending through it. It was a slow-speed elevator, and started only with a gradual motion. At each of the six floors, which it served. there were double doors opening outward from the elevator shaft, and a mechanical device made it impossible to start the elevator if the doors were open. Moreover, the opening of the doors operated through this device automatically to

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stop the elevator, if it were in motion. Upon the day when it is claimed the accident occurred, the claimant had taken the elevator to the sixth floor, and there, with the doors of the shaft open, talked with an acquaintance for a brief period. Thereafter he closed the doors and pulled upon the cable to start the elevator downward. No one knows what then occurred, for the claimant simultaneously lost consciousness. He came to his senses at the hospital some hours later, but was unable then or thereafter to recall anything which occurred after he had pulled up on the cable.

Shortly after the occurrence, the elevator was discovered at a point in its shaft about 3 feet up from the basement floor. The shaft doors were open and the claimant's head and a portion of his body extended outwardly from the opening. The elevator and its equipment were intact in every particular. It was operated immediately after the occurrence. and for many months thereafter, and was then and has ever since been in perfect working order. There was no evidence to indicate that the claimant accidentally struck his head against any projecting object in the elevator, or that any object had fallen upon his head, or that his body had come in contact with any metallic device carrying an electric current. The claimant was 69 years of age. When examined at the hospital, he was found to have a blood pressure of 200 and to be suffering from arteriosclerosis. One of the physicians testified at the hearing that in his opinion the claimant sustained an apoplectic stroke at the moment he pulled on the elevator cable. Another physician expressed the opinion that he suffered from a fit of epilepsy. No physician or layman gave testimony in support of any other theory.

It is the only possible inference from the proof that the plaintiff fell and sustained bruises as a result of an attack either of apoplexy or epilepsy. It is a reasonable inference, also, that the car stopped because the claimant in falling. struck the shaft doors and thereby caused them to open. The claimant is entitled to no statutory presumption to gain his case, not only because such a presumption will not prove an accidental injury (Joseph v. United Kimono Co., 194 App. Div. 568, 185 N. Y. Supp. 700). but because the just inferences of fact conclusively establish that his injuries did not arise out of his employment.

I favor reversal and dismissal.

All concur, except John M. Kellogg, P. J., and Woodward, J., who dissent.

LANDAU v. E. W. BLISS CO. ET AL.

(New York Supreme Court, Appellate Division, Third Department. December 28, 1921.)

191 New York Supplement, 454.

MASTER AND SERVANT—EVIDENCE OF COMPENSABLE LOSS OF VISION INSUFFICIENT.

Award of compensation for loss of vision *held* supported by no sufficient evidence of the loss being caused by an injury in the employment, but to rest on a doctor's conclusion from unjustified assumptions.

(For other cases. see Master and Servant, Dec. Dig. § 405[4].)

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Appeal from State Industrial Board.

Proceeding by Adolf Landau for compensation under the Workmen's Compensation Law (Consol. Laws, c. 67), opposed by the E. W. Bliss Company, employer, and the Travelers' Insurance Company, insurance carrier. From an award of the State Industrial Commission, the employer and insurer appeal. Award reversed, and matter remitted to Board.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Van Kirk, JJ.

Benjamin C. Loder, of New York City (E. C. Sherwood and William B. Davis, both of New York City, of counsel), for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Board.

WOODWARD, J. The State Industrial Commission finds as conclusions of fact that on May 1, 1919, Adolph Landau, the claimant, was engaged in the regular course of his employment for the E. W. Bliss Company, and that "while assisting a fellow workman, chipping casting at the plant of his employer, a chip of said casting struck said claimant in his left eye"; that "prior to May 1, 1919, claimant had in his left eye an irregularly shaped subcapsular opacity, which occupied the entire pupillary area, known as a cataract." Having found this alleged opacity, which, according to Webster, is "the state of being opaque; the quality of a body which renders it impervious to the rays of light; want of transparency, opaqueness"—and which must, of necessity, have prevented the claimant from getting anything like full vision from the left eye, the commission proceeds to find that "prior to May 1, 1919, claimant in no way suffered from or experienced loss of vision in his left eye"; that "the chip from the casting, which struck the claimant in his left eye, so aggravated the pre-existing condition of said eye as to cause the claimant to lose, as a result thereof, 70 per cent. of the useful vision of said left eye." Upon the basis of the above finding the commission has made an award for 89 $^{6}/_{7}$ weeks at the rate of $16.92 per week, and closed the case. The employer and the insurance carrier appeal.

The appellants admit that the claimant was struck in the eye by a small piece of casting, but contend that the evidence fails to show that the loss of vision is due to the alleged injury. Starting with the finding that there was an opacity of the left eye before this accident occurred, which "occupied the entire pupillary area," constituting what is known as a cataract, it would seem to be necessary to produce some reasonably clear testimony to show that the trifling accident, which did not prevent the claimant from continuing his work without loss of time, as he admits, was the cause of the loss of vision. A cataract, as defined by Webster, is "an opacity of the crystalline lens, or of its capsule, which prevents the passage of the rays of light and impairs or destroys the sight," and the crystalline lens seems to be what we known as the pupillary area, which was entirely occupied by this cataract before the accident. See Webster, "Eye." If there was a cataract "occupying the entire pupillary area" before the accident then it must be that the vision was impaired or destroyed at that time, and there is no medical testimony in this case to dispute this finding of fact and necessary conclusion.

The claimant testified that he lost no time by reason of the accident, and, answering questions of Commissioner Gompers, he said that "Dr. Behan and other doctors told me that the blow was so big that it has formed a cataract, and to-day (a year and a half after the accident) I

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can't see hardly anything with my left eye." Mr. Gompers asked: "And you saw all right before the accident?" The answer was: "Sure thing." Of course this question and answer was not confined to the left eye; the claimant may have had a complete vision in his right eye. Indeed, the record shows that the right eye is entirely normal, so that any general testimony that the claimant could see, that he did not use glasses, etc., is apart from the question involved here, and that is whether the impaired vision of the left eye, as it is conceded to exist to-day, is the result of the accident. The claimant did testify that he never had any trouble with his eye before this accident, that he never noticed anything the matter with his eye, that he could read, and that to-day he could not read the paper; but none of these things goes to the question at issue. A cataract is not usually painful. It was easy enough for the claimant to go on using his left eye with a developing cataract without being conscious of the defective vision in that eye. He may be in entire good faith in his testimony; but, if the finding of the commission that there was a cataract before the accident is well founded, then there must have been a substantial loss of vision, and the assumption of the award that he has lost 70 per cent. of a normal vision by reason of the accident is without evidence to sustain it.

Dr. Behan, who appears to have been in the employ of the E. W. Bliss Company, made a report to the commission as to the conditions found on the 2d day of May, 1919, the day following the accident. He reports that he found the right eye normal; that the left eye showed loss of vision of 20/70, which apparently corresponds substantially with the present condition and that there was the cataract found by the commission to have existed before the accident; that there was "no swelling of the lens observed," and that an X-ray of left eye was negative—that there was no foreign substance in the eye. On May 21, 1919, he reports substantially the same conditions, and on the 17th of March, 1920, he reports that a "complete examination of eyes this date reveals no change in findings of May 2, 1919, as noted above, nor on refraction results noted on May 21, 1919," and declares:

"It is my opinion that the lenticular changes noted in the left eye existed prior to the injury of May 1, 1919, for the reason that this eye showed no signs of activity within 24 hours after the alleged injury, and because the lenticular changes noted were in existence within 24 hours of said injury and were still present without change on March 17, 1920, when I last examined this patient."

Dr. Torok, who qualified as an expert, reported that he examined the claimant's eyes on the 25th day of February, 1920, about 9 months after the accident, and found the right eye normal and that the left eye, normal in some respects, has over the lens "an irregularly shaped subcapsular opacity which occupies the entire pupillary area," and that the vision is about one-fifth of normal. He says that the claimant is "suffering from a partial cataract in his left eye. This condition may possibly be due to such accident as that which occurred to him on May 1, 1919." This doctor was called as a witness by the appellants, and testified that he received a history of the accident from the claimant; that the claimant told him he was hit in the eye by a large piece of casting. He says that he thought the accident did not produce the condition which he found; says that the testimony showing that there was only a small piece of iron thrown into the claimant's eye, and that there was no reduction, indicates that the condition was not produced by the accident; that a cataract would be produced only by a very severe blow, or by a small piece entering the eye, injurying the lens, in the interior of the eyeball. His attention being called to Dr. Behan's report he says that it shows:

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"That the day after the accident the eye was absolutely free from inflammation, and he had exactly the same condition of the eye that I found a year later, which would be very much in favor of the opinion that the opacity of the lens was present before the accident.

This same witness testified that the cataract was not likely to result in 24 hours under the claimant's history of the accident, especially as there was no inflammation.

It is obvious that the commission relied upon this testimony as to the existence of the cataract before the accident, and the same witness discredits the theory that the injury produced the loss of vision, for he says that he found the conditions the same as those reported by Dr. Behan upon his examination a year later. Both of these physicians agree that the resulting loss of vision was not due to the particular accident.

The only possible foundation for this award must be found in the testimony of the claimant that he had had no trouble with his eye prior to the accident (a thing that by no means contradicts the established fact that the cataract existed at the time of the accident. and that the left eye showed no essential difference between the examination made by Dr. Behan one day after the accident and that of Dr. Torok nine months or more later) and the unsworn statement of Dr. Copeland, who assumes that the claimant was struck in the left eye by a piece of casting, that the eye became inflamed, and that the claimant had had a loss of vision since then, and that "at the present time, however, the loss of vision due to the accident is from 60 to 70 per cent." He gives no facts to justify these assumptions; his information is purely hearsay, so far as appears; and he merely concludes that there has been a loss of vision due to the accident.

It seems to us entirely clear that this case comes within the reasoning of Gentelong v. American Hide & Leather Co., 194 App. Div. 9, 12, 184 N. Y. Supp. 808. and McCarthy v. Globe Automatic Sprinkler Co., 196 App. Div. 619. 188 N. Y. Supp. 118, and that the award may not stand. The award appealed from should be reversed.

Award reversed, and matter remitted to the board. All concur.

ROSS v. HOWIESON ET AL.

(New York Supreme Court, Appellate Division, Third Department. November 16, 1921.)

191 New York Supplement, 276.

MASTER AND SERVANT — RY TO SEAMSTRESS USING ENTRANCE TO PLACE — RK ON UPPER FLOOR HELD NOT COMPENSABLE.

Workmen's Compensation Act, § 3, subd. 4, pr viding that "employee" means a person engaged in one of the occupation enumerated in section 2, or who is in the service of an employer whc e principal business is that of carrying on or conducting a hazardous employment on the premises or plant. or in the course of his employment away from the plant of his employer, as construed by wording of section before amendment by Laws 1916, c. 622, requires that the employee, rather than the employer, shall be engaged in employment upon the premises or at the plant. or in the course of his employment away from the plant. of his employer,

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and hence one employed as a seamstress in a dressmaking plant on an upper floor of a building, who was injured in going to work by slipping on a piece of coal in lower hall of building, was not an employee entitled to compensation.

(For other cases, see Master and Servant, Dec. Dig. § 375[2].)

(For other definitions, see Words and Phrases, First and Second Series, Employee.)

John M. Kellogg, P. J.. dissenting.

Appeal from State Industrial Commission.

Claim by Winnifred Ross for compensation under the Workmen's Compensation Law against Howieson, employer, and the Travelers' Insurance Company, insurance carrier. From an award by the Commission, the employer and the insurance carrier appeal. Reversed, and claim dismissed.

Argued before John M. Kellogg, P. J., and Cochrane, Henry T. Kellogg, Kiley, and Van Kirk, JJ.

Benjamin C. Loder, of New York City (William B. Davis, of New York City. of counsel), for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, of counsel), for the Commission.

Henry T. Kellogg, J. The employer maintained a dressmaking plant on one of the upper floors of a building situate at No. 2 West Forty-Seventh street in the city of New York. He did not own the building, nor was he in possession of any portion of its rooms, hallways, or staircases, other than those upon the floor where his plant was located. The claimant was a seamstress, who worked in the plant of her employer. While entering the lower hall of the building, she stepped upon a piece of coal, slipped. and fell to the floor, and sustained various injuries, for which an award has been made.

An employee is defined in subdivision 4 of section 3 of the Workmen's Compensation Law (Consol. Laws, c. 67) as follows:

"'Employee' means a person engaged in one of the occupations enumerated in section 2 or who is in the service of an employer whose principal business is that of carrying on or conducting a hazardous employment upon the premises or at the plant, or in the course of his employment away from the plant of his employer."

The sentence is badly constructed, owing to the fact, doubtless, that the subdivision as originally enacted was amended by the process of removing entire phrases therefrom and adding others thereto. Chapter 622, Laws of 1916. The subdivision originally read as follows:

"'Employee' means a person who is engaged in a hazardous employment in the service of an employer carrying on or conducting the same upon the premises or at the plant, or in the course of his employment away from the plant of his employer." Chapter 41. Laws of 1914.

Read in the light of this previous enactment, it is evident that the subdivision as now reconstructed requires that the employee, rather than the employer, shall be engaged in employment "upon the premises or at the plant, or in the course of his employment away from the plant of his employer." The Workmen's Compensation Law is thus made to embrace within its protection two distinct classes of employees, viz.: (1) Those actually upon the employer's premises or at his plant; and (2) those who are absent from the plant or premises for the furtherance of the employer's purposes while in the actual course of

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executing the same. As to all employees whose work is to be performed at a particular plant or place, the cases are clear that the day's work begins at the plant or premises, under the control of the employer, where such work is to be executed.

In Manor v. Pennington, 180 App. Div. 130, 167 N. Y. Supp. 424. the employer was in possession of the first and second floors of a garage building, where he was performing work of construction. An employee met with his death from an explosion of a boiler in the cellar of the building, to which he had gone for the purpose of eating his midday meal. It was held that, as the cellar was not the premises of the employer, the claim made for the death of the employee was not compensable. In Etherton v. Johnstown Knitting Mills Co., 184 App. Div. 820, 172 N. Y. Supp. 724, an employee went to the basement of the plant of her employer to set a bottle of tea on the boiler to heat it for her lunch, and was injured by a fall on the basement staircase. An award for her injuries was sustained. In Donlon v. Kips Bay Brewing & Malting Co., 189 App. Div. 415, 179 N. Y. Supp. 93, an award for the death of an employee, who fell down an elevator shaft while walking about the plant of his employer after having had lunch in a room of the plant set aside for that purpose, was affirmed. The distinction is that in the two last cases the accident occurred on the premises of the employer. while in the Manor Case it occurred away from such premises. In the Manor Case it was said:

"This accident did not occur upon the premises or at the plant of the employer, but upon the premises or at the plant of the Nannan & Henry Garage Company, where neither the employer nor the employee had any rights, except by the license of the owners; it occurred 'away from the plant of his employer,' but not 'in the course of his employment.'"

In Berg v. Great Lakes Dredge & Dock Co.. 173 App. Div. 82, 158 N. Y. Supp. 718, an employee fell into the water from a dock while waiting for a boat to take him to a dredge upon which he was employed and lived, and in consequence was drowned. A claim for his death was disallowed, on the ground that the employee had not reached the plant of his employer. In Murphy v. Ludlum Steel Co., 182 App. Div. 139, 169 N. Y. Supp. 781. it was held that an employee killed upon the premises of his employer was not within the Workmen-s Compensation Law, for the reason that the place of the accident was not the premises upon which the business of the employer was conducted. In referring to subdivision 4 of section 3 of the Workmen's Compensation Law the court said:

"Evidently the premises meant are not any lands which the employer owns, but rather the immediate premises or grounds upon which the plant is located."

This case was affirmed in 227 N. Y. 634, 126 N. E. 915. The same principle was involved in Matter of McInerney v. B. & S. R. R. Corp., 225 N. Y. 130, 121 N. E. 806, where an employee engaged to work in a railroad yard was injured on his way home at a point on the railroad right of way three thousand feet from his place of work. The court said:

"The fact that an employee is on the 'premises' of his employer when those premises consist of a railroad right of way or yards does not have the significance which it naturally would have in the cases of an ordinary manufacturing plant."

In Matter of Kowalek v. New York Consol. R. Co., 229 N. Y. 489. 128 N. E. 888, it was held that a guard on a railroad train. who had finished his work, was not in the course of his employment while awaiting a train which would take him home, although standing on the platform of a station of his employer, upon which he emerged at the close

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of his work. In Matter of De Voe v. New York State Railways, 218 N. Y. at page 320, 113 N. E. 257, L. R. A. 1917A, 250. it was said:

"The employee gets up in the morning, dresses himself, and goes to work because of his employment; yet, if he meets with an accident before coming to the employers' premises or his place of work, that is not a risk of his occupation, but of life generally."

The case of Matter of Littler v. George A. Fuller Co., 223 N. Y. 369, 119 N. E. 554, does not in the least derogate from the doctrine set forth in the cases cited. It was there held that an employee injured while being carried in a truck of his employer from his place of work free of charge could have a recovery. The court said:

"The place of injury was brought within the scope of the employment because Littler, when he was injured, was 'on his way * * * from his duty within the precincts of the company.' Matter of De Voe v. N. Y. State Railways, 218 N. Y. 318, 320. The day's work began when he entered the automobile truck in the morning and ended when he left it in the evening."

It was thus held in this exceptional case that "the premises" or "the plant" or "the precincts" of the employer must be considered as including the truck provided by the employer to convey his men to work. The doctrine of all the cases is to the effect that, in the case of a laborer engaged to work at a factory or upon certain fixed premises. he is not an employee, within the meaning of the Workmen's Compensation Law, until he is at the plant or upon the premises of his employer, and that an accidental injury, sustained before he has arrived or after he has departed from such plant or premises. is not compensable. At the time of the accident in the case at bar the claimant had not arrived at a plant or upon premises owned, operated, possessed. or in any wise controlled by her employer. It would be grossly unfair to employers to cast upon them the burden of protecting employees from all the perils attendant upon walking to or from their work through the innumerable hallways and over the many stairways of a great city building, commonly traversed daily by hundreds, if not thousands, of others than their employees, when such ways are not under their control, and the perils arising therefrom can by them in no wise be obviated or lessened. There must be a definite line. the crossing of which begins or ends the liability of an employer for arriving or departing employees. That line has been fixed by subdivision 4 of section 3 of the Workmen's Compensation Law at a point which bounds the plant or premises controlled by the employer for the purposes of the employment. In this view the claimant must fail in her case.

The award is reversed, and the claim dismissed. All concur. except

JOHN M. KELLOGG, P. J. (dissenting). The employer owes to the employee a safe place in which to work and a safe entrance into that place. The entrance may be through a door on the street, or a step or two above the street, or it may be. as in the Frey Case, stairs leading from the street to the place of work on the second floor, or, as in the Ross Case, through a hallway from which stairs ascend to the floor upon which the shop was located. In the Frey Case, while leaving the shop on the second floor by the stairway provided for that purpose and for the accommodation of the floor above, she was run into by several people apparently coming from the first floor into the hallway and swinging a door against her. In the Ross Case, the claimant, in entering the hall of the building to reach the stairway to her place of work, slipped on a piece of coal, fell, and received her injury.

If an employer locates his shop on the second floor of his building, and access is gained by a stairway outside or in the building, it would

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seem that the stairway would be a part of the plant or premises of the employer, and it would not be material whether the stairway was for the sole use of the employer or for the joint use of various employers. The question of property right in the stairway is immaterial; the use of the stairs is the important question, and between the employer and employee the stairs are the stairs of the employer, who alone furnished them for the use of the employee. The stairs and entrance way were not constructed for public use, but for the use of the persons having business in the building, and whoever might have calls of business or pleasure with them. An employer, whose plant is located above the first floor of a building, necessarily has the use for ingress and egress of the hallways and stairs leading thereto. The right to use them, if not mentioned in the lease, follows as a matter of right, and if the employer deems the stairs or entrance way insecure for his employee, he may locate his plant elsewhere or cause the necessary corrections to be made.

If the employer was running an elevator, or maintained a stairway of his own from the first to the upper floor, the case fairly would fall within the Littler Case, 223 N. Y. 369, 119 N. E. 554. There the employer was carrying his employees in a bus from a place near their homes to the plant, and it was held that an employee who was injured in the bus was injured in the course of his employment, and was entitled to compensation. We quote:

"The place of injury was brought within the scope of the employment because Littler, when he was injured, was on his way * * * from his duty within the precincts of the company."

It cannot be material whether the employee ran an elevator of its own or sustained a stairway of its own. It located its plant in such a way that it was necessary for the employee to use the stairway and the hallway, and, so far as we are interested in it, they may be treated as a part of the plant and premises of the employer.

In McInerney v. B. & S. R. R. Corp., 225 N. Y. 130, 121 N. E. 806, where a railroad yard employee traveled more than half a mile upon the right of way and fell through a trestle, it was held that he was not upon the employer's premises within the meaning of the act, as he was a substantial distance from the "ambit" of his employment and going in an unusual way. The court, referring to cases where the employee carries with him the character of an employee while approaching or leaving the premises, says (225 N. Y. at page 135, 121 N. E. 807):

"In the cases which have been called to our attention, where the claim of an employee has been sustained under the rule which we have discussed the accident happened in close proximity to the place of work, and while the employee was on the premises of the employer, and departing from or approaching his work by a way which had been furnished or adopted by the employer as a usual and customary one."

In Driscoll v. Gillen & Sons Lighterage, Inc., 187 App. Div. 909, 173 N. Y. Supp. 825, 226 N. Y. 568, 123 N. E. 863, the decedent employee was the captain of a lighter. On December 31st he started for his boat, intending to spend the day and night there. He was seen on shore about 6 o'clock in the evening, carrying some food, and stated that he was on his way back to the boat. He was not seen thereafter until May 2d, when his body was found in the water near where the boats were moored. His lighter, the Harry, lay alongside the lighter Greenpoint, in the East River at Pier 22 in Brooklyn. It was hooked, fore and aft, to the lighter Greenpoint, and about two feet therefrom, and the Greenpoint was secured to the pier, separated from it a like distance. It does not appear whether he fell from the Harry, from the

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Greenpoint, or from the pier, and apparently the court thought it was immaterial. He was going to his boat from the pier, over the way and in the manner the employer had prepared for him. The award was sustained.

In Re Sundine, 218 Mass. 1, 105 N. E. 433, L. R. A. 1916A, 318, the employee was injured upon the stairs while going to her luncheon. The stairs were not owned or in the control of the employer, but were the only means of access provided for the employees, and it was held the injury arose out of the employment.

In Martin v. Metropolitan Life Ins. Co., 197 App. Div. 382, 189 N. Y. Supp. 467, the defendant owned the building, which occupied an entire block in New York City. It occupied the eleventh and twelfth floors in its business. The remainder of the building was rented to various tenants. The claimant, in its employ on the eleventh floor, was injured while descending the elevator, during the noon hour, for her personal reasons, after she had obtained her luncheon at the employer's lunchroom on the twelfth floor, and it was held that she could not maintain an action of negligence, as the case fell within the Workmen's Compensation Law. There the claimant's employer only used in its business the two floors, and those two floors had the use of the elevators in common with all the tenants of the building. The elevators were the only means which the employer had furnished to enable its employees to pass from the street to their work. The ownership of the building was not the controlling feature, for in the McInerney Case the railroad company owned the right of way where the accident occurred; but it was too remote from the premises or plant where the employee worked, and not a way provided for its use. The fact that the insurance company owned the building did not extend its plant or premises of employment to include the entire building. The plant and premises were the eleventh and twelfth floor. The material fact is that the accident took place upon the only means which the company had furnished its employees to get to and from the place of work.

The words "upon the premises or at the plant * * * of the employer," in subdivision 4 of section 3 of the Workmen's Compensation Law, do not refer to ownership or property rights, but to the plant or premises as used, without regard to who owns or controls them. Premises upon the second floor of a building, where there is no approach, cannot be used as a plant or premises for an employment. The approach, which makes it possible to use it for practicable purposes, is a necessary incident to and a part of the plant or premises, so that the statute is not speaking of title to property, but as to the manner in which property is used. The stairway and hallway in question, within the liberal spirit which should control the construction of this remedial statute as between the employer and employee, were a part of the premises or plant of the employment. In each case the employee was at the place of the accident, not for personal reasons, or because the stairway or hall was used by others than the employer and his employees but for the sole reason that the employer had furnished this place as the only possible means of access to the workshops.

In Latter's Case, 130 N. E. 637, the factory of the employer was on the fifth floor, which he held under a lease from the owner of the building. The lease did not in terms refer to the elevator. The only means of access to the factory was by the elevator or a stairway; the elevator was generally used. An employee, in ascending the elevator to begin his day's work, was injured thereon, and was given compensation, the court saying:

He "was in a place where he had the right to be as against the landlord and as against the employer, who could have been found to have authorized its use. This right was dependent upon and arose from the

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employment. and the risk of injury while using the elevator was an incident and hazard of the employment."

In the instant cases the employer required the employees to use the place of the accident as a condition of the employment. We may say, having in mind the quotation from the Littler Case, that the place of injury was brought within the scope of the employment because the employee, when she was injured. was on her way to her duty within the precincts of the company, and upon the only way which the employer had made it possible for her to reach her work.

I favor an affirmance.

FARR v. BABCOCK LUMBER & LAND CO. (No. 594.)

(Supreme Court of North Carolina. Dec. 21, 1921.)

109 Southeastern Reporter, 833.

2. MASTER AND SERVANT — COMPENSATION ACT OF TENNESSEE HELD NOT TO PRECLUDE SERVANT EMPLOYED IN TENNESSEE FROM SUING IN NORTH CAROLINA.

The Workmen's Compensation Act of Tennessee does not preclude an employee who was employed in Tennessee, but who was injured while working in North Carolina, from bringing action in county in which he was injured for injuries, on the grounds that employer failed to keep a physician at the camp to attend employee after he was injured, that employer employed an incompetent physician. and that employer was negligent in failing to provide employee transportation to his home.

(For other cases, see Master and Servant, Dec. Dig. § 369.)

Exceptions and Appeal from Superior Court. Graham County; Harding, Judge.

Action by Ernest Farr against the Babcock Lumber & Land Company. Order overruling motion for nonsuit as to some of the causes of action and defendant excepts and appeals. Appeal dismissed.

The plaintiff is a resident of Graham county, and the defendant is a foreign corporation engaged in the manufacture of lumber. with plants in Tennessee. The defendant owned timber lands in Graham county. and operated a railroad for hauling logs from Graham to its plants. The defendant had camps, a hospital. and an office in Graham county. The plaintiff, an employee of the defendant, was injured while in the prosecution of the work assigned him. The complaint states four causes of action: (1) Defendant's failure to provide for plaintiff a safe place in which to work; (2) defendant's failure to keep a physician at the camp to attend plaintiff after he was injured; (3) defendant's employment of an incompetent physician; (4) defendant's negligent failure to provide plaintiff transportation to his home from the junction on the road of defendant and Knoxville Power Company. Plaintiff alleged that defendant had undertaken to provide for the plaintiff and other employees a competent physician and surgeon when needed, and made a monthly charge or assessment which was deducted from the employee's wages.

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The defendant denied the plaintiff's material allegations and alleged that the contract of employment was made in Tennessee and subject to the provisions of the Workmen's Compensation Act (Laws 1919, c. 123) passed by the General Assembly of Tennessee on April 15, 1919, and made effective from July 1, 1919.

The defendant contended that, upon the face of the pleadings—it having been agreed that the contract of employment had been made in Tennessee—the court had no jurisdiction. The court sustained the motion, as to the first cause of action, and overruled it as to the second, third, and fourth. Upon the intimation of the court the plaintiff submitted to a nonsuit as to the first cause, and did not appeal. The court further adjudged that the trial should proceed upon the second, third, and fourth causes. The defendant excepted and appealed.

Merrimon, Adams & Johnston, of Asheville, for appellant.
R. L. Phillips and T. M. Jenkins, both of Robbinsville, for appellee.

ADAMS, J. [1] His honor held that the court had no jurisdiction of the first cause of action, and retained the second, third, and fourth causes for trial by jury. The defendant thereupon excepted and appealed. The order appealed from was not final or of such character as to deprive the defendant of any substantial right, and for this reason the appeal was premature. The defendant can preserve its exception until a final judgment is rendered. In numerous cases this court has held that a premature or fragmentary appeal will not be considered. Hailey v. Gray, 93 N. C. 196; Lane v. Richardson, 101 N. C. 182, 7 S. E. 710; Piedmont Co. v. Buxton, 105 N. C. 74, 11 S. E. 264; Emry v. Parker, 111 N. C. 261, 16 S. E. 236; Ry. v. King, 125 N. C. 454, 34 S. E. 541.

[2] We are requested, however, to review so much of the judgment as retains for trial the second, third, and fourth causes of action. As now advised, especially in the absence of an opposing interpretation by the Supreme Court of Tennessee, we are of opinion that the sections of the Workmen's Compensation Act cited and relied on by the defendant do not purport to interfere with the jurisdiction of the superior court of Graham as to the second, third, and fourth causes of action stated in the complaint, and that there was no error in his honor's order that these causes be retained for trial.

Appeal dismissed.

Walker, J., concurs only in dismissal of appeal.

SOUTHERN SURETY CO. v. BEAIRD. (No. 1192.)

(Court of Civil Appeals of Texas. El Paso. Nov. 10, 1921. Rehearing Denied Dec. 1, 1921.)

235 Southwestern Reporter, 240.

3. MASTER AND SERVANT—NOTICE OF COMPENSABLE INJURY AND CERTIFICATE OF NECESSITY OF MEDICAL TREATMENT HELD WAIVED.

Where an injured employee's physician notified the insurer within 30 days after injury, certified to the Industrial Accident Board within two weeks the necessity for further treatment, and thereafter, at least once a week, notified the insurer through its agent of the employee's condition

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and treatment, but, acting on such agent's assurances that certification to the Board of the necessity for further treatment was not necessary, omitted to further advise it, the insurer waived the giving of such notices and certificates, as required by Vernon's Ann. Civ. St. Supp. 1918, arts. 5236—9, to 5246—11, and was estopped from asserting the want thereof, or any action the Board might have taken had notices and certificates been given, even though such notices and actions of the Board with respect to fees and charges for treatment are of the essence of the insurance contract.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

5. MASTER AND SERVANT—"HOSPITAL SERVICES" WITHIN COMPENSATION ACT DEFINED.

Care, meals, heat, and artificial light furnished to a disabled employee commensurate with his needs are included in "hospital services," to which such employee is entitled under Workmen's Compensation Act (Vernon's Ann. Civ. St. Supp. 1918, arts. 5246—9 to 5246—11), though furnished in a private residence.

(For other cases, see Master and Servant, Dec. Dig. § 385[16].)

6. MASTER AND SERVANT — EVIDENCE AS TO LIABILITY UNDER COMPENSATION ACT FOR HOSPITAL SERVICE HELD ADMISSIBLE.

In a suit to set aside an award by the State Industrial Accident Board for hospital services rendered to an injured employee by his father, the court did not err in admitting evidence that the father had furnished his son with board, lodging, and care, nor in permitting the attending physician to testify that the liability insurer's agent, in its behalf, had authorized the rendition of such services without certifying to the Board the necessity for further medical treatment, as required by Vernon's Ann. Civ. St. Supp. 1918, art. 5246—9, the evidence showing that it was within the apparent scope of such agent's authority to so advise the physician.

(For other cases, see Master and Servant, Dec. Dig. § 404.)

Appeal from Eastland County Court; R. L. Rust, Judge.

Suit by the Southern Surety Company to set aside award of Industrial Accident Board to C. V. Beaird. Judgment for defendant, and plaintiff appeals. Affirmed.

D. T. Mason, of Dallas, T. H. McGregor, of Austin, and E. F. Cameron, of El Paso, for appellant.

Harrison, Cavin & Key, of Eastland and H. C. Peyton, of Brownwood, for appellee.

WALTHALL, J. This case presents a suit originally in the justice of the peace court by appellant, Southern Surety Company, to set aside and cancel an award made by the State Industrial Accident Board to C. W. Beaird, appellee, for hospital services rendered by him to Chester L. Beaird, his son, in the sum of $168.

In the justice court the trial resulted in favor of the Southern Surety Company. An appeal was duly prosecuted by C. W. Beaird to the county court, where a trial de novo was had before the court without a jury, resulting in a judgment in favor of appellee in the sum of $168, from which judgment this appeal is prosecuted.

An agreed statement of facts is found in the record, from which we, with some abbreviations, make the following findings of fact:

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On the 19th day of November, 1918, Chester L. Beaird, while in the employment of the Snow Transfer Company, and while in the performance of his duty, was severely burned by a gasoline explosion. After his injury he was taken from Ranger, Tex., to the home of his father, appellee. near Brownwood, Tex., where he was confined to his bed continuously from the time of the accident to May 24, 1919. During all of the time of his confinement and disability he was under the constant care and treatment of a physician, Dr. Brown. On the 21st day of November, 1918, Chester L. Beaird entered into a verbal contract with his father, C. W. Beaird, appellee, whereby, for and in consideration of $1 per day. appellee was to furnish to Chester L. Beaird during his total incapacity care, meals. fuel, light, and other necessaries incident to his sickness and total incapacity. Appellee furnished his son with a room and bed at his farmhouse, and he and his family constantly waited upon and cared for Chester L. Beaird during his sickness and total incapacity for 168 days. Chester L. Beaird gave no notice to the Industrial Accident Board of the accident or his need of medical attention; nor did he give such notice to the appellant, Southern Surety Company. Chester L. Beaird did not receive authority from the Industrial Accident Board or the Southern Surety Company to contract for the medical services or the care and attention furnished him by appellee. Commencing with the second week after the injury and continuing up to the date of the trial of this case, the Southern Surety Company has been paying to Chester L. Beaird a weekly compensation of $13.84 per week. said payments were made through E. B. Henly, an insurance agent.

Within two weeks after the injury of Chester L. Beaird Dr. Brown certified to the Industrial Accident Board the necessity for further medical treatment of Chester L. Beaird, further certifying that he would be totally disabled for several weeks, but the doctor received no authority from the Board for the continuance of medical care and treatment. Within two weeks after the accident Dr. Brown, at the request of Chester L. Beaird, notified E. B. Henly of the condition of Chester L. Beaird, and of his treatment and the necessity for such treatment. Henly told Dr. Brown that his agency had issued a policy of compensation insurance for the Snow Transfer Company, the policy being issued by the Southern Surety Company. Henly suggested that Dr. Brown advise the Industrial Accident Board of the injury and necessity for treatment, which notice was given by Dr. Brown. The Board replied to Dr. Brown that no report had been made of the accident to Chester L. Beaird. Henly advised Dr. Brown that it would not be necessary to make any report, as he fully understood about the matter of the medical treatment by Dr. Brown and at the home of his father. and was satisfied with the treatment and instructed Dr. Brown to continue same. Dr. Brown went to Henly at least once a week for the purpose of notifying him of the condition of Chester L. Beaird and of the necessity for further medical and hospital treatment. Finally Henly notified Dr. Brown that it was not necessary for him to continue to make any further report in regard to the condition and treatment of Chester L. Beaird, as he fully understood the same, and was willing that such treatment, both by Dr. Brown and by the relatives of Chester L. Beaird at the home of his father. should be continued as long as same was necessary. Upon this instruction from Henly Dr. Brown discontinued giving weekly notice to Henly, but did make an occasional report to him. In making such reports to Henly Dr. Brown was acting for himself as to medical attention, and at the request and for Chester L. Beaird as to the services and treatment then being rendered by his father, appellee, and other relatives.

At the request of Henly, on a number of occasions, Dr. Brown carried weekly compensation vouchers issued by the Southern Surety Company to Chester L. Beaird under the terms of its policy and delivered

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same to Chester L. Beaird at the home of his father. Dr. Brown then knew of claims of other parties against appellant being paid through the agency of Henly at Brownwood. Henly & Co are insurance agents and represent appellant at Brownwood.

At the time Dr. Brown first notified Henly of the condition of Chester L. Beaird and of his treatment of him, he also told Henly of the arrangement Chester L. Beaird had made with his father in regard to his father giving him hospital care and treatment. Henly agreed with Dr. Brown that he might go ahead with his medical treatment. and agreed and consented that Chester L. Beaird might be kept at his father's home under the then agreement between the father and son, for a charge by the father of $1 per day for care, treatment, and board.

About the 1st of February. 1919, a traveling representative of appellant was in Brownwood at the office of Henly & Co.. and requested Dr. Brown to call at the office for consultation as to Chester L. Beaird. The representative requested Dr. Brown to submit his bill for services rendered and for medicines and dressings used, stating at the time that he did not consider appellant responsible for more than two weeks regardless of the condition of Chester L. Beaird; that the only notice given the Board by Dr. Brown was the notice of December 2, 1918; that Dr. Brown did not receive any authority or notice from the Board authorizing him to continue his professional services to Chester L. Beaird, or to have continued the care and attention and hospital services then being given by appellee at his home.

The reason Dr. Brown gave no further notice was the fact that he relied on the statement of Henly, as above, and to the effect that it would not be necessary to further notify the Board; that notices to him would be all that would be necessary. When Dr. Brown first notified Henley of the accident to Chester L. Beaird and of the medical and hospital treatment he was then receiving, Henly instructed Dr. Brown to continue the medical treatment and hospital services without notifying the Board that he would consent to both the medical and hospital treatment and service without either being ordered by the Board. This Henly repeatedly told Dr. Brown. Both Dr. Brown and appellee relied on the statement of Henly. and for that reason no reports were made to the Board other than the one made about the 2d of December, 1918.

The case having originated in the justice court, it was agreed on the trial in the county court that the appellant pleaded orally: General demurrer; special exception to appellee's answer that the services rendered to Chester L. Beaird were not hospital services; that it was not shown that the cause for continued hospital services had been certified to the Industrial Accident Board as required by law; "general demurrer as to the means alleged in the defendant's answer, and defendant authorized by E. B. Henly to bind the Southern Surety Company to waive notice to the Industrial Accident Board."

[1. 2] There is no merit in the first assignment complaining of the action of the court in overruling its motion to quash appellee's appeal bond in perfecting the appeal from the justice court and dismiss the appeal from the judgment in the justice court. The judgment in the justice court was in favor of appellant, Southern Surety Company, refusing to allow the award of the Industrial Accident Board and that it recover its costs, the costs amounting to $4.50, and paid by defendant, Beaird.

Beaird evidently was entitled to appeal. The costs are not estimated as being a part of the "amount of the judgment" in fixing the amount of the appeal bond when one is required to be given. the costs being no part of the "amount" recovered. The bond is exclusive of costs. A fine analysis of the law by Judge Gaines, as it is now written, is found in Yarbrough v. Collins, 91 Tex. 306, 42 S. W. 1052, and later applied by

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Judge Brown in H. & T. C. Ry. Co. v. Red Cross Stock Farm, 91 Tex. 628, 45 S. W. 375. Beaird could appeal without bond.

[3, 4] Under the second assignment error is claimed to the overruling of the general demurrer; the contention being that, unless the attending physician or surgeon certifies the necessity to the Industrial Accident Board and the insurer for additional hospital services during the second or any subsequent week of continuous total incapacity requiring the confinement to a hospital, and from week to week certify to the necessity of another week of hospital services, the insurer is not liable for hospital services furnished the injured employee.

After stating the time, place, and the fact of his injury, and the extent of it (a severe burn from gasoline explosion), it was alleged that Dr. Brown, acting for and at the request of Chester L. Beaird, the injured employee, notified appellant as quickly as he could ascertain the name of the company insuring Chester L. Beaird and within thirty days from the date of the injury, and that within two weeks of the injury, on December 2, 1918, certified to the Industrial Accident Board the necessity for further treatment of Chester L. Beaird, showing that he would be totally disabled for at least six or eight weeks; that thereafter Dr. Brown at least once a week notified appellant through its duly authorized agent, E. B. Henly, of the condition of Beaird, and his treatment; that Henly on each occasion told Dr. Brown that he fully understood the situation and was satisfied with the arrangements for care and treatment of Chester L. Beaird, and for him (Dr. Brown) to go ahead, and that Dr. Brown, acting on the assurances and requests as stated, did continue his treatment; that Dr. Brown told Henly that he wished to comply with all regulations as to certification to the Board and association the necessity for treatment; that Henly assured Dr. Brown that such certification was not necessary, and for him, Dr. Brown, to go ahead; and that, with such assurances from Henly, Dr. Brown omitted to further notifyy and advise the Board, and thereafter did no more than to advise Henly. Appellee, after pleading the facts as above, alleged that appellant had waived the right to any other notice to the Board and was estopped to now complain of any insufficiency of notice to any concern or board.

It will readily be seen that the petition does not fully comply with the requirements of articles 5246—9 to 5246—11, Vernon Texas Civil Statutes Supp. 1918, but it is insisted by appellee that Henly and the company of which he was a member were agents of appellant, and that the facts pleaded show a waiver by appellant of the certification and notice to the Board, and, as well, notices to appellant as insurer for additional hospital services.

The pleading of appellee and the evidence show that Henly and the company of which he was a member were agents of the appellant, Southern Surety Company, and fully represented it at Brownwood, Tex.; that Henly was kept fully advised by Dr. Brown from week to week of the condition of Beaird, the treatment given him, and the necessity of it, and the services then being given him by his father and the agreed arrangement between Chester L. Beaird and his father for such care. Henly frequently assured Dr. Brown, then representing Chester L. Beaird in the matter of giving the required notices and certificates, that he was informed as to everything necessary for his principal and the Board to know in the premises, and assured Dr. Brown that further notices and certificates would not be necessary, and Dr. Brown and Chester L. Beaird acted upon such assurances.

It is quite evident that appellant's agents had full knowledge of all the facts, and intended to and did surrender and relinquish his principal's right to notices, and any action the Industrial Accident Board might have taken in protecting the rights of appellant by requiring certificates for additional needed treatment and hospital care. We are of the opinion

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that the answer sufficiently shows that appellant voluntarily waived the giving of the required notices and certificates to the Board, and is now estopped from asserting a want of either notice or certificate or any action appellant or the Board might have taken had notices and certificates been given. As said in Sovereign Camp. Woodmen of the World. v. Putnam, 206 S. W. 970, the principle of estoppel in equity stands upon the very foundations of right and fair dealing; it considers and weighs the conduct of men in their dealings with each other and gives that effect and meaning to their actions which common sense and justice dictate.

The more difficult question to be decided here seems to be: Does the fact that the law itself forbids a recovery under the act unless the notices are given by the employee for the amounts expended or incurred for hospital services, unless the insurer shall have had notice of the injury, and refused. failed, or neglected to furnish it, and that the Board shall regulate all fees and charges for treatment, have the effect to prevent a recovery by the insured, where but for the provisions of the law a recovery could be had by the employee? In other words, are such notices and action of the Board essence of the contract of the insurer to pay for necessary treatment of the injured employee? We have concluded that such notices and action of the Board are essence of the contract, but that. as said by Judge Phillips in Equitable Life Assurance Society of U. S. v. Ellis, 105 Tex. 526, 147 S. W. 1152, 152 S. W. 625, concurrent with this principle is always the qualification that this is so, unless there be a waiver or estoppel. Appellant was at all times present in the person of its agent. Henly, and was fully advised at all times of the character of the care and treatment then being furnished the injured employee, and the cost of it to appellant, and by his advice and assurances to Dr. Brown prevented the notices and certificates to be given, which but for such advice and assurances would have been given. We have concluded that. in view of appellee's pleas of waiver and estoppel, the court was not in error in overruling the demurrer.

[5] By the third assignment it is insisted that the special exception to the answer should have been sustained, as the character of the services rendered for which compensation is sought are not hospital services within the contemplation of the Workmen's Compensation Act, and do not include board, room, rent, fuel, etc.. furnished in a private residence.

It requires no argument to show that a private residence, technically speaking, is not a hospital. The statute provides for hospital services. The issue is presented as to what is included in hospital services. Appellant insists that "hospital services" embraces only treatment received in a hospital, and do not include "hospital care, meals. fuel, light, and other necessaries." for which the charge of $1 per day is made. We do not concur in appellant's contention. The expressions used in the statute are:

"The employee shall be entitled to the medical aid, hospital services and medicines." "Such additional hospital services as are provided in this paragraph shall not be held to include any obligation on the part of the association to pay for medical or surgical services not ordinarily provided by hospitals as a part of their services." "Where such medical aid, hospital service or medicines are furnished by a public hospital or other institution payment thereof shall be made to the proper authorities conducting the same."

The statute does not specify the services to be rendered other than as above, and the evidence offered does not show what services are ordinarily furnishd by hospitals or other institutions. The articles on hospitals we have examined do not specify the services ordinarily rendered by hospitals. We can, however, imagine the inconvenience and utter lack of what would be expected of a hospital service that did not furnish some care, meals, heat when needed, and artificial light to a totally disabled

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employee. We think the service should at least be commensurate with the need. Again. appellant's agent agreed that the services rendered should be rendered, and the compensation.

What we have said indicates our view on the matter presented by the fourth assignment complaining of the overruling of a special exception to the answer that same did not show that notice had been given to the Board, the employer. or the insurer of the need of hospital services. Evidently the notice provided by the statute vitally affects the liability of the parties entering into the contract of employment, but we hold under the facts of this case that appellant waived the notice. Rice v. Garrett, 194 S. W. 667.

[6] The court was not in error as complained of in the fifth assignment in admitting evidence that appellee had furnished the insured with board, lodging, and care. Nor was the court in error, as complained of in the sixth assignment, in permitting Dr. Brown to testify that Henly, in behalf of the appellant, had authorized the services rendered by appellee to the injured employee. and that it would not be necessary for appellee to certify to the Board the necessity for further medical treatment. To us it seems to have been within the apparent scope of the authority of Henly to have so advised Dr. Brown. We need not repeat the evidence. Henly's authority to speak for appellant as agent is not denied.

The agreed weekly compensation of $13.84 per week for total incapacity of the injured employee for work does not exceed the average weekly wages provided by the statute, and did not include the services rendered by appellee. The seventh and eighth assignments complaining of the judgment for appellee for $168 for services for the care. meals, light, and fuel furnished is overruled.

The court was not in error in overruling appellant's motion for a new trial on the grounds of the errors assigned.

Finding no reversible errors, the case is affirmed.

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DEARBORN v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA ET AL. (L. A. 6809.)

(Supreme Court of California. Dec. 20, 1921.)

203 Pacific Reporter, 112.

MASTER AND SERVANT — EVIDENCE HELD TO SHOW EMPLOYMENT WAS NOT CASUAL WITHIN COMPENSATION ACT.

Evidence *held* to show that the labor cost of the building upon which the injured employee was engaged was in excess of $100, and the time occupied by the contemplated work more than 10 days, so as to support a finding of the State Industrial Commission that employee's employment was not casual within Workmen's Compensation Act, §§ 8a, 8c (Stats. 1917, p. 835.)

(For other cases, see Master and Servant, Dec. Dig. § 405[2].)

In Bank.

Proceeding under the Workmen's Compensation Act by Mrs. Elizabeth Hayden and others, to recover compensation for the death of S. E. Hayden, employee, opposed by Florence Ritchie Dearborn, employer. An award was made by the Industrial Accident Commission, and the employer applies for certiorari to review the commission's order. Award affirmed.

Jerome H. Kann, of Los Angeles, for petitioner.

A. E. Graupner, of San Francisco, for respondents.

WASTE, J. This is a proceeding brought to review, and have annulled, an award of the respondent the Industrial Accident Commission. S. E. Hayden was killed on March 24, 1920, while working as a carpenter for Florence Ritchie Dearborn, the petitioner herein. The accident was caused by his being thrown from an automobile while on his way to a telephone to order lumber needed in the erection of the building on which he was working. He left surviving him the other respondents, a widow and three minor children, who were dependent upon him for support. The employer denied any liability for compensation for the death of Hayden, and the dependents made due application for an adjustment of the claim. There were two hearings before the Commission. On the first the applicants were awarded the sum of $4,999.98. That decision was confirmed on the rehearing. Thereupon the petitioner brought this proceeding in review.

The defendant before the Commission, the petitioner here, denied liability for compensation in the matter of Hayden's death, upon the ground that his employment was both casual, and not in the course of petitioner's trade, business, profession, or occupation. There was ample proof that Hayden, at the time of receiving the injuries from which he died, was actually performing services for Mrs. Dearborn. The burden was therefore cast upon petitioner to prove that the deceased was an independent contractor in the matter, or otherwise excluded from the provisions of the Compensation Act. Workmen's Compensation Act, § 19d (Stats. 1917, p. 849). She was unsuccessful before the Commission, which found that the employment of Hayden was not casual, and made the award. The correctness of that finding presents the only point of controversy on the hearing.

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The material facts appear without conflict. Mrs. Dearborn, the petitioner, is associated with her husband in ranching near Blythe, in this state. Being desirous of having a small dwelling house erected for the occupancy of her brother and his family, she employed the deceased, Hayden, to attend to the matter for her. She ordered the lumber and paid the labor bills. Her testimony relating to the employment is that—

"He (Hayden) was to build that little house at Fertilla. He was to receive his pay by the day; that was what he asked; he did not ask for pay any other way. I employed him. I authorized him to employ the other carpenters. There was no understanding with him that I would give him a lump sum of money for building the house so that he could pay them; the arrangement was hurried; there was nothing said about help. Ultimately the price (for the help) would come out of my pocket. The only sum that was mentioned was the amount he asked me for his services by the day—that was $8.50. That is what I agreed to pay him. There was no provision whatever in the arrangement with Mr. Hayden by which a sum of money was to be paid to him for building this house, out of which he could pay these other men."

It appears also that Mrs. Dearborn bought and paid for all the lumber and materials used in the erection of the building. It seems conclusively established, therefore, that the deceased was not an independent contractor in building the house. Was he otherwise excluded from the protection of the act? To have worked this result his employment must have been both casual, and not in the course of the business or occupation of his employer. As before stated. Mrs. Dearborn was engaged, with her husband, in farming. Respondents do not contend that the employment of Hayden was in the course of that business. Hence the inquiry narrows to a consideration of the alleged nature of his work.

The relevant portion of the Workmen's Compensation Act, section 8a (Stats. 1917, p. 835), provides that the term "employee," as used in sections 6 to 31, inclusive, of the act, shall be construed to mean, "every person in the service of an employer, * * * but excluding," among others, any person whose employment is casual. Section 8c of the act provides that the term "casual" "shall be taken to refer only to employments where the work contemplated is to be completed in not exceeding ten working days, without regard to the number of men employed, and where the total labor cost of such work is less than one hundred dollars." The application of this test to the facts of the case presents the question to be determined.

At the outset of this inquiry we may repeat what was said by the present Chief Justice in Southern Pacific Co. v. Industrial Accident Comm., 177 Cal. 378, 380, 170 Pac. 822, 823:

"This court, in reviewing awards of the commission, is not acting as a court of appeal. It has no power to weigh the effect of positive evidence. It must assume that the Commission believed all the evidence given which tends to sustain the award made. * * * Section 84 [section 67 of the present act] of the Workmen's Compensation Act, which gives us the power we are now exercising over this award of the Commission, authorizes us to annul an award only when the Commission acted without or beyond its powers, or when the award was procured by fraud, or is unreasonable, or when the findings of fact do not support it. The findings are not subject to review except in so far as they may have been made without any evidence whatever in support thereof. The review of the findings, even in such cases, is not based on the theory that they are not supported by the evidence and that we are weighing evidence to determine that proposition, but upon the theory that the Commission has no jurisdiction to make a finding where there is no evidence to support it.

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This restatement of the power of the court on review in these proceedings is pertinent for the reason that the petitioner takes the position that there was no evidence in this proceeding below to support the finding of the noncasual character of Hayden's employment, and that, as a consequence of such absence of fact, the Commission exceeded its jurisdiction in making the award. If the petitioner's contention is correct the award must be annulled; otherwise it must stand.

According to the testimony before the Commission, Mrs. Dearborn contemplated the construction of a small dwelling on property to be purchased, to be occupied by her brother and his family. She wanted the work to be done quickly. Consequently she talked the matter over with the decedent, and employed him in the manner already shown. She was assured by Hayden that the work would take three or four days. Mrs. Dearborn and Hayden, together, ordered the first list of materials for the building. Hayden secured two carpenters to work with him on the job for two or three days, agreeing to pay them $8.50 per day, the same wages he was to be paid by the petitioner. The work was commenced on Wednesday, and had not proceeded far before the carpenters found they were short the amount of milling needed for the building. Hayden started to go to a nearby store to telephone to the lumber company about the shortage of material. He had not gone far when Mr. Ritchie brother of Mrs. Dearborn, for whose use the latter was building the house, volunteered to take him to the store in his automobile. On the way Ritchie turned suddenly to avoid running down a chicken. As the auto swerved back into the roadway, which was in the sand, Hayden was thrown out, coming into violent contact with the ground, and sustained the injuries which resulted in his death. The work on the building was interrupted for a short time on the day of the accident, and for a like period on the day Hayden was buried. Lumber and materials for the job, costing in all $454.39, were ordered, from March 24th to and including April 9th. It was used in the building. Mrs. Dearborn testified that workmen were on the job all the time between those dates. Switzer, the last of the carpenters to be paid off, received a check dated April 10th. He testified that he worked but 8, 9 or 10 days, but the fact remains that the materials were being furnished to and were used in the erection of the structure by some one over a period far in excess of 10 days. The total cost of the labor for the building was $189.15. On the foregoing evidence the Commission based its findings and made the award.

The petitioner seeks to avoid the effect and compelling force of the evidence already summarized by asserting that, while the cost of the labor on the finished house, and the length of time consumed in its erection, unite to remove the work of decedent from the category of a "casual employment," the work actually "contemplated" by her when she employed Hayden was completed within 10 days, and at a cost for labor of less than $100. In support of this contention she testified that the structure she was building for the occupancy of her brother, and family, was to be completed only as far as the exterior was concerned. No inside comforts or furnishings were to be provided, and no toilet was to be built on the premises; that as the work progressed she changed her mind, and, in order to make the place more habitable as a dwelling, she went ahead and completed the structure. She relies upon evidence of an alleged understanding with the decedent, Hayden, that the house would be built in 3 or 4 days, and her own testimony as to what work she contemplated at the time. However that may be, at one point in her testimony Mrs. Dearborn testified that she employed Hayden "with the expectation that he would remain to finish—to go through with the building." It is quite clear that the death of Hayden in no way operated to cause any change in the plans for the building. It seems only reasonable to infer that the work actually contemplated by the petitoner, when she

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employed Hayden, was the erection of some kind of a dwelling house, which would be habitable, and at least fairly comfortable when occupied by her relatives. She may not have had very definite ideas on the subject as to the cost and duration of the work. Whatever her plans may have been, her testimony last quoted shows that it was undoubtedly within her contemplation that the decedent would remain to finish the work of erecting the building. That work, as has been shown, took more than 10 days, and the cost of the labor was in excess of $100. In the judgment of the Commission the petitioner did not successfully overcome the burden of proof imposed by the statute. It specifically found that the evidence before it was insufficient to show that the work contemplated was confined to exterior work and flooring, and did not include interior work and the toilet.

The respondents point out that, if it were true that the work contemplated by the petitioner, when she employed the decedent, was to be completed in 4 days, there would still be evidence to support the finding of the Commission that the cost of the labor was in excess of $100, and the employment was therefore not casual. The carpenters, and there were three of them, each received $8.50 per day. At that rate, the cost of their labor alone for the four days would amount to $102.

From this review of the proceedings it clearly appears that facts were not wanting before the Commission to justify the finding that the total labor cost of the building upon which the decedent employee was engaged was in excess of $100, and the time occupied by the contemplated work more than 10 days. Its conclusion, based thereon that the employment was not casual is amply supported. The Commission was therefore not without jurisdiction in the matter, and the award is affirmed.

We concur: Shaw, C. J.; Lennon, J.; Wilbur, J.; Shurtleff, J.; Sloane, J.; Richards, Judge pro tem.

EMPLOYERS' LIABILITY ASSUR. CORPORATION, LIMITED, ET AL. v. INDUSTRIAL ACCIDENT COMMISSION ET AL. (S. F. 9839.)

(Supreme Court of California. Dec. 21, 1921. Rehearing Denied Jan. 19, 1922.)

203 Pacific Reporter, 95.

1. MASTER AND SERVANT — WORKMEN'S COMPENSATION CONFINED TO RELATION OF EMPLOYER AND EMPLOYEE.

Const. art. 20, § 21, as to workmen's compensation, does not give the Legislature power to create and enforce a liability on the part of any one not an employer to compensate persons not his employees, nor to create courts or commissions having judicial power for the settlement of disputes concerning such liability between persons not sustaining the relation of employer and employee, and is not changed in this respect by its amendment in 1918.

(For other cases, see Master and Servant, Dec. Dig. § 347.)

2. MASTER AND SERVANT — COMPENSATION AWARD TO PARTNER AS EMPLOYEE UNAUTHORIZED.

Where claimant's own testimony showed that he was a partner of the firm by which he claimed to be employed, in that he performed his part of the business of the firm without wages, receiving his only reward

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therefor out of an equal division of the firm profits, the fact that his name was among the employees of the firm on the firm's workmen's compensation policy, and that the insurance carrier received benefits in the way of additional premium because his name was added to the list of employees in the policy, did not give the Industrial Accident Commission power to award him compensation as an employee, for whether or not the insurance company would be estopped to deny liability to claimant as an employee covered by the policy in another form of proceeding, no such estoppel would confer jurisdiction to make such an award upon the Commission, a tribunal with powers limited to awarding compensation to claimants who are employees in fact.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

In Bank.

Proceeding under the Workmen's Compensation Act by W. L. Williams, as employee, opposed by Employers' Liability Assurance Corporation, Limited, insurance carrier, and Green & Williams, a copartnership, employers. The Industrial Accident Commission awarded compensation to claimant, and the insurance carrier and employers apply for certiorari to review the Commission's order. Award annulled.

R. P. Wisecarver and Redman & Alexander, all of San Francisco, for petitioners.

A. E. Graupner, of San Francisco, for respondent Commission.

Courtney L. Moore, of San Francisco, for respondent Williams.

RICHARDS, J. pro tem. This proceeding was instituted by the petitioners herein to review an award of the Industrial Accident Commission granting compensation to W. L. Williams, one of the respondents herein. There is no dispute as to the facts upon which this proceeding is predicated. W. L. Williams was a partner in the firm of Green & Williams, copartners, engaged in the rockcrushing business and employing several men. The duties of Williams as a member of said firm were those of working with the men in the gravel pit, while the duties of Green, the other member of the copartnership, were those of attending to the selling and collecting business of the firm. Each was an equal partner, neither receiving wages, but deriving his benefits from the association solely out of the profits of the business. The petitioner herein was the insurance carrier of the firm under the terms of a policy issued by it, which policy, as to most of its provisions, was in the usual printed form, apparently intended for general use throughout the United States where workmen's compensation laws existed, with addenda attached thereto referring particularly to the provisions of the California law upon the subject. In this policy of insurance there was inserted the following clause:

"Pay roll for Comp. to include drivers and drivers' helpers, also chauffeurs and chauffeurs' helpers.

"Including William L. Williams at an amount not exceeding $1,666 per annum. All others excluded."

W. L. Williams was injured while at work in the gravel pit during the life of this policy, and made application to the Industrial Accident Commission for an award, naming the firm of which he was a member and its insurance carrier as the respondents in said application. An answer was filed by the said respondents, denying the jurisdiction of the Commission over said proceeding, and also denying that the applicant was in the employ of said firm, and alleging that upon the date of his injury said applicant was not earning more than the minimum amount upon which compensation is based under the Workmen's Compensation Act.

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Upon the hearing before the Commission it made an award to the applicant of $20.83 a week for 240 weeks, and $12.82 a week for the remainder of his life, together with the sum of $708.22 accrued from the date of his injury to the date of said award. The award states:

"That the foregoing weekly benefit is based upon wages exceeding the maximum at which compensation shall be computed."

The insurance carrier applied for a rehearing before the Commission, which was denied, whereupon it instituted this proceeding, seeking the annulment of the foregoing award.

The petitioner's first contention is that W. L. Williams was not an employee of the firm of Green & Williams, and hence the Industrial Accident Commission could have no jurisdiction over his case. It must be concluded that as to the facts of the case, the undisputed evidence showed that W. L. Williams was not an employee of the copartnership of Green & Williams of which he was an equal member, performing without wages his part of the work and business of said firm, and receiving and to receive his only reward therefor out of an equal division of the profits thereof. There had been no profits earned by said copartnership up to the date of the applicant's injury. While he had withdrawn some small amounts from the firm, these were, according to his own testimony, in the nature of loans, some portion of which he had repaid from other resources. Section 21 of article 20 of the state Constitution, as it read prior to 1918, provided:

"The Legislature may by appropriate legislation create and enforce a liability on the part of all employers to compensate their employees for any injury incurred by the said employees in the course of their employment, irrespective of the fault of either party. The Legislature may provide for the settlement of any disputes arising under the legislation contemplated by this section by arbitration, or by an industrial accident board, by the courts or by either any or all of these agencies, anything in this Constitution to the contrary notwithstanding."

[1, 2] It has been held by this court in several recent cases that the Legislature had no power under this clause of the Constitution to create and enforce a liability on the part of any person not an employer to compensate persons who do not sustain to him the relation of employee, and that the Legislature under said section had no power to create courts or commissions having judicial power for the settlement of disputes concerning such liability between persons who did not sustain the relation of employer and employee to each other. Carstens v. Pillsbury, 172 Cal. 572, 158 Pac. 218; Pacific G.& El. Co. v. Industrial Accident Comm., 180 Cal. 497, 181 Pac. 788. Each of these cases had reference to liabilities arising out of and during a partnership relation, and in each of which it was decided that the provisions of the Workmen's Compensation Act wherein it was attempted to invest the Industrial Accident Commission with jurisdiction to hear and determine such cases were unconstitutional and void. In the year 1918 the foregoing section of the Constitution was amended so as to broaden the powers of the Legislature "to create and enforce a complete system of workmen's compensation, by appropriate legislation." Whatever the effect of this amendment to the Constitution may be in other respects, its primary object remains that of dealing, and of authorizing the Legislature to deal, with the subject of workmen's compensation. In that respect it purports to be no broader in its scope than the section of the Constitution above quoted and which it replaced. This being so, the above-cited decisions of this court defining the powers of the Legislature under said former clause in the Constitution still remain as to the particular point at issue here in full force and effect. The respondent herein concedes the force of these decisions, but undertakes to avoid their effect by showing that in the policy of insurance issued to

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the firm of Green & Williams, said W. L. Williams was expressly mentioned and listed among the employees of said firm, and it is the respondent's contention that the name of W. L. Williams, having been thus inserted in said policy among the employees of the firm, even though he was not in fact such employee. and that said insurance carrier having received benefits in the way of added premium by virtue of the insertion of the name of said Williams in said policy as such an employee, were sufficient to give the Industrial Accident Commission jurisdiction to determine the fact as to whether said Williams was or was not an employee of his own firm. This contention is based upon the showing that the Workmen's Compensation Act embraces certain sections which provide that working members of partnerships receiving wages, irrespective of profit from said partnership, shall be deemed employees thereof, and which also undertake to give the Commission jurisdiction to determine controversies arising out of insurance policies issued to self-employing persons. Workmen's Compensation Act, 1917, §§ 8b, 57b (St. 1917, pp. 835, 869). Even if it were to be conceded that such a stipulation between the insured and the insurance carrier could suffice to confer jurisdiction upon the Industrial Accident Commission to hear and determine the question as to whether the person named as an employee therein is or is not such an employee as would be entitled to the benefits of the act, it would avail the applicant in this proceeding nothing since the undisputed evidence shows that he was not in fact an employee of the partnership of which he was was a member. His own testimony before the Commission is conclusive upon this subject, and brings the case squarely within the above authorities so as to compel an annulment of this award.

[3] The respondent herein, however, urges that the insurance carrier by the fact of having issued this policy and received the consideration therefor in the way of premium is estopped thereby to claim that W. L. Williams is not an employee of the insured. In support of this contention the respondent cites a number of cases from other jurisdictions, all of which, with one exception, are cases of agreement between individuals and estoppels arising therefrom in no way affecting the question of the jurisdiction of tribunals to hear and determine such controversies. On the other hand, it has been held in this state that a surety company is not estopped to deny liability upon a void obligation by reason of the fact that it has executed the same and received the benefits thereof. Loop L. Co. v. Van Loben Sels et al., 173 Cal. 228, 159 Pac. 600; Shaughnessy v. American Surety Co., 138 Cal. 543, 69 Pac. 250, 71 Pac. 701; Coburn v. Townsend, 103 Cal. 233, 37 Pac. 202. The case of Kennedy v. Kennedy Mfg. Co., 177 App. Div. 56, 163 N. Y. Supp. 944, is the only case cited by petitioner bearing upon the question at issue here. That was a case arising under the Workmen's Compensation Act of New York, and the court held that the insurer in that case was estopped to deny that the applicant was an employee of the insured corporation when he had been listed as such employee in the insurance policy. This ruling, however, was not necessary to the decision of that case, since it clearly appeared that, irrespective of the terms of the policy, the applicant was, upon the facts, an employee of the corporation. That case is therefore not authority for the respondent's contention in the instant case. Upon principle it must be held that jurisdiction of the subject-matter of a controversy cannot be conferred upon a tribunal of limited powers either by the direct agreement of the parties or by an estoppel growing out of such agreement. 15 Corpus Juris, p. 844, § 164; Lindsay-Strathmore I. Dist. v. Superior Court, 182 Cal. 334, 187 Pac. 1056. Upon the facts of this case the applicant for this award was not an employee of the copartnership of which he was a member at the time of his injury. The Industrial Accident Commission had therefore no jurisdiction to entertain his application or to make the award. Whether or not W. L. Williams

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would have a right of recovery in the ordinary courts of law upon any obligation on the part of the insurer arising out of the terms of this policy and of his injuries is a matter which we are not called upon to determine in this proceeding.

The award is annulled.

We concur: Shaw, C. J.; Wilbur, J.; Waste, J.; Lennon, J.; Shurtleff, J.

HOLMBERG v. CITY OF OAKLAND. (Civ. 3907.)

(District Court of Appeal, First District, Division 1, California. Nov. 21, 1921.)

203 Pacific Reporter, 167.

3. MASTER AND SERVANT—COMPENSATION LAW IN FORCE AT TIME OF INJURY GOVERNS.

The general rule of construction applied to compensation laws is that the law at the time of the injury is to be taken as the measure of the right of recovery.

(For other cases, see Master and Servant, Dec. Dig. § 349.)

Appeal from Superior Court, Alameda County; Dudley Kinsell. Judge.

Action by Ernest Holmberg against the City of Oakland. Judgment for defendant, and plaintiff appeals. Affirmed.

Ostrander & Carey, of Oakland, for appellant.

Leon E. Gray, City Atty., and Markell C. Baer, Deputy City Atty., both of Oakland, (T. J. Ledwich, of Oakland, of counsel), for respondent.

RICHARDS, J. This appeal is from a judgment in favor of the defendant in an action brought by the plaintiff to recover the sum of $358.-75 alleged to be due for surgical services, hospital bills, etc., incurred and paid by the plaintiff while under treatment for injuries suffered by him while a patrolman on the police force of said city.

The date of the plaintiff's said injuries was October 3, 1914, and he continued to suffer therefrom up to and including March 16, 1920, at which date the operation was performed and the hospital and other medical bills contracted which form the basis of the present action.

The plaintiff rests his right of recovery upon the provisions of section 92½ of the city charter which reads as follows:

"Any officer or member of the police department sustaining an injury while in the performance of his duty shall be entitled to receive in addition to the benefits otherwise provided in article 14 of this charter such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, crutches and apparatus, including artificial members, as may be required during the continuance of his disability, the same to be provided by the city; and the council shall allow such officer or member so injured full pay during the continuance of his disability, or until such time as he may be retired on a pension."

The defendant resists the plaintiff's claim upon the sole ground that the foregoing section of the city charter was enacted and went into ef-

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fect on January 18, 1919, and that said section of the charter is not retroactive so as to be given application to injuries sustained prior to the said date when it became effective.

[1] We are entirely satisfied that this contention must be sustained. It is a well-settled rule of this and many other states that legislative acts are not to be considered retrospective unless the intention to make them so clearly appears from their terms. Willcox v. Edwards, 162 Cal. 460, 123 Pac. 276, Ann. Cas. 1913C, 1392; Vanderbilt v. All Persons, 163 Cal. 507, 126 Pac. 158; Gurnee v. Superior Court, 58 Cal. 88. The authorities on this subject are thus summed up in the Encyclopedia of Law and Procedure:

"It is a rule of statutory construction that all statutes are to be construed as having only a prospective operation, unless the purpose and intent of the Legislature to give them a retrospective effect is expressly declared, or is necessarily implied from the language used. In every case of doubt the doubt must be solved against the retrospective effect." 36 Cyc. 1205.

[2, 3] When we look to the terms of the foregoing section of the charter upon which appellant relies we find, not only that retrospection is not evpressed in its terms, but, on the contrary, its use of the future tense imports that it was only intended to apply to conditions and remedies arising after the date of its adoption. This conclusion is further enforced by the construction which has been quite uniformly applied to compensation laws, which is to the effect that the state of the law at the time of the injury is to be taken as the measure of the right of recovery of the injured person. It was so held by our Supreme Court in the case of Hyman Bros. B. & L. Co. v. Industrial Accident Comm., 180 Cal. 423, 181 Pac. 784, and the rule therein stated follows in the line of the general authority in other jurisdictions (Arizona, etc., Co. v. Clark, 207 Fed. 817, 125 C. C. A. 305; Soderstrom v. Curry, 143 Minn. 154, 173 N. W. 649; Schmidt v. O. K. Bak. Co., 90 Conn. 217, 96 Atl. 963; Baur v. Court of Com. Pleas, 88 N. J. Law, 128, 95 Atl. 627; Diebeikis v. Link Belt Co., 104 N. E. 211).

[4] The appellant further contends that while his original injury was admittedly sustained prior to the enactment of the section in question, his injuries thus suffered, and by which his right knee was affected, were aggravated by the use of his injured limb in the continued performance of his duties as a patrolman, and that the operation for the recovery of the expense of which he brings this action was necessitated by this aggravation of his original injury, and that such operation was performed after the taking effect of the foregoing section of the charter. It must be conceded by the appellant that his affliction, however long continued and however aggravated by the ordinary use of his limb in walking, whether as a patrolman or otherwise, is referrable to the original injury to his knee, and is in no sense a new and independent injury —such an outcome and consequence as would have followed had the appellant not been a patrolman, but had been using his limb in the ordinary exercise of walking. It was therefore such an aggravation of his injury as did not arise peculiarly out of the performance of his official duty. This being so, the continuance and even increase of his disability with the resultant operation must be held to be referrable to the original injury sustained by him on October 3, 1914, over four years before the section of the charter in question went into effect. Such section not being retrospective, it follows that the appellant was not entitled to the relief which he seeks in this action by virtue of its terms.

Judgment affirmed.

We concur: Waste, P. J.; Kerrigan, J.

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GONIER v. CHASE COMPANIES, INCORPORATED (CHASE METAL WORKS).

(Supreme Court of Errors of Connecticut. Nov. 30, 1921.)

115 Atlantic Reporter, 677.

1. MASTER AND SERVANT — DEATH BY FALL CAUSED BY UNCONSCIOUSNESS DUE TO DISEASE HELD AN "INJURY ARISING OUT OF EMPLOYMENT" WITHIN COMPENSATION ACT.

Where a painter working on a staging was subject to attacks of indigestion, causing temporary unconsciousness, his death from a fall from the staging, caused by temporary unconsciousness due to an attack of his ailment constituted an "injury arising out of his employment" within the Workmen's Compensation Act; the danger of falling and the liability of resulting injury being a risk arising out of the conditions of his employment, as the proximate cause of his injury was his fall. and the proximate cause of his fall was the attack of his ailment which he brought to his employment.

(For other cases, see Master and Servant Dec. Dig. § 374.)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

2. MASTER AND SERVANT — WORKING ON STAGING HELD NOT "WILLFUL AND SERIOUS MISCONDUCT" WITHIN COMPENSATION ACT.

Where a painter who knew that he was subject to attacks of indigestion causing temporary unconsciousness had always been able to anticipate such attacks, and protect himself, and he had no warning against working on a staging about 11 feet above a surface covered with paving blocks, except a doctor's advice to discontinue working in high places, given about three months before, *held*. that his conduct in working on the staging did not constitute "willful and serious misconduct" within the Workmen's Compensation Act, defeating recovery for his death by a fall caused by temporary unconsciousness; "willful misconduct" meaning either intentional misconduct—that is, such as is done purposely, with knowledge—or misconduct of such a character as to evince a reckless disregard of consequences to himself by him who is guilty of it.

(For other cases, see Master and Servant, Dec. Dig. § 380.)

Appeal from Superior Court, New Haven County; Christopher L. Avery, Judge.

Proceedings under the Workmen's Compensation Act by Gertrude Gonier for compensation for the death of Joseph Gonier, opposed by the Chase Companies, Incorporated (Chase Metal Works). Award by the Compensation Commissiner, and case reserved by Superior Court, on appeal. Superior court advised to affirm the award of the Compensation Commissioner.

Joseph Gonier, the deceased, had a contract of employment with the defendant for more than 26 weeks next before April 15, 1920, and both employer and employee were subject to the Connecticut Compensation Act (Pub. Acts 1913, c. 138, as amended by Pub. Acts 1915, c. 288).

The deceased had worked as a painter for defendant for over two years, and had painted structures at a height above the ground without being affected by it. He began in September, 1918, visiting physicians for their prescription. None of the physicians told him his trouble; in-

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deed they did not agree as to this. From time to time prior to April 15, 1920, he had spells of unconsciousness, but he had always been able to anticipate these and take firm hold of some support, and after temporary loss of consciousness he would resume work. The defendant knew that the deceased suffered from indigestion, and that on one occasion when he was at home he had a spell of fainting or unconsciousness. About three months before the date of his injury a physician had advised him to discontinue working in high places, because of the liability to have one of these attacks. He replied that he had painted all his life, and knew no other kind of work, and he had to continue in the line of his own occupation.

On April 15, 1920, he was given his choice between inside work, and outside on a staging some 11 feet above the surface, which was covered with wooden paving blocks. He was not feeling well that morning, and preferred working out of doors. He worked awhile, and then went to defendant's dispensary and said he had indigestion. The nurse in charge gave him a dose of rhubarb and soda, and he took this and apparently felt relieved, and resumed his work. The deceased believed that his trouble was indigestion, and several times for that complaint the nurse had given him a similar remedy which had relieved him. He also frequently had complained of his stomach. It did not appear that he had a disease which, in the absence of this fall, would have been fatal within any brief period of time. He was during this morning while at work jovial and joking with his fellow workmen. On returning from the dispensary he worked awhile, and then, apparently again feeling uncomfortable, he sat down on the platform where he was painting, smoked a cigarette, stood up, or partly stood up, to resume work, and then fell backward to the surface below and fractured his skull as a result of the fall, from which he died.

Benjamin I. Spock, of Waterbury, for appellant.

Francis W. Carroll, of Waterbury, for appellee.

WHEELER, C. J. (after stating the facts as above). The reservation brings up for review two points:

[1] First. Did the death of Gonier, resulting from a fall from the staging, caused by a temporary unconsciousness due to disease, constitute an injury arising out of his employment?

"An injury arises out of an employment when it occurs in the course of the employment, and is the result of a risk involved in the employment or incident to it, or to the conditions under which it is required to be performed." Marchiatello v. Lynch Realty Co., 94 Conn. 260, 263, 108 Atl. 799.

The injury is the result of a risk involved in or connected with the employment, when there is present in the circumstances of the accident some causal connection between the employment, or the conditions under which it is required to be performed, and the injury. We pointed out in Larke v. Hancock Mutual Life Ins. Co., 90 Conn. 303, 309, 97 Atl. 320, 322 (L. R. A. 1916E, 584), that—

"The term 'arising out of' in this act points to the origin or cause of the injury."

The immediate question before us is whether the death of the decedent was caused by a risk involved in the conditions of his employment; and that resolves itself to a determination of whether the fall or the attack of vertigo caused the injury. In Monroe v. Hartford Street Ry. Co., 76 Conn. 201, 207 56 Atl. 498, 501, Hamersley, J., defines a proximate cause thus:

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"When an event is followed in natural sequence by a result it is adapted to produce, or aid in producing, that result is a consequence of the event, and the event is the cause of the result."

The fall of Gonier was the event, and it was followed by his injury which the fall was adapted to produce. Later, in Smith v. Connecticut Ry. & Ltg. Co., 80 Conn. 268, 270, 67 Atl. 888, 889 (17 L. R. A. [N. S.] 707), Baldwin, C. J., defined proximate cause thus:

"That only is a proximate cause of an event, juridically considered. which, in a natural sequence, unbroken by any new and intervening cause. produces that event, and without which that event would not have occurred."

Applying these definitions to the facts of this case we must hold that the proximate cause of the decedent's injury was his fall, and the proximate cause of his fall was his attack of indigestion. Whether his physical condition had been idiopathic, or due to his own fault, or to something that had occurred while he was outside the course of his employment, if by reason of it he fell and injured himself, the proximate cause of the injury in each case was the fall, and of the fall the physical concondition. In his discussion of this subject in Fiarenzo v. Richards & Co., 93 Conn. 581, 586, 107 Atl. 653, 565, Gager, J., quotes the maxim of Lord Bacon:

"It were infinite for the law to consider the causes of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause. and judgeth the act by that, without looking at any further degree."

And this has been the underlying principle of our decisions in enforcing liability for torts. In the Fiarenzo Case, at page 585 of 93 Conn, at page 564 of 107 Atl., it is said:

"Had the deceased slipped and been injured while walking from one place of work to another on his employer's premises in the course of his work, it would hardly be claimed that the injury did not arise out of the employment."

This could not have been asserted unless we had been of the opinion that the fall, and not the slipping. caused the injury. Reeves v. Dady Corporation, 95 Conn. 627, 631, 113 Atl. 162, 163, was decided upon the point that at the time the decedent fell from the doorway he had temporarily departed from the course of his employment.

"In this case," we say, "the decedent did not fall out of the doorway through carelessness or because of any disability which he brought to his employment."

The inference although unexpressed. seems to us plain that, if he had fallen because of a physical disability which he had brought to his employment, as vertigo, an epileptic fit, or heart disease, the resulting injury would have been one arising out of the employment. And this would have been so because the fall would have caused the injury, and not the physical disability.

We have examined all of the cases upon this subject. The courts of Great Britain have not uniformly followed Wicks v. Dowell & Co.. L. R. (1905) 2 K. B. Div. 225, but finally British authority has adopted its doctrine. The case was brought to secure compensation for a workman who, while employed in unloading coal from a ship, was, while at his work, seized with an epileptic fit to which he was subject, and fell into the hold of the ship and was injured. In discussing whether the injury "arose out of the employment," Collins, M. R., said:

"A man is picked up at the bottom of the hold of a ship suffering from injuries. What is the cause of his condition? The proximate cause obviously is that he has fallen from a height. But it is suggested that.

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if the occuurence is analyzed, it will be seen that the accident was caused by the idiopathic disease from which the man was suffering, and that therefore the accident did not arise out of his employment. At that point the authorities come in, to the effect that, although the cause of the fall was a fit, the cause of the injuries was the fall itself, and they are direct authorities that the injury in the present case was caused by an accident.

"Then did the accident arise out of the man's employment? When we get rid of the confusion caused by the fact that the fall was originally caused by the fit and the confusion involved in not dissociating the injury and its actual physical cause from the more remote cause—that is to say, from the fit—the difficulty arising from the words 'out of the employment' is removed. How does it come about in the present case that the accident arose out of the employment? Because by the conditions of his employment the workman was bound to stand on the edge of what I may style a precipice, and if in that position he was seized with a fit he would almost necessarily fall over. If that is so. the accident was caused by his necessary proximity to the precipice, for the fall was brought about by the necessity for his standing in that position. Upon the authorities, I think the case is clear; an accident does not cease to be such because its remote cause was the idiopathic condition of the injured man; we must dissociate that idiopathic condition from the other facts and remember that he was obliged to run the risk by the very nature of his employment, and that the dangerous fall was brought about by the conditions of that employment."

The reasoning of the Master of the Rolls applies the rule of proximate cause in accordance with the view of this court to which we have referred. In Wright & Greig, Ltd., v. M'Kendry (1918) 56 Scot. L. Rep. 39, 41, 12 B. W. C. C. 410, the decedent fell upon the slightly sloping floor of his store and fractured his skull. The cause of his fall was a uræmic fit arising from his kidneys. In supporting the judgment of the lower court that the fall caused the injury and that that arose out of the employment. Lord Shaw said:

"The expression [arising out of the employment], in my opinion. applies to the employment as such—to its nature, its conditions, its obligations and its incidents. If by reason of any of these the workman is brought within the zone of special danger, and so injured or killed, it appears to me that the broad words of the statute * * * apply. * * * In this case I think the workman was by the conditions and incidents of his employment engaged at the time of the accident at a place which turned out to be a place of special danger, because but for the hard concrete floor the fatality would not or might not have occurred."

And Lord Parmoor said:

"If the conditions of his employment * * * exposes him at the time * * * of the accident to the injury, * * * then, although the accident is not consequent on and has no causal relation to the work on which the workman is employed. such accident arises out of his employment, as incident, not to the * * * work, but to the * * * risks of the * * * position in which by the conditions of his employment he is obliged to work."

And Lord Dundas said:

"In the case before us the immediate cause of this man's fatal injury was the fall. If the fall was an accident arising out of the employment, then it is irrelevant to consider that the cause of the fall was a fit."

In Thorn or Simpson v. Sinclair, L. R. (1917) App. Cas. 127, 144, House of Lords, Scottish. 10 B. W. C. C. 220, 227, a workman was injured by the roof of the building in which he was working falling upon him. The roof fell because the wall of an adjoining building fell on the

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roof. The court held that the injury did arise out of the employment. Lord Parmoor said:

"Such accident arises out of his employment, as incident, not to the character of the work, but to the dangers and risks of the particular building or position in which by the conditions of his employment he is obliged to work."

Wicks v. Dowell & Co., L. R. (1905) 2 K. B. Div. 225, is approved and followed in Peoria Railway Terminal Co. v. Industrial Board. 279 Ill. 352. 360, 116 N. E. 651; Vulcan Detinning Co. v. Industrial Com., 295 Ill. 141, 128 N. E. 917.

Some of the cases which plaintiff cites do not raise our precise question. For example, Carroll v. What Cheer Stables Co., 38 R. I. 421, 96 Atl. 208, L. R. A. 1916D, 154. Ann. Cas. 1918B, 346, is not a case where the injury was caused solely by the workman's previously diseased condition, but his fall was due to dizziness induced by disease. On similarly related facts the courts of California, New York, Kansas, and Michigan have reached a different conclusion, and their conclusions would lead them to hold in the instant case that the injury to Gonier was caused by his attack of indigestion, and did not arise out of his employment. The latest cases in these jurisdictions which reach a contrary conclusion to that we have reached. are: Cox v. Kansas City Refining Co. (1921) 108 Kan. 320, 195 Pac. 863; Eastman Co. v. Industrial Acc. Com. (Cal. 1921) 200 Pac. 17; Van Gorder v. Packard Motorcar Co., 195 Mich. 588, 162 N. W. 107, L. R. A. 1917E, 522; Joseph v. United Kimona Co., 194 App. Div. 568, 185 N. Y. Supp. 700.

Gonier's employment brought him upon this scaffolding, from which. if he fell, he was in danger of serious injury. The danger of falling and the liability of resulting injury was a risk arising out of the conditions of his employment.

[2] Second. Did Gonier's conduct in working upon this staging constitute willful and serious misconduct? He knew that if he fell from the staging he might seriously injure himself. So far as the finding discloses he had no disease other than indigestion. He knew he had this physical ailment, and that he had had spells of temporary unconsciousness while at his work as a result of it, but he had always been able to anticipate these attacks and protect himself during them, and, after a temporary loss of consciousness. resume work. He had had an attack of indigestion on this morning, but it does not appear to have been severe. If the case rested upon these facts, they could not be held to establish even mere negligence in the deceased. No warning had been given the deceased against working upon this elevated staging, except the advice to him to discontinue working in high places by Dr. Godfrey some three months before, and the case upon this point is almost wholly dependent upon whether his work on this staging, after this advice, was as matter of law the "willful and serious misconduct" of the statute which prevents the award of compensation to his dependent. Misconduct is any improper or wrong conduct. And when such misconduct is not trivial, but grave in character, it becomes the serious misconduct of the statute; that is improper conduct of a grave and aggravated character. Whether misconduct is serious is to be determined from its nature, and not from its consequences. Johnson v. Marshall, Sons & Co., Ltd., L. R. (1906) App. Cas. 409, 22 Times L. Rep. 565. Misconduct which exposed the deceased to serious injury would be serious misconduct. Not only must the misconduct be of this grave character, but under the statute it must also be willful. By willful misconduct is meant either intentional misconduct—that is, such as is done purposely, with knowledge—or misconduct of such a character as to evince a reckless disregard of consequences to himself by him who is guilty of it. Burns' Case. 218 Mass. 8, 105 N. E. 601, Ann. Cas. 1916A. 787; Nickerson's Case, 218 Mass. 158, 160, 105

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N. E. 604, Ann. Cas. 1916A, 790; General American Tank Car Corp. v. Borchardt (1919) 69 Ind. App. 580, 122 N. E. 433, 435; note to Clem v. Chalmers Motor Co., L. R. A. 1916A, 355.

We have had occasion to consider these terms of our statute several times. With one exception they were cases of mere negligence, and we held, with all authority, that willful and serious misconduct means something more than ordinary negligence. Fiarenzo v. Richards & Co., 93 Conn. 581, 107 Atl. 563. Ordinary negligence could never be even serious misconduct, much less willful misconduct; and, although gross negligence might present an instance of serious misconduct, it could never present a case of willful misconduct, as our definition of willful misconduct clearly indicates, and the authorities so hold. Burns' Case, 218 Mass. 8, 105 N. E. 601, Ann. Cas. 1916A, 787; Nickerson's Case, 218 Mass. 158, 105 N. E. 604, Ann. Cas. 1916A, 790; Gignac v. Studebaker Corporation, 186 Mich. 574, 152 N. W. 1037; Riley's Case, 227 Mass. 55, reported also as Riley v. Standard Acc. Ins. Co. (1917) 116 N. E. 259. No misconduct which is thoughtless, heedless, inadvertent, or of the moment, and none which arises from an error of judgment, can be "willful and serious misconduct." Johnson v. Marshall, Sons & Co., 94 Law T. Rep. 828; Baltimore Car Foundry Co. v. Ruzicka, 132 Md. 491, 104 Atl. 167, 4 A. L. R. 113. Nor will every violation of a statute or a public regulation, or a rule, regulation, order or instruction of an employer, constitute willful and serious misconduct. In Merlino v. Connecticut Quarries Co., 93 Conn. 57, 60, 104 Atl. 396, 397, we said:

"Merlino's failure to obey this rule was a careless and perhaps a negligent omission, but it was not such serious and willful misconduct as amounts to a defense under the Workmen's Compensation Act."

United States Fidelity & Guaranty Co. v. Industrial Acc. Com., 174 Cal. 616, 163 Pac. 1013. Whether one violation or repeated violations will constitute willful and serious misconduct must depend upon the circumstances, notably upon the nature of the misconduct and the character of the statute, regulation, rule, order, or instruction violated. Each case must be weighed and determined by its own circumstances. What is serious misconduct is primarily a question of fact, as is a finding of negligence. So, similarly, what is willful misconduct is a question of fact. Nickerson's Case, 218 Mass. 158, 105 Atl. 604, Ann. Cas. 1916A, 790; George v. Glasgow Coal Co., Ltd., L. R. A. (1909) App. Cas. 123.

In reversing an order reducing compensation under a statute for willful failure to obey any reasonable rule of the employer adopted for the safety of the employee, the Supreme Court of Wisconsin said:

"We are of opinion that there was no willful failure to obey a rule of the employer by Healey within the meaning of the statute. Mere violation of a rule does not always constitute willful misconduct. To have that effect the disobedience must have been deliberate, not merely a thoughtless act on the spur of the moment." Frint Motorcar Co. v. Industrial Commission, 168 Wis. 436, 439, 170 N. W. 285, 286.

See Diestelhorst v. Industrial Acc. Com., 32 Cal. App. 771, 164 Pac. 44.

The breach of a rule by one who knows at the time that he is breaking the rule is a willful breach, but if by direct proof, or out of the circumstances, it appears to have been the result of thoughtlessness or inadvertence, the breach cannot be held to have been willful. A conclusion that certain facts constitute willful and serious misconduct, is reviewable by this court when the record presents all the facts and the alleged error is properly assigned. Nolan v. New York, N. H. & H. R. Co., 70 Conn. 159, 174, 39 Atl. 115, 43 L. R. A. 305. The defense of willful and serious misconduct is an affirmative one. The burden of establishing it is on the employer. U. S. Fidelity & Guaranty Co. v. Industrial Acc. Com., 174 Cal. 616, 163 Pac. 1013. Since the finding is one of fact, the

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court on review will not hold this conclusion erroneous unless the facts clearly show this to be so; and in reaching its decision the reviewing court will keep before it the fact that the employer has the duty of proving this defense.

The doctor's warning to the deceased three months before the accident, so far as the circumstances show, may not have been fully understood or deemed important by the deceased. The attack of what he believed to be indigestion had yielded to simple treatment; he had had no indication of one of these spells of unconsciousness; he felt relieved and able to begin work; he was in good spirits; and as he stood up to continue his work he became faint and fell. So far as the record shows, the doctor's advice may not have been in his memory at this time; his act in continuing work upon the staging may have been in entire forgetfulness of this warning. If his conduct could be held to have been misconduct, it would be difficult to hold it to have been serious misconduct. But, aside from this, it could not be held to have been willful. He did not continue to work knowing at this time of his liability to suffer one of these spells of unconsciousness which would be likely to cause him to fall, so that his course could not be found to have been done purposely, with knowledge. Neither could it be said that the circumstances show on his part a reckless disregard of consequences for his own safety.

The superior court is advised to affirm the award of the Compensation Commissioner.

The other Judges concurred.

PASSINI v. ABERTHAW CONST. CO. ET AL.

(Supreme Court of Errors of Connecticut. Dec. 23, 1921.)

115 Atlantic Reporter, 689.

1. MASTER AND SERVANT — SISTER LIVING APART FROM SINGLE BROTHER HELD A "DEPENDENT" MEMBER OF HIS "FAMILY" WITHIN COMPENSATION ACT.

The word "family," which is not defined in Workmen's Compensation Act (Gen. St. 1918, § 5388), defining "dependents" to mean members of the injured employee's family wholly or partially dependent on him, is recognized in the common law of Connecticut as a word of variable and elastic meaning, not limited to members of a collective body of persons living in one household under one head and domestic government, but the word is recognized as meaning individuals related through descent, without regard to unity of residence, a meaning consistent with the remedial purposes of the statute; and hence a sister partially dependent upon deceased employee, a single man injured in his employment, is a member of his "family," entitled to compensation as a dependent, though she lived apart from him in another state.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

(For other definitions, see Words and Phrases, First and Second Series, Dependent; Family.)

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2. MASTER AND SERVANT — AWARD FOR DEATH OF EMPLOYEE RESIDENT SISTER AND NONRESIDENT ALIEN PARENTS HELD IN ACCORD WITH STATUTORY PROVISIONS FOR "NORMAL COMPENSATION" AND FOR PARTIAL DEPENDENTS.

Where deceased employee who left partially dependent parents, nonresident aliens, and a partially dependent sister, a resident of this country, earned over $36 a week, and contributed $13 a week for the sister's support, an award allowing compensation to the parents at the rate of one-half of $5 a week and to the sister at the rate of $13 a week for 312 weeks was in accord with the provisions made by Gen. St. 1918, § 5350, for alien dependents, and the provisions of Laws 1919, c. 142, § 6, for partial dependents; the sister's right as such dependent being in no way affected by the provisions as to alien dependents, the term "normal compensation" used in section 5350 meaning the compensation that would have been awarded such nonresident alien dependents if they had been residents.

(For other cases, see Master and Servant, Dec. Dig. § 386[1].)

Case Reserved from Superior Court, New Haven County; John W. Banks, Judge.

Proceeding under the Workmen's Compensation Act by Marina Speroni Passini against the Aberthaw Construction Company and others. Defendants appeal from a finding and award of the acting Compensation Commissioner of the Third district in favor of the plaintiff, as a dependent of Joseph Speroni, deceased employee, reserved by the superior court on the Commissioner's finding for the advice of the Supreme Court of Errors. Superior court advised to dismiss the appeal and to affirm the award of the Commissioner.

On March 23, 1920, Joseph Speroni, an employee of the Aberthaw Construction Company, sustained an injury in the course of and arising out of his employment, from which he died on that day. The average weekly wage of the deceased was in excess of $36. The deceased was single, and boarded and lodged in Berlin, Conn., at the time of his injury.

The parents of the deceased at this time were aliens residing in Italy, and were partially dependent upon him; also the claimant, a sister of the deceased, was residing in New York City, and was then partially dependent upon the deceased. Upon the application of the alien parents, the Commissioner awarded them compensation at the rate of one-half of $5 a week for 312 weeks.

The deceased was contributing $13 a week to the support of the claimant at the time of his injury. The Commissioner awarded the claimant compensation at the rate of $13 a week for 312 weeks.

Clarence W. Seymour, of Hartford, for plaintiff.

Richard H. Deming, of Hartford, for defendant.

CURTIS, J. [1] The defendants claim that the Commissioner erred in holding that the sister, who resided in New York City, was a member of the family of the deceased (who resided in Connecticut), and therefore a dependent entitled to compensation under the definition of "dependent" in section 5388 of the General Statutes. This definition reads:

"Dependents shall mean members of the injured employee's family or next of kin who were wholly or partially dependent upon the earnings of the employee at the time of the injury."

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The word "family" is not defined in section 5388, wherein various words used in the Compensation Act are defined. In the common law of this state the word "family" is recognized as a word of variable and elastic meaning. Piccinim v. Conn. L. & P. Co., 93 Conn. 423, 106 Atl. 330; Crosgrove, Ex'r, v. Crosgrove et al., 69 Conn. 421, 38 Atl. 219; Dalton v. Knights of Columbus, 80 Conn. 216, 67 Atl. 510, 125 Am. St. Rep. 116, 11 Ann. Cas. 568.

In the absence of a definition of the word "family" in the Workmen's Compensation Act (Laws 1913, c. 138), the word should be held to have such meaning or meanings recognized by our common law as are consistent with the remedial purpose of the act. Its meaning in our law is not limited to that of all members of a collective body of persons living in one household and under one head and domestic government. Other meanings are attached to the word in our common law. Individuals related through descent, without regard to unity of residence, also constitute a family.

The word "family" is recognized in our common law as meaning individuals related through descent, without regard to unity of residence; this meaning is consistent with the remedial purpose of the Workmen's Compensation Act, and is therefore a meaning of the word "family" as used in section 5388 of the General Statutes.

The Commissioner did not err, therefore, in holding that the sister of the deceased, living apart from him, was a member of the family of the deceased, and therefore, as a partial dependent, entitled to compensation. In view of this holding, there is no occasion to discuss the meaning of the term "next of kin" as used in section 5388.

[2] The defendants further claimed that compensation could not be awarded the sister in excess of the sum of $2.50 a week, because of the provisions of that part of section 5350 of the General Statutes relating to the compensation of aliens. Section 5350 provides, in substance, that alien dependents, nonresidents of the United States or its dependencies or Canada, shall receive one-half the sum that would have been awarded to resident dependents in their situation. The section then provides:

"The other half of the normal compensation may be paid in accordance with the rules of apportionment herein provided to such persons resident in the United States, or its dependencies, or Canada, if any there be, as would be entitled to compensation were there no such nonresident alien dependents."

The term "normal compensation," used in section 5350, means the compensation that would have been awarded such nonresident alien dependents if they had been resident dependents, or dependents residing in a dependency of the United States or in Canada.

The compensation awarded the partially dependent sister was determined under section 6 of chapter 142 of the laws of 1919, and section 5350, and, under the facts of this case, was in no way dependent upon or affected by the above statutory provision as to aliens. The parents and the sister were partially dependent upon the deceased; therefore they were entitled to have awarded to them proportionate parts of a sum equal to one-half of the average weekly earnings of the decedent, to be divided among them according to the relative degree of their dependence, subject to the statutory limitation that in no case could either, as a partial dependent, be awarded a sum greater than the weekly contribution of the deceased to the support of such one, and as to the parents subject also to the above provision as to aliens.

The Commissioner, in accord with these statutory provisions, awarded compensation as follows: To the parents, one-half of $5 a week, and to the sister, $13 a week.

Under the provision as to aliens (section 5350) the normal compensation of $5 a week to the parents was diminished to $2.50 a week. The

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provision as to "the other half of the normal provision" obviously has in this case no relation to or effect upon the compensation awarded the sister.

Under the facts in the instant case, "the other half of the normal compensation" to the alien parents reverts to the employer, because the sister receives out of one-half of the average weekly wages of the deceased (to wit, $18) the $13 a week which the deceased contributed to her support, which was the limit of her compensation. She received this from one-half of the weekly wages of the deceased without requiring any part of "the other half of the normal compensation" to the parents, withheld from them under the provisions of section 5350, to make her compensation equal to the weekly contribution of the deceased to her support. One-half the weekly wage of the deceased, minus the normal compensation of the partially dependent parents (that is $18–$5) equals the contribution of $13 a week to the sister, which sum is the limit of compensation that she could receive. "The other half of the normal compensation" therefore could not be used as compensation in this case, and remained the money of the employer.

The provision as to "the other half of the normal compensation" referred to in section 5350 may, in many cases, affect the compensation of a resident dependent.

If in this case the one-half of the weekly wages of the deceased, when diminished by the normal compensation of the partially dependent alien parents, had been reduced below the weekly contribution of the deceased to the sister's support, then "the other half of the normal compensation" would have been available to apply to her weekly compensation.

The superior court is advised to dismiss the appeal, and to affirm the award of the Commissioner.

The other Judges concurred.

GRABOWSKI v. MISKELL ET AL.

(Supreme Court of Errors of Connecticut. Dec. 23, 1921.)

115 Atlantic Reporter, 691.

1. MASTER AND SERVANT — COMPENSATION COMMISSIONER'S FINDING SHOULD STATE FACTS FOUND.

Under the Workmen's Compensation Act, the Commissioner's findings should not state the evidence, but the facts found from the evidence.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

2. MASTER AND SERVANT — COMPENSATION COMMISSIONER'S FINDINGS IN CONFLICT WITH FINDINGS ON PRIOR HEARINGS HELD ERRONEOUS.

A Compensation Commissioner having approved a voluntary agreement reciting a physical injury which was found on evidence presented on two subsequent hearings, *held*, that findings to the contrary made by a Commissioner acting for him on third hearing involving the issues of fraud and changed condition were so erroneous as to require correction necessitating a rehearing.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

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3. MASTER AND SERVANT—COMPENSATION COMMISSIONER MAY REOPEN AWARD AND HEAR CASE DE NOVO ON PROOF OF FRAUD.

Under the Workmen's Compensation Act (Gen. St. 1918. § 5355), providing that the Commissioner shall have the same power to open and modify an award as any court has to open and modify a judgment of such court, in a case where the issue of fraud is properly before him. the Industrial Commissioner has the power to open and modify a voluntary award and hear the case de novo.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

Appeal from Superior Court, Hartford County; William M. Maltbie, Judge.

Proceeding under the Workmen's Compensation Act by Mary Grabowski, employee, opposed by Simon T. Miskell, employer, and the Travelers' Insurance Company, insurer. From a finding and award of the Compensation Commissioner of the Fifth District, acting for and in place of the Commissioner of the First District, dismissing the claim plaintiff appealed to the superior court, which sustained the appeal, and defendants appeal. No error.

The first and third grounds of plaintiff's motion to correct, referred to in the opinion, were as follows:

"(1) By striking out paragraph 29 of the finding, because the same is contrary to the evidence, and substituting therefor the fact as disclosed by the evidence that the claimant has a sensitive area on the right side of her head, as was demonstrated at the final hearing by Dr. Alfred N. Rowley, and that the mere touching of this sensitive area with the finger causes the claimant to flinch and suffer pain."

"(3) By adding to the finding the fact, as disclosed by the evidence, that the Travelers' Insurance Company, the employer, Simon T. Miskell, and Dr. C. W. Robertson jointly made an investigation of the accident in the latter part of March, or early part of April, 1920."

Allan E. Brosmith, of Hartford, for appellants.
Jacob Berman, of Hartford, for appellee.

WHEELER, C. J. The superior court sustained the plaintiff's appeal from the Commissioner for his errors in denying the first and third grounds of plaintiff's motion to correct, and in reopening the award and determining the case de novo and dismissing the claim.

The appeal of the defendants from the judgment of the superior court assigns as error the sustaining of the appeal. And this brings before us the court's decision granting the first and third grounds of plaintiff's motion to correct and its holding that the Commissioner could not open the award and try the case de novo.

In order to pass upon these questions we must have before us the history of this action.

[1, 2] On January 12, 1920, the parties entered into a voluntary agreement approved of by the Commission as provided for in the Compensation Act (Gen. St. 1918, §§ 5339–5414), which recited that the claimant, the plaintiff herein, had received on November 26, 1919, an injury arising out of and in the course of her employment, viz. a slight fracture of the skull.

Subsequently on March 9 and 25, 1920, Commissioner Chandler heard this claim de novo. The record does not disclose the procedure, but we assume that it followed the proper procedure—a motion in writing specifying with reasonable certainty the ground or grounds for the modifica-

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tion or opening of the award. Commissioner Chandler found certain of the facts as contained in the voluntary agreement, presumably by stipulation of the parties, and he makes other findings, some of which detail the evidence, but do not give the facts found from this evidence. This was at variance without repeated injunction as to the manner in which findings should be made. The finding does recite that the plaintiff on November 26, 1919, sustained the injury described in the voluntary agreement.

On September 30, 1920, another hearing before Commissioner Chandler was had in this case. The record does not contain the motion for the rehearing, but from the nature of the finding we judge that its purpose was to determine whether the incapacity had ceased.

Paragraphs 4 and 8 of the supplemental finding are as follows:

"(4) While the fact of the original injury was agreed to in the aforesaid voluntary agreement, it became advisable in the course of the present hearing to admit testimony as to the nature of the injury and the fact of its occurrence. It was found that on November 26, 1919, the claimant was struck in the head by a beam which fell in the tobacco shed in which she was working, resulting in an abrasion of the scalp and a swollen area. Whether or not there was a small fracture of the scalp is in dispute, and no finding is made thereon."

"(8) I find that for an unknown period of time after the injury the claimant was incapacitated from the direct physical effects thereof. There came a time, however, when the direct physical effects passed away, and there remained a neurotic condition, which, although intangible and subjective, is a pathological fact chargeable to the injury."

From a period one week after the injury to August 30, 1920, the plaintiff had been under the care of the physician provided by the defendant employer.

None of the parties to this proceeding question the right of Commissioner Chandler to have twice heard this case de novo or to have made the orders he did after the approval of the voluntary agreement, and for this reason we do not consider at this time this question.

It thus appears that the defendant employer's physician had had the plaintiff under his care for upward of 10 months, and that the Commissioner, after a full hearing, made his finding as to the origin, extent, and present continuance of plaintiff's injury on October 22, 1920, nearly 11 months after the claimed physical injury.

On December 1, 1920, the defendant insurer filed with Commissioner Williams, acting for Commissioner Chandler, its motion for a rehearing "on the ground that the proceedings hitherto had in this case had been, so far as the insurance company was concerned, induced by a misstatement, and hence that changed conditions of fact had arisen, and that the principles of equity required a rehearing.

The Commissioner overruled plaintiff's objection to the granting of the motion for a hearing de novo, and heard the case de novo. In his finding he states that whether or not the plaintiff had sustained an injury arising out of and in the course of her employment had never before been seriously presented to or heard by the Commissioner. This was a mistake, since Commissioner Chandler had twice determined this issue after hearing had and upon such evidence as the parties desired to present.

The finding also states that the beam which the plaintiff claimed fell on her head, causing the injury for which the award was made, never, in fact, struck her, and that she never sustained a trauma in consequence. The finding further states that the plaintiff and Dr. Brace, her personal physician, claimed, to whom it does not appear, but let us assume the Commissioner intended to say to the insurer, that there was a wound upon her head on December 2d, 1919, and one of the radiographs taken about this time showed a fracture of the skull.

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The finding further states that these statements were untrue and that the agreement made with the plaintiff and all payments made to her under the award were made under misrepresentation of fact induced by the statement of the plaintiff and Dr. Brace. Practically the Commissioner finds that Dr. Brace had testified falsely as to this injury.

The finding does not specifically find that the plaintiff was guilty of fraud, but the memorandum made a part of the finding makes this charge, and it a necessary inference from the other facts found.

"The fraud charged is based upon the finding that she was never in fact injured; that her claim of injury to her head, of a cut upon it, and of a fracture of the skull were without foundation in fact. The Commissioner reached this conclusion largely upon the fact that on July 6, 1920, the plaintiff's scalp over the region where she complained of being hit was opened and no objective signs of injury appeared, and upon the further fact found in paragraph 29 that "none of the physicians, with the exception of Dr. Brace, was able to find any objective signs of injury."

The plaintiff did not move to correct the finding of these statements of the plaintiff and of Dr. Brace. The trial court's memorandum indicates that it reached the conclusion that Commissioner Chandler had reached, that the plaintiff was hit by this beam. But this evidence was not before the court for the purpose of correcting the finding in this particular, and we are not at liberty to consider this conclusion of the court.

The court struck out paragraph 29, which we have quoted, and in its place, at the request of the plaintiff, made this substitution:

"That the claimant has a sensitive area on the right side of her head, as was demonstrated at the first hearing by Dr. Alfred N. Rowley, and that the mere touching of this sensitive area with the finger caused the claimant to flinch and suffer pain."

The striking out of paragraph 29 removed one of the weighty facts which had influenced the Commissioner in concluding that the plaintiff had never received a physical injury to her head. The substitution for this of a fact tending to corroborate her claim that she had received such an injury was a fact which weakened materially the conclusion that the plaintiff had never suffered such an injury.

The other correction of the finding as to the investigation of this accident by the defendant insurer in March, 1920, was also a material factor on the finding of fraud. It is impossible to measure the effect these changes in the finding would have upon the issue of fraud, but that they are so material as to require a rehearing we entertain no doubt; and if, in addition, it were permissible to read the finding as corrected by the fact found by the trial court that the plaintiff was in fact struck and injured by this beam, a large part of the groundwork of fraud would disappear, and, if the physical injury be found, we must remember that the conclusion of Commissioner Chandler, as made in his supplemental finding, that the then neurotic condition of the plaintiff was chargeable to the injury, does not appear to have been contested.

[3] The remaining question upon this appeal is whether the Commissioner had the power to open the award and try the case de novo. Its disposition involves a construction of General Statutes, § 5355:

"Any award of, or voluntary agreement concerning compensation made under the provisions of this chapter shall be subject to modification, upon the request of either party and in accordance with the procedure for original determinations, whenever it shall appear to the Compensation Commissioner that the incapacity of an injured employee has increased, decreased or ceased, or that the measure of dependence, on account of which the compensation is paid, has changed, or that changed

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conditions of fact have arisen which necessitate a change of such agreement or award in order properly to carry out the spirit of this chapter. The Commissioner shall also have the same power to open and modify an award as any court of the state has to open and modify a judgment of such court. The Compensation Commissioner shall retain jurisdiction over claims for compensation, awards and voluntary agreements, for any proper action thereon, during the whole compensation period applicable to the injury in question."

The Commissioner under this statute has power at any time to modify the voluntary agreement or award whenever it shall appear to him:

(a) That the incapacity of the injured employee has increased, decreased, or ceased, or that the measure of dependence, on account of which the compensation is paid, has changed. This power continues so long as the agreement or award continues. Fair v. Hartford Rubber Works Co., 95 Conn. 350. 111 Atl. 193.

The defendants' motion does not seek to modify the award because the incapacity had ceased. It seeks to nullify it from its inception, not to modify it from the date of his hearing.

(b) That changed conditions of fact have arisen which necessitate a change of such agreement or award in order properly to carry out the the spirit of the Compensation Act. Clearly the changed conditions of fact refer to conditions which are different from those existent when the agreement or award was made. Fair v. Hartford Rubber Works Co., supra.

The situation as found by Commissioner Williams was not a changed condition from that existent when the award was made. The injury, if any, had not changed. That it had increased or decreased was not what it meant by changed conditions of fact; such are taken care of by (a).

Remedies (a) and (b) are quite unlike the remedy which a court exercises in opening a judgment. It may be that, practically applied, remedies (a) and (b) would cover most occasions for the opening or modification of an agreement or award.

But the Legislature, intending to make sure that the Commissioner should have ample power to open and modify an award, provided, in addition, remedy (c):

"The Commissioner shall also have the same power to open and modify an award as any court of the state has to open and modify a judgment of such court."

In Fair v. Hartford Rubber Works Co., supra, we construed remedy (c) as giving to the Commissioner the same power to open and modify his award as our court of equity has to open and modify its judgment without the limitation governing its exercise of this power, that in the given case it must appear that the private suitor could not in the exercise of reasonable diligence have theretofore sought the remedy he now seeks.

The Commissioner may exercise remedy (c) without requiring the plaintiff in the action to show that he could not in the exercise of reasonable diligence have brought his present cause before the Commissioner at the time of the award he attacks. If the issue of fraud were regarded as properly before Commissioner Williams in defendants' motion, which is not a part of the record, he had the power under remedy (c) to hear the case on this issue de novo, and upon clear proof of the fraud to open the award.

The Commissioner was not in error in his holding that he had the power to open the award and try the case de novo. He was in error in his finding of facts in the particulars before referred to, and hence the trial court properly sustained the appeal.

There is no error.

The other judges concurred.

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DARSCH v. THEARLE DUFFIELD FIRE WORKS DISPLAY CO. (No. 11241.)

(Appellate Court of Indiana, Division No. 1. Jan. 11, 1922.)

133 Northeastern Reporter, 525.

1. MASTER AND SERVANT—INDUSTRIAL BOARD HAS LIMITED POWERS.

The Industrial Board can exercise only such powers as are conferred on it by the Legislature.

(For other cases, see Master and Servant, Dec. Dig. § 397.)

2. MASTER AND SERVANT—COMPENSATION ACT HELD NO PART OF CONTRACT OF EMPLOYMENT BETWEEN NONRESIDENTS.

The provisions of Workmen's Compensation Act, §§ 2, 4, that every employer and every employee with certain exceptions should be presumed to have accepted the act, and that every contract of employment should be presumed to have been made subject to its provisions, were intended only to apply to such persons as were residents of the state, and made their contracts of employment within the state. or maintained an office and place for doing business within the state, and cannot be applied to an injury to a nonresident employee working in the state under contract of employment entered into in another state by a nonresident corporation whose office was in that state.

(For other cases, see Master and Servant, Dec. Dig.. § 368.)

Appeal from Industrial Board.

Proceeding before the Industrial Board by Arnold Darsch against Thearle Duffield Fire Works Display Company. After making an award, on subsequent hearing, the Board entered an order dismissing the claim, from which claimant appeals. Affirmed.

James L. Murray, of Indianapolis, for appellant.

Othniel Hitch, of Indianapolis, for appellee.

ENLOE, J. On the 1st day of June, 1921, the appellant filed his application with the Industrial Board, asking for an adjustment of compensation, as against the appellee herein, stating in said application that the place of business of appellee was 36 South State Street, Chicago, Ill. A copy of appellant's application, together with a notice that a hearing would be had thereon, at the State House, Indianapolis, Marion county, Ind., on the 13th day of June, 1921, at 10 o'clock a. m., was at once sent by mail to appellee at its said office in Chicago, Ill.

On the day and at the time set for the hearing of said cause the appellee appeared by one Maher, its secretary, and also by counsel, and moved to dismiss the proceedings because of want of jurisdiction, and stated as grounds therefor that both of the parties hereto were residents of the state of Illinois; that the contract of employment between the parties was entered into in the state of Illinois; that appellant was an Illinois corporation. and had no office or place of business in the state of Indiana; and that the appellant, at the time he was injured was only temporarily employed in Indiana. This motion to dismiss the proceedings was, in effect, overruled by the one member of the board who heard the cause, and an award made to appellant. Thereafter, in due time, the appellee, by its attorney, asked for a review of the proceedings herein by

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the full Industrial Board, which was duly had on the 11th day of July, 1921, at which time additional evidence was heard. On the 13th day of July, 1921, the full board made its finding as follows:

"That on the 9th day of June, 1920, the plaintiff was in the employment of the defendant at an average weekly wage in excess of $24; that on said date he received an injury by reason of an accident arising out of and in the course of his employment, of which the defendant had actual knowledge at the time; that said injury resulted in the permanent reduction of the sight of plaintiff's right eye to one-tenth normal vision with glasses; that at the time of the plaintiff's injury the defendant was a resident of Illinois, was domiciled therein, and transacted its business from said state; that at said time the plaintiff was also a resident of Illinois; that he was working for the defendant under a contract of employment made in said state, and at the time was only temporarily in the state of Indiana, engaged in performing work for the defendant under his contract of employment made in Illinois; that at said time the defendant had not localized itself or established any place of business in the state of Indiana. * * *"

Upon the facts thus found the board concluded that it had no jurisdiction of the cause, and dismissed the appellant's claim, from which order of dismissal this appeal is prosecuted.

Under this record the question arises, Did the Industrial Board have any jurisdiction over the subject-matter in this cause, i. e., does the compensation law of this state enter into and become a part of a contract of employment, entered into between citizens residing in a foreign state, or nation, if the employee in such contract should happen to come temporarily into this state, in the performance of his duties, under such contract of employment?

[1, 2] The Industrial Board of Indiana is purely a creation of our statute, brought into existence by legislative will. Being such, it is elemental, that it can have and exercise only such powers as are conferred upon it by its creator, the Legislature of this state. Primarily the board was created to administer the Workmen's Compensation Law of this state (Laws 1915, c. 106), as between those persons subject to the provisions of said law. The second section of said act provides:

"From and after the taking effect of this act, every employer and every employee, except as herein stated, shall be presumed to have accepted the provisions of this act respectively to pay and accept compensation for personal injury or death by accident arising out of and in the course of the employment, and shall be bound thereby. * * *"

The fourth section of said act provides:

"* * * And every such contract made subsequent to the taking effect of this act shall be presumed to have been made subject to the provisions of this act. * * *"

The state of Indiana cannot regulate the conduct of citizens of foreign states. Its laws are of binding force and effect only upon persons within this state, and the language of said section as to employers and employees who shall be deemed to have accepted its provisions manifestly was intended only to apply to such persons as were residents of this state and made their contracts of employment here, or maintained an office and place for doing business within this state. To give to the act in question the force and effect contended for by appellant, and to so construe the same that it would apply to the parties hereto and to their said contract of employment would, to our minds, render said act of doubtful validity, and such a construction will therefore be avoided whenever reasonably possible.

The case of Douthwright v. Champlin et al., 91 Conn. 524, 100 Atl. 97, Ann. Cas. 1917E, 512, cited and relied upon by appellant, when carefully read, is not analogous to the instant case, at is appears in that case

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that both the employer and employee had recognized the applicability of the statute of Connecticut, the court saying:

"Both the claimant and the respondent have accepted part B. of chapter 138, P. A. 1913, and Champlin had insured his full liability in insurance companies authorized to take such risks."

Under the facts of this case the Industrial Board was without jurisdiction to make an award to appellant, and its action in dismissing said application is affirmed.

IN RE SWARTZ. (No. 11219.)

(Appellate Court of Indiana, Division No. 1. Jan 5, 1922.)

133 Northeastern Reporter, 506.

MASTER AND SERVANT—COMPENSATION FOR 50 PER CENT. PERMANENT DISABILITY NOT LIMITED TO $2,500.

Compensation for 50 per cent. permanent disability is not limited to $2,500 by Workmen's Compensation Act, § 40, providing that total compensation payable under the act shall in no case exceed $5,000.

(For other cases, see Master and Servant, Dec. Dig. § 385[1].)

Appeal from Industrial Board.

Proceedings by Gus Swartz under the Workmen's Compensation Act to obtain compensation for a personal injury. Question certified by Industrial Board. Answer in the affirmative.

BATMAN, P. J. Under the provisions of the Workmen's Compensation Act, the Industrial Board has certified to this court the following facts:

"On and prior to the 9th day of February, 1920, one Gus Swartz was in the employment of A. at an average weekly wage of $26.88; that on said date he received a personal injury by an accident arising out of and in the course of his employment, of which A. had actual knowledge at the time; that said injury was received by the said Swartz by falling a distance of approximately 45 feet, alighting on a concrete floor; that there was a compound, comminuted fracture of the right leg at the ankle joint, the left arm was broken at the wrist; there were severe bruises at the lower part of the spinal column, with probably a fracture of two vertebræ, severe injury to the left side of the chest, and a very severe injury on the left side of the head; that the plaintiff's injuries have impaired his equilibrium so that he is staggery and unsteady on his feet; that said injuries have resulted in a 50 per cent. permanent disability, that is, the plaintiff has permanently lost 50 per cent. of his ability to work and earn wages; that all the foregoing facts are admitted by the employer."

Based on these facts, the Industrial Board has submitted the following question: "Would an award of 250 weeks' compensation to Gus Swartz be according to law?"

It appears that the foregoing facts were certified, and the question based thereon was submitted, in order to have this court determine whether the compensation of the inured employee is limited to a maximum of $2,500 by reason of section 40 of the Workmen's Compensation Act (Acts 1915, p. 404). We are of the opinion that his compensation

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is not so limited. It is clear to us that the provision of said section, "that the total compensation payable under this act shall in no case exceed five thousand dollars," was not intended to serve as a primary basis for the determination of the compensation to be paid under any of the provisions of said act, but was intended to serve as a limitation only. To hold that it is applicable to a case like the one under consideration would result in making it limit the compensation of employees in many instances, whose compensation fall far short of the maximum specified. If it be said that to so hold will result in some instances in inequalities of compensation in cases of total permanent impairment, and permanent partial impairment, our answer is that this is a matter of legislative rather than judicial consideration.

We answer the question submitted in the affirmative.

BUCYRUS CO. v. REISINGER. (No. 11142.)

(Appellate Court of Indiana, Division No. 2. Jan. 12, 1922.)

133 Northeastern Reporter, 516.

1. MASTER AND SERVANT — EMPLOYER HELD NOT ENTITLED TO COMPLAIN OF WANT OF NOTICE OF NECESSITY FOR MEDICAL AID REQUIRED BY COMPENSATION ACT.

Where an employer, having knowledge of an accident and injury, and knowing that employee needed further treatment, failed to make active effort to see that he got the necessary medical care required by the Workmen's Compensation Act, § 25 (Burns' Ann. St. Supp. 1921, § 8020i1) which implies more than a passive willingness to comply with its requirements, the employer cannot complain that it was not notified when employee's condition became more serious by reason of general septicæmia.

(For other cases, se Master and Servant, Dec. Dig. § 393½.)

2. MASTER AND SERVANT — COMPENSATION HELD PROPERLY AWARDED FOR PERMANENT PARTIAL DISABILITY.

Where employee received a single injury which resulted in general septicæmia, which in time produced a general permanent impairment of his entire body, and resulted in the permanent loss of 35 per cent. of the use of the left arm, 15 per cent. of the use of the right arm, and 15 per cent. of the use of each leg, it cannot be said that the Industrial Board abused its discretion, or erred to the prejudice of the employer in making an award of 190 weeks' compensation under Workmen's Compensation Law, § 31.

(For other cases, see Master and Servant, Dec. Dig. § 385[11].)

Appeal from Industrial Board.

Proceeding by John Reisinger, under the Workmen's Compensation Act, to obtain compensation for personal injuries, opposed by the Bucyrus Company, the employer, and another. There was an award of compensation, and the employer appeals. Affirmed.

Frederick K. Warne and Joseph W. Hutchinson, both of Indianapolis, for appellant.

W. M. Wheeler, of Evansville, for appellee.

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McMahan, J. The Industrial Board awarded appellee 190 weeks compensation, beginning February 8, 1920. Appellant appeals from this award, and contends that it is contrary to law, and not sustained by sufficient evidence.

The Board found that on December 19, 1919, appellee was in the employ of appellant at an average weekly wage of $24; that on said date he received a personal injury by an act arising out of and in the course of his employment of which appellant at the time had actual knowledge; that said injury resulted in general septicæmia as a result of which appellee was confined to his bed for several weeks beginning February 8, 1920, and was wholly unable to work from that time to May 17, 1920; that such septicæmia produced a general permanent impairment of appellee's entire body, and resulted in the permanent loss of 35 per cent. of the use of his left arm, 15 per cent. of the use of his right arm, 15 per cent. of the use of each leg.

The facts as disclosed by the evidence are as follows: December 19, 1919, appellee was, and for a period of about 7 years immediately prior thereto had been, in the employ of appellant. While at work on said day he sustained an injury by getting a splinter of steel in one of his fingers. Appellant had knowledge of this accident and injury at the time, and furnished appellee with first aid, after which appellee went back to work. The injury was dressed again by appellant the next morning, which was Saturday. Appellee returned to work Monday morning. His finger at that time was badly discolored, and getting worse. He showed it to a representative of appellant, who sent him out to the first aid department for further treatment, and from there he was sent to a physician, who treated it with iodine (and directed the application of poultices) and sugar of zinc, telling appellee it would be all right. Appellee did not work for three days, when he began working for another employer at a place much nearer his home. When he quit working for appellant he intended to go to Missouri. But there is no evidence that appellant had any knowledge that appellee had quit working for it, or that he had any intention of going to Missouri. In the course of a few days his hand began to itch and would be swollen in the morning, but after he would work awhile the swelling would go down to some extent, but his finger was always discolored, sore, and itched. About the 1st of January, 1920, appellee went to a physician of his own selection, Dr. Lavelle, who continued to treat him until February 8, 1920, when he became worse on account of blood poisoning, and had to go to bed. He was not able to go back to work for about 3 months. Abscesses developed on both hands, arms, legs, ankles, and feet, so that in the course of treatment the attending physician lanced him in 22 different places. His sores had to be dressed every day, and required the attention of both doctor and nurse. His condition was such that the attending physician says he did not "see how he ever got well." He did not return to appellant's physician for further treatment. In testifying upon this subject, appellee said:

"I was not told to return. He (the physician) said I could come back if I wanted to. He said it would be all right in a day or two. He did not say he expected me to return if it was not all right. He said I could come if I wanted to. There was a slight swelling in my left hand all along, but I thought it might be from the lancing. I didn't pay much attention to it at the time until it started itching. I thought may be it would go away. The swelling continued for about 3 weeks, when I got sick, and on February 8, 1920, had to go to bed. We called Dr. Megenheimer."

Dr. Patterson, the physician to whom appellant sent appellee for treatment, testified relative to having treated appellee; that appellee should have had further treatment, and that he instructed him to return for further treatment, but that he did not do so. The evidence also shows the extent and character of appellee's impairment as found by the Board.

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Appellant complains of the failure of appellee to return to its doctor for further treatment, and insists that there is no evidence appellant knew, or that it had any notice, of the serious injury to appellee which manifested itself February 8, 1920, and that a notice of injury in this case, in order to be effectual, must be a notice of the injury of February 8, 1920, when the serious result of the accident manifested itself, and when appellee was compelled to go to bed; that its notice and knowledge of the original injury was not sufficient. Appellant, conceding that it had notice of the accident and injury December 19, 1919, contends that, since appellee did not return to its physician for further treatment, it had the right to assume that he had recovered, and that it was entitled to further notice when his condition became so serious that he had to quit work and go to bed.

Section 8020i1, Burns' Supp. 1921 (Acts 1919, p. 161, § 25), provides that:

"During the first thirty days after an injury the employer shall furnish or cause to be furnished, free of charge to the injured employee, an attending physician, for the treatment of his injuries, and in addition thereto such surgical, hospital and nurse's services and supplies as the attending physician or the Industrial Board may deem necessary."

[1] The requirement of this statute implies something more than passive willingness on the part of an employer to respond to a demand or request for medical aid. It implies some degree of active effort to bring to the injured employee the required humanitarian relief. A person injured by an accident is presumed to be under more or less physical disability, and not in a normal condition so as to be able to look out for himself and his needs. This being true, it becomes the duty of an employer having knowledge that one of his employees has been injured by an accident arising out of and in the course of his employment to be more than passive in his efforts to furnish the medical aid prescribed and required by the statute. The statute requiring the employer to furnish medical services is mandatory in form. Having had knowledge of the accident and injury, and knowing that appellee needed further treatment, and having failed to make any effort to see that he got the necessary medical care, appellant is in no position to complain of the fact that it was not notified when appellee's condition became serious as the result of the accident and injury of which it had actual knowledge. The employer here had notice of the injury. The doctor to whom it sent appellee for treatment knew and testified that further treatment was necessary. It therefore had an opportunity to take the proper steps to furnish medical aid to the injured employee, and with such knowledge as is disclosed by the evidence in this case, having failed to follow up appellee's injury, it is in no position to complain of the failure to give it notice that the injury was growing worse. Appellant knew that appellee's injury did not respond to first aid treatment. It sent him to a physician for treatment, and knew that he needed further treatment. It knew he quit work, and, having failed to do more than show a passive willingness to comply with the mandatory requirement of the statute to furnish medical aid, appellant cannot now be heard to complain that it had no notice of the serious effect of the injury which nearly resulted in his death, and which made him a cripple for life. If appellant was prejudiced because of its failure to have notice of appellee's serious illness which the Board found resulted from the accident and injury to appellee, the fault can be traced to its failure to follow up and treat an injury that it knew needed further treatment.

[2] Appellant also contends that, upon the facts as found by the Board, appellee in no event would be entitled to compensation for a period of more than 185 weeks. Appellant has been content to cite Acts 1919, pp. 162, 163, in support of this contention. We assume that by this cita-

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tion appellant refers to section 31 of the Workmen's Compensation Law. Our attention, however, has not been called to any specific provision of that section or of any other section of the statute which specifically fixes the period of compensation in the instant case. Appellant has made no attempt to show why appellee's compensation should be limited to 185 weeks. Clause "a" of section 31 among other things provides for 250 weeks' compensation for the loss of an arm and 200 weeks, for the loss of a leg. Clause "b" provides that, for a total permanent loss of the use of an arm, hand, finger, leg, etc., compensation for such loss shall be the same as for loss by separation. Clause "c" relates to the permanent partial loss of the use of a single member, as distinguished from clause "b," which relates to the total permanent loss of such use. Clause "d" relates to total permanent disability, while clause "e" relates to the loss of both hands or both feet, or the sight of both eyes, or of any two such losses, and provides that compensation in such cases shall be paid for 500 weeks. Clause "f" relates to the permanent loss of the sight of an eye, while clause "g" relates to complete loss of hearing.

All other cases of permanent partial impairment are provided for in clause "h," which reads as follows:

"In all other cases of permanent partial impairment compensation proportionate to the degree of such permanent partial impairment, in the discretion of the Industrial Board, not exceeding five hundred weeks."

Appellee received a single injury, which resulted in general septicæmia, and which produced a permanent general impairment of his entire body and in the permanent loss of 35 per cent. of the use of the left arm, 15 per cent. of the use of the right arm, and 15 per cent. of the use of each leg.

Compensation for such permanent partial impairment as appellee suffered is not provided for other than in clause "h" heretofore quoted. The Legislature, as it had a right to do, provided that for the loss of one arm above the elbow compensation should be awarded for a period of 250 weeks, for the loss of one leg above the knee, that compensation should be awarded for 200 weeks, and for the loss of both arms or both legs that compensation must be allowed for 500 weeks. Compensation allowed for the loss of one arm is greater than is allowed for the loss of one leg, but compensation for the loss of both arms and for the loss of both legs is the same. Compensation for the loss of both legs is two and a half times the compensation allowed for the loss of one leg. We know of no method of determining to a mathematical certainty the per cent. or degree of a partial impairment. The extent of such an impairment depends upon the facts in each individual case, and the Board, in determining the extent of such impairment, must of necessity use their best judgment.

What shall be said as to the method of determining the period for which compensation shall be paid in cases of permanent partial impairment under clause "h"? Under clause "c" compensation for a permanent partial loss of one leg shall be paid "for the proportionate loss" of the use of such leg, and, if it be admitted that an employee who suffers a 50 per cent. permanent partial loss of the use of one leg should receive compensation for 100 weeks, it does not follow that, if he suffers a 50 per cent. permanent partial loss of the use of both legs, the period of compensation is 200 weeks. If we should hold that the law fixes the period for which compensation shall be paid, it would be more reasonable to fix such period at 250 weeks, or at one-half of the period fixed for the loss of both legs. We assume that appellant's contention is that appellee's compensation for each arm should be determined by obtaining 35 per cent. of 250 weeks for the loss of the use of one arm, 15 per cent. of 250 weeks for the loss of the use of the other, and 15 per cent. of 400 weeks for the loss of the use of both legs. Upon this calculation ap-

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pellee would be entitled to 185 weeks' compensation as contended for by appellant.

In order to hold that the award of 190 weeks' compensation to appellee is not contrary to law, it is not necessary for us to determine whether the board must arrive at the period during which compensation shall be paid by a mathematical calculation based on the percentages of his several impairments, or whether such period shall be fixed at a certain number of weeks, not exceeding 500, as the Board in its best judgment shall deem proper. All we need do is to hold, if the Board has some discretion in fixing the time during which compensation shall be paid, that such discretion was not abused, or if we should hold that for such a loss the injured employee should be allowed compensation for 35 per cent. of 250 weeks for the partial loss of one arm and 15 per cent. of 250 weeks for the loss of the other, and 15 per cent. of 500 weeks for the partial loss of both legs, the total time for which compensation should be paid would be 200 weeks. But it is to be observed that either holding would require an affirmance of the award. Appellee not only suffered a partial loss of the use of his arms and legs, but he also suffered a general permanent impairment of his entire body, the degree or extent of which is not disclosed, and we are not prepared to say that the Board, in determining the amount of compensation to be paid appellee, should not take into consideration the impairment of appellee's body, as well as the impairment of his arms and legs. If there was any error in fixing the number of weeks for which compensation should be paid in the instant case, it was an error in appellant's favor, and one of which it cannot complain.

The award is affirmed.

WERTZ v. REYNOLDS ET AL. (No. 11242.)

(Appellate Court of Indiana, Division No. 2. Dec. 23, 1921.)

133 Northeastern Reporter, 393.

1. MASTER AND SERVANT — CESSATION OF EMPLOYMENT WITHIN COMPENSATION ACT QUESTION OF FACT.

It is a question of fact as to when employment for the day ceases under the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 375[2].)

2. MASTER AND SERVANT—EVIDENCE HELD TO SHOW INJURY DID NOT ARISE OUT OF AND IN COURSE OF EMPLOYMENT WITHIN COMPENSATION ACT.

In a proceeding under the Workmen's Compensation Act to obtain compensation for the death of a timber buyer while driving the employers' car to a garage, or to his home, after leaving employers' office in the evening, evidence *held* to support a finding that death did not arise out of and in the course of the employment.

(For other cases, see Master and Servant. Dec. Dig. § 405[4].)

Appeal from Industrial Board.

Proceeding by Laura A. Wertz under the Workmen's Compensation Act (Laws 1915, c. 106), to obtain compensation for the death of Henry Wertz, her husband, opposed by Frank Reynolds and others, the employers. There was an award denying compensation, and the applicant appeals. Affirmed.

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Titsworth & Titsworth and John A. Titsworth, all of Rushville, and Anthony P. Donadio, of Indianapolis, for appellant.

Allan P. Vestal, of Indianapolis, for appellees.

McMahan, J. The facts as found by a majority of the members of the full Industrial Board are, in substance, as follows: On January 14, 1921, one Henry Wertz was in the employ of appellees at an average weekly wage in excess of $24. He received a personal injury on said day, which resulted in his death about five hours afterward. Appellees had actual knowledge of said injury and death immediately thereafter. Appellant is the surviving wife of said Henry Wertz, and was living with him as such at the time of the injury and death. The accident did not arise out of and in the course of his employment with appellees.

The evidence shows that Mr. Wertz was a timber buyer for appellees. He had no particular territory, but bought wherever there were trees to sell, and in so doing used an automobile belonging to appellees, which was kept sometimes at the Wertz home and sometimes at appellees' mill. Mr. Wertz had his own car, which he kept in a garage in Rushville. Sometimes he took the company car to the garage and left it there while he drove his own to his home about a mile west of the city. He was accustomed to use the car for his personal use whenever he liked. His duties required him to be at the mill and start the teams, and then to take the automobile and go out to buy timber. There was no fixed time for him to report back. He usually reported to the mill when he finished his work and before going to his home. On January 14, 1921, he reported to the factory about 4:00 or 5:00 p. m. He left the factory in the company automobile and was injured as a result of a collision with a Cincinnati, Indianapolis & Western Railway train. Some time during the day he stated that he wanted to take the automobile home with him that evening so as to bring his wife into town that night. Appellees gave him permission to take the automobile for that purpose. It is not known whether he was going home or to the garage or to either when he was killed.

Appellant claims that said injury arose out of and in the course of the employment; that Wertz was not using the car for his own personal use and such personal use could not have begun until he had reached his home, when his employment for the day would have ended.

In Stacy v. Travelers' Insurance Co., 225 Mass. 174, 114 N. E. 206, quoted by appellant to the proposition that an injury may arise out of and in the course of employment while an employee is on the way home, the place in which the accident occurred was on the premises of the employer, was the usual and the only convenient way of going home, and entirely under the employer's control.

[1, 2] It is a question of fact as to when employment ceases. Indian Creek Coal, etc., Co. v. Wehr, 128 N. E. 766. The evidence here is sufficient to support the finding of the board that the injury to the employee which caused his death did not arise out of and in the course of his employment.

The award is affirmed.

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NORTHERN INDIANA GAS & ELECTRIC CO. v. THOMAS. (No. 11097.)

(Appellate Court of Indiana, Division No. 1. Dec. 23, 1921.)

133 Northeastern Reporter, 393.

MASTER AND SERVANT — REVIEWING COURT WILL NOT WEIGH EVIDENCE IN COMPENSATION CASE.

Where there is competent evidence to sustain an award of the Industrial Board, the reviewing court will not weigh the evidence.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Appeal from Industrial Board.

Proceeding by Vernie Thomas against the Northern Indiana Gas & Electric Company before the Industrial Board. From an award in favor of plaintiff, defendant appeals. Affirmed.

Bomberger, Peters & Morthland, of Hammond, for appellant.

Eichhorn & Edris, of Bluffton, for appellee.

REMY, J. The only question involved in this appeal is the sufficiency of the evidence to sustain an award of the Industrial Board. It appears from the record that there is competent evidence to sustain the award. Under such circumstances, this court will not weigh the evidence.

Affirmed.

AMERICAN COAL MINING CO. v. CRENSHAW ET AL. (No. 11069.)

(Appellate Court of Indiana, Division No. 2, Dec. 23, 1921.)

133 Northeastern Reporter, 394.

1. MASTER AND SERVANT—INJURIES TO EMPLOYEE GOING HOME ON TRAIN FURNISHED EMPLOYER BY RAILROAD HELD COMPENSABLE AS "ARISING OUT OF AND IN COURSE OF EMPLOYMENT."

Where a mine owner's employee returning from work was injured in alighting from a train operated under a contract between his employer and a railroad company as a private carrier for the exclusive carriage of the mine owner's employees to and from work, the injury arose in due course and out of his employment, within Workmen's Compensation Act, though, by agreement, the employer retained from the men's wages a stipulated sum per month for the privilege of using the train.

(For other cases, see Master and Servant, Dec. Dig. § 375[2].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

2. MASTER AND SERVANT — COMPENSATION CLAIMANTS MAY ELECT REMEDY AGAINST EMPLOYER INSTEAD OF AGAINST WRONGDOER.

Even if dependents of an employee injured while using a train furnished his employer by a railroad company for the exclusive carriage

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of the employees have a remedy against the railroad company, they are not thereby precluded from their remedy under the Workmen's Compensation Act against the employer.

(For other cases, see Master and Servant, Dec. Dig. § 354.)

Appeal from Industrial Board.

Proceeding for compensation under Workmen's Compensation Act for the death of Curtis Crenshaw, employee, by Edna Crenshaw and others, claimants, opposed by the American Coal Mining Company, employer. From an award of compensation. the employer appeals. Affirmed.

Hays & Hays, Alonzo C. Owens, W. Paul Stratton, John S. Taylor, and G. W. Buff, all of Sullivan, for appellant.

John A. Riddle, of Vincennes, for appellees.

NICHOLS, J. This was a proceeding before the Industrial Board by appellees against appellant for compensation. It is alleged in the application for such compensation that one Curtis Crenshaw, of whom appellees were dependents, died May 4, 1920, from personal injury received by him in an accident arising out of and in course of his employment with appellant. The Industrial Board, after hearing the evidence, found that the deceased received the injury which resulted in his death while in due course of his employment, and rendered its award in favor of appellees accordingly, from which award appellant prosecutes this appeal.

It is the contention of appellant that the injury of the deceased did not arise in the course and out of his employment by appellant, and that therefore it is not liable. It appears by the evidence, which is substantially undisputed, that on May 4, 1920, the deceased was working for appellant, and that he had worked during the regular hours that day. He began worl at 7 o'clock in the morning, and quit work at 3 o'clock in the afternoon. He was a machine man. There was operated from appellant's mine to the city of Bicknell, Ind., a train which was operated under a written contract between appellant and the Vandalia Railroad Company, the substance of which contract, so far as we need to consider, was that, whereas appellant had requested the railroad company to furnish it special facilities for getting miners living in the city of Bicknell and the immediate vicinity, and employed by appellant, to and from its mine, and said railroad company was not a common carrier of passengers for hire over the branch of road to be used, and did not operate any passenger trains thereon, but was willing as a private carrier, and not otherwise, to furnish appellant with facilities desired by it for getting its miners to and from the mine. The parties to said contract entered into an agreement to the effect that the railroad company as a private carrier, and not otherwise, agreed to furnish appellant a sufficient number of cars and engine and train crew, and to operate the same between said city of Bicknell and the coal mine, the cars to be used by appellant for the sole purpose of carrying its miners between said city and its mine. The railroad company agreed to furnish appellant a sufficient number of cars to carry its miners each day, taking them to the mine from the city in the morning, and returning with them in the afternoon of each working day. Appellant agreed to pay the railroad company $250 per month, with a provision that if the number of persons carried exceeded 250 the coal company should pay an additional $1 for each person so handled in excess of 250, and with a provision that there should be no deduction for any cause from the payment of $250 per month. On this train many of the employees of appellant rode to their work in the morning, and rode from the mine to Bicknell in the evening. There was a written agreement with each miner riding upon the train in which it was

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stipulated that in order to obtain the benefit of being carried on such train which appellant proposed should be run for the joint accommodation of appellant, and the men employed at the mine, the contracting miner agreed to pay $1 per month toward the expense of running the train, the same to be retained by appellant. A certificate was furnished to each miner who executed this agreement, giving him the right to ride upon such train between the city of Bicknell and appellant's mine. The distance from the city to the mine was about four miles. It appears that the Commercial Club of the city of Bicknell in the early history of the operation of the train, paid the deficit which appellant had obliged itself to pay, but later such deficit was paid by appellant. Later, the railroad company required a guaranty of $500 per month, but there was no new contract written. At the time of the injury of the decedent the miners were each paying $1.25 per month to ride on the train. The train was operated under the direction of the railroad and by its employees. Appellant claimed no control over the deceased before 7 o'clock in the morning or after 3 o'clock in the afternoon, and it was optional with him as to whether or not he rode on the train. He was not in any manner limited by appellant as to how he should come to his work and how he should return home therefrom. All of the employees did not ride on the train, some of them walked and some came in automobiles. On the afternoon of May 4, 1920, as the train was crossing Main street in the city of Bicknell, the deceased, while riding thereon in going home from his work, and in attempting to alight, was injured, and died as a result of such injuries.

Appellant contends that an injury under such circumstances as these did not arise in the due course of and out of the employment of the deceased. The question here presented has not been decided by this court, but similar questions have been judicial consideration in other jurisdictions, both American and English, in construing like provisions of the Workmen's Compensation Act. Laws 1915, c. 106.

In Cremins v. Guest, 1 B. W. C. C. 160, a mining company by agreement with the Great Western Railway Company and the Rhymney Railway Company ran a train on their line each morning and evening for the accommodation of their own workmen. The train ran between Dowlais and Bedlinog, close to which place the mine was situated, and it was an implied term of the contract of service between the workmen and the employers that the train should be provided by the employers, and that the workmen should be entitled to travel by it to and from their work without charge. There was no obligation to use the train. A workman at the Bedlinog station, who intended to travel home by the train, was, during a rush of workmen to enter the train, pushed off the platform and killed. It was held that the relationship of master and servant existed at the time of the accident, and that the widow as a dependent was entitled to recover.

In Davies v. Rhymney Iron Co., 2 B. W. C. C. 22, a colliery company provided a train on their railway to take the workmen from the colliery to their homes. A collier on reaching the point nearest his home, three-quarters of a mile from the colliery, met with an accident. It was held that the accident arose out of and in the course of the employment.

In Mole v. Wadsworth, 6 B. W. C. C. 129, a workman, whose only method of getting to and from work was by means of a boat supplied by his employer, was drowned by falling from the boat as he was returning at the usual hour. It was held that the accident arose out of and in the course of the employment.

In Walton v. Tredegar Iron & Coal Co., 6 B. W. C. C. 592, a collier, living six miles from the pit where he worked, traveled free of charge to and from his work on a train provided by a railway company at the instance of the employers. By an agreement the collier indemnified the

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employers against loss from accident on the journey, and agreed to desist from exercising the privilege of traveling by the train whenever his employers required him to do so. In getting into this train for the journey home the collier was killed by an accident. It was held that the accident arose out of and in the course of the employment.

In Richardson v. Morris, 7 B. W. C. C. 130, a laborer was engaged on a farm on an island about a mile from the mainland. He lived there, in the farmhouse, and was paid a yearly wage. He was recently married, but his wife remained with her parents on the mainland. One Sunday he wished to visit his wife, and his master ferried him over in his (the master's) boat. It was a rough day, and in attempting to land the man slipped, injured himself internally, and died soon afterwards. It was held that the accident arose out of and in the course of his employment.

In Dominguez v. Pendoia (Cal.) 188 Pac. 1025, it was held that where an employee was killed by being thrown from an automobile furnished by the master to transport the employees to the place of work his injuries arose out of and in course of his employment within the Workmen's Compensation Act.

In Littler v. Fuller Co., 233 N. Y. 369, 119 N. E. 554, it was held that, where an employer, on demand of employees for free transportation from the railway station to the place of building a house hired a truck to carry them to and from work, an employee, injured while on such truck on the way to the station, was injured within the scope of the employment under the Workmen's Compensation Law.

In Re Donovan, 217 Mass. 76. 104 N. E. 431, Ann. Cas. 1915C, 778, it was held that where a servant was injured while riding to his place of work in a wagon which was furnished by the master incidental to the employment and is a part of the contract of employment the injury arose out of and in the course of his employment under the Workmen's Compensation Act.

In Swanson v. Lathan & Crane, 92 Conn. 87, 101 Atl. 492, it was held that a workman whose contract required his employer to pay the expense of his transportation to and from his home while engaged in work out of town, was killed at a railroad crossing while going home after his day's work in an automobile owned and driven by a fellow workman, which had been engaged by the employer for the purpose, that the accident arose out of and in the course of the decedent's employment within the meaning of that expression in the Workmen's Compensation Act. and that the master was liable not only for the death of this particular workman, but also for that of the owner and driver of the car who was killed at the same time.

In Scalia v. American, etc., Co., 93 Conn. 82, 105 Atl. 346, it was held that the injury and death to tobacco plantation workers after they had entered into a contract of employment and while being driven to the place of work in an automobile furnished by the employer pursuant to the employment contract, arose in the course of and out of their employment.

In Fisher v. Tidewater Bldg. Co. (N. J. Sup.) 114 Atl. 150, it was held that, where a workman was killed some distance from the place of his employment, while boarding a train on which the employer furnished free transportation from the place of employment to the workman's home, the accident causing death was one which arose out of and in the course of his employment within the Workmen's Compensation Act, so that his widow was entitled to an award.

In Western Indemnity Co. v. Leonard (Tex. Civ. App.) 231 S. W. 1101, it was held that, where a shipbuilding company operated under a contract with the federal government, on a cost plus profit basis and the company's expenses in furnishing railway transportation to its employees were part of the costs, and an employee, after leaving the train at the place of work and while he was on the railroad right of way, started

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to return to the train on seeing a signal that there would be no work that day, and was injured in jumping across a ditch between him and the train, the injury occurred in the course of the employment, within the Workmen's Compensation Act.

In Payne v. Industrial Comm., 296 Ill. 223, 129 N. E. 830, it was held that where a train crew had been relieved from service under the Hours of Service Act (U. S. Comp. St. § 8678), but had obtained permission from the train dispatcher to ride into a terminal on the first train going in that direction, and where under the rules of the company the employees were paid while deadheading into the terminal, the employees, though not on duty within the Hours of Service Act while deadheading into the terminal, were in the employ of the railroad at such time within the Workmen's Compensation Act.

In Central Construction Co. v. Harrison, 137 Md. 256, 112 Atl. 627, it was held that, where an employer agreed to furnish employees free transportation to and from work, and arranged with railroad for such transportation, and where employees were at first transported by regular train, but later, because of increasing numbers, by special work trains, and where by subsequent agreement the payment for transportation of such employees was made direct to the railroad by the United States government, for which the work was being done, an employee, who was directed to board the wrong train, and, on discovery of mistake was injured by boarding the following regular train which would carry him to his work was injured by an accident which arose out of and in the course of his employment within the Workmen's Compensation Act.

[1] From the foregoing authorities the general rule seems to be that where the conveyance for the employees has been provided by the employer, after the real beginning of the employment, whether such conveyance be his own or is one used for his benefit by virtue of a contract with another, the same being in compliance with one of the implied or express terms of the contract of employment, for the mere use of the employees, and is one which the employees are required, or as a matter of right are permitted, to use by virtue of their contract of employment, the employer is liable. In the instant case it is undisputed that the train which was carrying appellant's miners, including the decedent, to and from their place of work was being operated under a contract between appellant and the railroad company, and that the consideration for such operation was paid by appellant. We attach no importance to the fact that the employee had agreed to pay, and was paying at the time of the injury, $1.25 per month for the privilege of using the train, such sum being retained by appellant from the employee's wages. This was but an incident of his employment. It also appears that the train was being used for the exclusive purpose of carrying appellant's employees, including the decedent, to and from the place of work. We follow the principle above set out, and hold that the decedent's injuries arose in due course and out of his employment.

[2] Appellant cites the case of Vandalia R. R. Co. v. Stevens, 67 Ind. App. 238, 114 N. E. 1001, as a case upon which it relies for the purpose of showing that the railroad company was not a private carrier by virtue of its contract with the mining company, but that it was a common carrier, and as such could not avoid its liability. We need not discuss that case further than to say that the action was at common law for injuries sustained because of the negligence of appellant, and the statements in such opinion are made with reference to the relation of appellee as a passenger to the appellant as a common carrier, the court not primarily considering the relation of the appellee and the mining company at the time of his injury. The question there involved was not the same as in this case. That, notwithstanding the relation of the appellee in that case to the railroad company as one of its passeugers as determined by the

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opinion, he might have elected his remedy against the mining company, instead of against the railroad company, is well established; and the fact, if such it is, that in this case appellees might have their remedy against the railroad company did not preclude them from their remedy, under the Workmen's Compensation Act, against the mining company, appellant herein.

The award is affirmed.

PIONEER COAL CO. v. HARDESTY ET AL. (No. 11247.)

(Appellate Court of Indiana, Division No. 1. Dec. 21, 1921.)

133 Northeastern Reporter, 398.

1. MASTER AND SERVANT — COMPENSATION CLAIMANT HAS BURDEN OF PROOF.

In proceedings under the Workmen's Compensation Act. the burden of establishing each fact necessary to a legal award of compensation, rests upon the applicants.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

2. MASTER AND SERVANT — COMPENSATION AWARD CANNOT BE BASED ON MERE CONJECTURE.

In proceedings under Workmen's Compensation Act, facts necessary to a legal award of compensation must be based on something more than mere guess, conjecture. surmise, or possibility.

(For other cases, see Master and Servant, Dec. Dig. § 405[1].)

3 MASTER AND SERVANT—COMPENSATION INJURY PROVABLE BY CIRCUMSTANTIAL EVIDENCE.

In proceeding under Workmen's Compensation Act for death of employee, the fact that employee's death was caused by an accident arising out of his employment may be established by circumstantial evidence.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

4. MASTER AND SERVANT—FINDING OF COMPENSABLE INJURY TO WATCHMAN KILLED BY ASSAILANT HELD UNWARRANTED.

In proceeding under Workmen's Compensation Act for death of a night watchman wounded by an unknown assailant while on duty, evidence *held* insufficient to sustain a finding that he was injured in an accident arising out of his employment.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

5. MASTER AND SERVANT—INDUSTRIAL BOARD'S FINDING SUSTAINED, IF FACTS PROVEN WITH REASONABLE INFERENCES WILL SUSTAIN IT.

In proceedings under Workmen's Compensation Act, a finding of the Industrial Board must be sustained if the facts proven, taken in connection with the reasonable inferences which may be drawn therefrom, will sustain it.

(For other cases, see Master and Servant, Dec. Dig. § 405[1].)

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Appeal from Industrial Board.

Proceedings under Workmen's Compensation Act (Laws 1915, c. 106) by Erma Hardesty and others for compensation for death of Asa Hardesty, the husband and father of the claimants, opposed by the Pioneer Coal Company, employer. Award for claimants, and employer appeals. Reversed.

Elmer E. Stevenson, of Indianapolis, for appellant.

E. E. Perry, and J. M. Haley, both of Ft. Wayne, for appellees.

BATMAN, P. J. This appeal involves an award of compensation in favor of appellees. Appellant challenges the sufficiency of the evidence to sustain the finding that Asa Hardesty, the husband of Erma Hardesty and the father of the remaining appellees, received personal injuries from an accident, arising out of his employment by appellant, from which he died. The undisputed evidence establishes the following facts. On January 7, 1921, and for a week prior thereto, Asa Hardesty was in the employ of appellant as a night watchman at its coalyard, which covered a considerable area. There was an office building on the yard, and coal, sewer pipe, horse feed, etc., were stored at various places thereon. Near the center of the yard, and about 200 feet from the office building, was a small one-story shanty, containing two rooms, which was used by the night watchman as a place of shelter and to warm himself. None of the coal was close to the shanty, as it was piled near the outside of the yard, some of it being as much as 400 or 500 feet therefrom. The front room contained a stove and some benches and chairs, and the rear room was used for keeping repairs for harness. Hardesty was the only person whose duty required him to be at the yard during the night. He was required to feed the horses kept on the premises early in the morning, in order to have them ready for use when the other employees came to work. On the morning of the day named, one of said employees came to the yard early, and, not seeing Hardesty, looked about to find him. He entered the shanty and found him in the rear room, unconscious, but still alive. He had been seriously injured by being struck on the head, and was covered with dirt and blood. He had evidently been struck with a piece of a single-tree, which was found in the shanty with blood on it. This weapon did not belong there, but had been brought in from the outside. The stove was partly tipped over, its pipe was down, the benches were upset, the harness was pulled from the wall, blood was spattered on various objects, giving evidence of a fierce struggle. Hardesty was removed to a hospital, where he died two days later, without regaining consciousness.

[1-4] In determining the question presented by this appeal we must bear in mind that the burden of establishing each fact necessary to a legal award of compensation rests on the applicants. Haskell, etc., Car Co. v. Brown (1917) 67 Ind. App. 178, 117 N. E. 555; Hege & Co. v. Tompkins (1918) 69 Ind. App. 273, 121 N. E. 677. Also that such facts must be based on something more than mere guess, conjecture, surmise, or possibility. Swing v. Kokomo, etc., Co., 125 N. E. 471; St. Louis, etc., Co. v. Ind. Comm., 298 Ill. 272, 131 N. E. 617. In the instant case there is no evidence from any witness as to who inflicted the fatal injuries on the decedent, or why they were inflicted. No one testified that he was assaulted because he was the watchman on duty, or that he was injured in the defense of his employer's property, or by reason of any other fact connected with the service in which he was engaged. This, however, does not necessarily preclude a finding that the decedent received his injuries by accident arising out of his employment, as that fact may be established by circumstantial evidence. Recognizing this, we have carefully reviewed the evidence, and considered appellees' brief, in an

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effort to find some substantial circumstance which would support such finding, but our efforts have been unsuccessful. In fact the surrounding circumstances are opposed to such finding. The injury was not inflicted in the office building where appellant's safe was located, or out in the yards where the coal, feed, etc., were stored, but in a shanty where nothing of substantial value was kept. The place where the struggle occurred does not indicate that the decedent had surprised his assailant in some felonious act. It rather indicates that his assailant had sought him out, and entered the shanty for the purpose of inflicting an injury upon him. The finding of a deadly weapon with blood upon it, which had been carried into the shanty from the outside, is strong evidence of that fact. This conclusion is further supported by the fact that no evidence of any theft, or attempted theft, could be found. To these circumstances may be added those which point to a motive for the assault, in no way connected with the services he was performing for appellant. In view of these facts, and the rule stated above, we are forced to the conclusion that there is no substantial evidence to sustain the finding under consideration.

[5, 6] In reaching this conclusion we have not been unmindful of the rule that a finding of the Industrial Board must be sustained if the facts proven, taken in connection with the reasonable inferences which may be drawn therefrom, will sustain the same. This rule, however, cannot be applied arbitrarily, but judgment must be exercised in so doing, in accordance with correct and common modes of reasoning. As said by this court in a recent decision:

"An inference should not be drawn where sufficient facts are wanting, or from facts proven, which are inconsistent with, or repelled by, other facts equally well established. An inference cannot be said to be reasonable which can only be drawn by a capricious disregard of apparent truthful testimony that is in itself probable, and is not at variance with other proved or admitted facts." Russell v. Scharge (1921) 130 N. E. 437.

Failing to find any evidence to sustain the finding challenged, the award is reversed.

CHICAGO & E. R. CO. v. KAUFMAN ET AL. (No. 11233.)

(Appellate Court of Indiana, Division No. 1. Dec. 21, 1921.)

133 Northeastern Reporter, 399.

2. MASTER AND SERVANT — CORPORATION LIABLE FOR COMPENSABLE INJURY TO CONTRACTOR'S WORKMAN.

In a proceeding against a railroad company and its contractor under Workmen's Compensation Act, to recover for the death of the contractor's employee, the company was liable, though deceased was not in its employ, where it had not exacted from the contractor the certificate required by section 14, showing his compliance with section 68.

(For other cases, see Master and Servant, Dec. Dig. § 367.)

Appeal from Industrial Board.

Proceeding by Grace I. Kaufman and others under the Workmen's Compensation Act, opposed by the Chicago & Erie Railroad Company and another. From an award the defendant named appeals. Affirmed.

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Bowers, Fightner & Bowers, of Huntington, and Clyde E. Shorey, John E. Gavin, and Adams, Follansbee, Hawley & Shorey, all of Chicago, Ill., for appellant.

J. Willard Moffett, Charles K. Lucas, and H. B. Spencer, all of Huntington, for appellees.

BATMAN, P. J. [1] This appeal involves an award against appellant and one John Mann in favor of appellees who are the widow and children of Charles W. Kaufman, deceased. The finding discloses facts which sustain the award as against said Mann, and in addition thereto it is found that said Mann "had not complied with section 68 of the Workmen's Compensation Act at the time of or prior to the injury to said Kaufman." The finding concludes as follows:

"That said Mann was doing work for the Chicago & Erie Railroad Company under contract, and that said Kaufman was laboring upon said work at the time of his death, and that said Chicago & Erie Railroad Company did not exact from said Mann a certificate from the Industrial Board of Indiana, showing that said Mann had complied with section 68 of the Compensation Act at the time of making said contract with said Mann, or at any time prior thereto."

This quotation contains the only finding with referencee to appellant. Based on this finding, the Industrial Board made an award in favor of appellees against appellant and said Mann, the amount and duration of which are not questioned. It provides, in substance, that an effort be first made to collect the amount thereof from said Mann, and, on his failure to pay the same, that said amount be collected from appellant. This appeal is based on three specifications of error; the first being that the award is contrary to law. This is the only specification that will be considered, as the other two contain nothing not included in the first. The statute provides that the first specification shall be sufficient to present both the sufficiency of the facts found to sustain the award and the sufficiency of the evidence to sustain the finding of facts. Thus at appears that two distinct questions may be raised under such specification, and it is incumbent upon an appellant, under the rules governing the preparation of briefs, to indicate the particular question to which his propositions or points are addressed. In the instant case appellant has failed to do this by an appropriate heading, but has presented each one of them under the caption "Contrary to Law." This requires an examination of each of the seven propositions or points stated, with a view of ascertaining if there is anything contained therein to indicate the particular question to which they are addressed. Such an examination discloses that there is no proposition or point addressed to the sufficiency of the evidence to sustain the finding of facts, but that all, in so far as they present any question, relate to the sufficiency of the facts found to sustain the award. We will therefore confine ourselves to that question alone. Appellant's propositions or points numbered 1, 4, 5, and 6 are based on an assumption that the decedent was engaged in interstate commerce at the time he received his fatal injuries, while No. 7 is based on an assumption that he was working in the state of Ohio at such time. An examination of the finding fails to disclose that the Industrial Board found that any such facts existed. It is well settled that the failure to find a fact is equivalent to a finding against the party having the burden. Wysong v. Nealis (1895) 13 Ind. App. 165. 41 N. E. 388; Raynes v. Staats-Raynes Co. (1918) 68 Ind. App. 37, 119 N. E. 809. If there was evidence to establish the facts assumed by appellant, it might have based error on their absence in the finding, but, having failed to do so, it has waived any question in that regard. We conclude that the propositions or points named fail to present any question for our consideration.

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[2] Appellant's second proposition or point is based on a claim that the deceased was not in its employ, but was in the employ of said Mann, who was doing work for it under a contract, and for that reason it is not liable for his death. This fact might have relieved appellant from liability prior to the amendment of section 14 of the Workmen's Compensation Act. Acts 1919 p. 159. But this section was amended for the evident purpose of creating liability under said act in favor of the employees of various classes of contractors, under certain circumstances, where none had theretofore existed. In view of the provisions of said amended section, we hold that appellant's contention cannot be sustained.

[3] Appellant's third proposition or point consists of the following statement:

"Section 14, Acts 1919, is unconstitutional for the reason that it denies corporation as in this case the freedom to contract, and the statute infringes the right of private contract, and it deprives parties affected by it of their property without due process of law."

This is not sufficient to present a constitutional question, under the well-settled rules by which we are bound, and of which we note the following: One who asserts the unconstitutionality of a statute must clearly identify the same, and must point out the particular provision of the particular Constitution violated. Levy v. State (1903) 161 Ind. 251, 68 N. E. 172; Edenharter v Connor (1916) 185 Ind. 643, 114 N. E. 212. Courts will not make an independent search of constitutional provisions to discover a cause for holding a legislative act invalid. Haun v. State (1914) 183 Ind. 153, 108 N. E. 519. Questions involving the constitutionality of statutes are never considered unless they are so presented as to imperatively require it. Knight v. Board (1913) 179 Ind. 568, 101 N. E. 1010. Although the condition of the record and the assignment of error are such as to admit a constitutional question, yet if the brief of a party is such as not to present the same, it cannot be said to be duly presented. Lewis v. Albertson (1899) 152 Ind. 693, 49 N. E. 34. It will be observed that the statement under consideration does not designate any particular statute, but merely asserts that "section 14, Acts 1919, is unconstitutional." It does not state whether it violates a provision of the state or federal Constitution. A section of the former and an amendment of the latter, without book or page, as the rules require, are cited, with certain decisions of the Supreme Court, as authorities in support of the statement made, but this is not a compliance with rule 22 (55 N. E. v), governing the preparation of briefs, as under that rule the propositions or points stated must be complete and sufficient within themselves. Courts are not required to search authorities cited, in order that they may draw inferences to supply omissions in the statement of propositions or points which a party has attempted to make. It will be observed that the statement under consideration merely asserts, in effect, that said section denies freedom to contract, infringes the right of private contract, and takes property without due process of law. In the case of Rose v. State (1908) 171 Ind. 662, 87 N. E. 103, 17 Ann. Cas. 228, the Supreme Court held, in effect, that such objections were too indefinite to present a constitutional question. In that case the court was asked to consider the constitutionality of an act "because it authorized the taking of property without due process of law," but refused to do so on the ground that such objection is too indefinite to present any question, quoting the following with approval:

"While a discussion or elaboration of a point is not proper in the statement of points, mere general statements, without specific and definite reasons specifically applied, present no question for decision." Pittsburgh, etc., R. Co. v. Lightheiser (1907) 168 Ind. 438, 78 N. E. 1033.

Finding no reversible error in the record, the award is affirmed.

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HADLEY v. ROGERS ET AL. (No. 11253.)

(Appellate Court of Indiana, Division No. 2. Dec. 21, 1921.)

133 Northeastern Reporter, 401.

MASTER AND SERVANT — COMPENSATION CLAIMANT SHOWN TO BE EMPLOYEE OF PARTNERSHIP OPERATING THRESHING OUTFIT.

Where the owner of a threshing outfit and another entered into a contract by which the owner undertook to furnish the outfit, oil, and keep up repairs, and the other undertook to furnish all labor, make contracts for jobs, and collect pay, gross income to be divided equally, evidence *held* to warrant the inference that a workman furnished, who was injured in the work, was an employee of both parties to contract so as to justify an award against them under the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 405[2].)

Appeal from Industrial Board.

Proceeding by Sylvin Rogers under the Workmen's Compensation Act (Laws 1915, c. 106) to obtain compensation for personal injuries, opposed by James Hadley and Samuel W. Roe, the employers. Award of compensation, and the first-named employer appeals. Affirmed.

John Rynerson and Geo. W. Long, both of Columbus, for appellant.

Silas A. Hays and Mat J. Murphy, both of Greencastle, for appellee.

DAUSMAN, C. J. The undisputed evidential facts involved in the controversy here presented are as follows: In the summer of 1920 James A. Hadley was about 74 years of age. He resided on a farm in Hendrick county, near North Salem. Samuel Roe resided about three miles from the Hadley home. Hadley owned two threshing outfits. He did not want to engage actively in the work of threshing that year, on account of his age. Hadley and Roe entered into an oral contract, by the terms of which Hadley undertook to furnish a threshing outfit, furnish the oil to be used in the operation of the outfit, and to keep up repairs; Roe undertook to furnish all the labor, to make contracts for the jobs, and to collect the pay for threshing; and the gross income was to be divided equally between Hadley and Roe. After making that contract Hadley took out insurance in his own name for the protection of the workmen against injuries by accident; and after the accident to Rogers, Hadley again took out insurance in the name of Hadley & Roe for the same purpose. Roe employed laborers to assist in the operation of the outfit, of whom Rogers was one, and proceeded with the work of threshing. On three different occasions while threshing was in progress, Hadley visited Roe. On these occasions Hadley oiled the machinery and looked after the mechanical features. On one occasion the stacker broke, and Hadley took the stacker to North Salem, had it mended, and brought it back to the machine. Roe collected the pay for threshing, and the two men settled their accounts and divided the gross income according to their agreement. While Rogers was engaged in said employment he received an injury by accident arising out of the employment.

On the foregoing facts, the Industrial Board found that Rogers was an employee of Hadley & Roe, and awarded compensation accordingly. The only contention presented is that Rogers was not an employee of Hadley & Roe, but was an employee of Roe individually.

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The finding that Rogers was an employee of Hadley & Roe is a legitimate conclusion to be drawn from the evidence. 30 Cyc. 402 et seq.; Columbia, etc., Co. v. Lewis, 63 Ind. App. 386, 115 N. E. 103; Id., 65 Ind. App. 339, 116 N. E. 1; Zeitlow v. Smock, 65 Ind. App. 643, 117 N. E. 665; Sugar Valley Coal Co. v. Drake, 66 Ind. App. 152, 117 N. E. 937; Mobley v. Rogers, 68 Ind. App. 308, 119 N. E. 477; Muncie M. & F. Co. v. Thompson, 70 Ind. App. 157, 123 N. E. 196; Nissen T. & S. Co. v. Miller, 125 N. E. 652; Coppes Bros. & Zook v. Pontius, 131 N. E. 845; Miller v. C. & W. Kramer Co., 10 N. &C. C. A. 1215.

The award is affirmed.

RESSI'S CASE.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 20, 1922.)

133 Northeastern Reporter, 566.

MASTER AND SERVANT — CHILD BECOMING 18 BETWEEN PARENT'S INJURY AND DEATH NOT CONCLUSIVELY PRESUMED DEPENDENT WITHIN COMPENSATION ACT.

Under St. 1911, c. 751, pt. 2, § 7 (G. L. c. 152, § 32), providing that children under the age of 18 shall be conclusively presumed wholly dependent upon the parent with whom they are living at the time of the death of such parent, etc., where a daughter, though under 18 at the time of the injury, was over 18 at the time of the parent's death, she was not conclusively presumed to be wholly dependent, and the Industrial Accident Board should have found the degree of dependency as a fact.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

Appeal from Superior Court, Suffolk County.

Proceedings under the Workmen's Compensation Act by Mary Ressi for compensation for the death of her father, William Ressi, opposed by the S. N. & C. Russell Manufacturing Company, employer, and the American Mutual Liability Insurance Company, insurer, Compensation was allowed by the Industrial Commission, and decree therefor entered, and the insurer appeals. Reversed and remanded.

The only question involved was that of dependency. The single member of the Industrial Board found that petitioner lived with her father at the time of his injury and death, and was under the age of 18 years at the time of his injury, and was conclusively presumed to be wholly dependent upon him for support.

Sawyer, Hardy, Stone & Morrison, of Boston (Gay Gleason, of Boston, of counsel), for appellant.

John B. Cummings and James M. Rosenthal, both of Pittsfield, for appellee.

PIERCE, J. This is an appeal by the insurer from a decree of the superior court affirming a finding of the Industrial Accident Board, which on review had affirmed and adopted the findings and rulings of the board member. St. 1911, c. 751, and amendments thereto, now G. L. c. 152.

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The member upon the reported evidence warrantably found as a fact and ruled as a matter of law within the meaning of St. 1911, c. 751, pt. 2, § 7 (G. L. c. 152, § 32), that the claimant, Mary Ressi lived with her father, William Ressi, when he received an injury arising out of and in the course of his employment on January 22, 1920, and when, as a result of the injury, he died on November 13, 1920. The evidence further supports the finding that the father was a widower and that the claimant was under the age of 18 years at the time of his injury.

Upon the above findings the member made a further finding and ruling that the claimant "is conclusively presumed to be wholly dependent upon him [the father] for support and is entitled to a weekly compensation of ten dollars for a period of 400 weeks, subject to the provisions of the act." This last finding and ruling manifestly overlooks the testimony of the claimant and the admitted fact that Mary Ressi became of age on April 18, 1920, and consequently was over the age of 18 years at the time of the father's death on November 13, 1920, and in so doing disregards the provision of St. 1911, c. 751, pt. 2, § 7, now G. L. c. 152, § 32, which reads:

"The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee: * * * (c) children under the age of eighteen years * * * upon the parent with whom they are living at the time of the death of such parent, there being no surviving dependent parent. * * * In all other cases questions of dependency, in whole or in part, shall be determined in accordance with the fact as the fact may be at the time of the injury; * * *."

It follows that the member and the Industrial Accident Board should have found as a fact the degree of the claimant's dependency "in accordance with the fact as the fact may be at the time of the injury," and should not have ruled on the facts reported that the claimant was within the statute, or one of the class of persons by statute "conclusively presumed to be wholly dependent for support upon a deceased employee."

The decree of the superior court must be reversed, and the case remanded to the Industrial Accident Board for a determination of dependency in accordance with the fact.

Decree accordingly.

CHESTNUT & SMITH ET AL. v. LYNCH ET AL. (No. 12128.)

(Supreme Court of Oklahoma. Dec. 6, 1921. Rehearing Denied Jan. 10, 1922.)

202 Pacific Reporter. 1018.

(Syllabus by the Court.)

1. MASTER AND SERVANT—REVIEW OF INDUSTRIAL COMMISSION'S AWARD LIMITED TO ERRORS OF LAW.

In a suit instituted in this court to review an award of the State Industrial Commission, the suit must be to review an error of law, and not an error of fact. The decision as to all matters of fact is final.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

2. MASTER AND SERVANT—COMPENSATION CASE HELD TO INVOLVE QUESTION OF FACT NOT REVIEWABLE.

The opinion of the Industrial Commission examined, and *held*, that the appeal herein involves a question of fact and not an error of law.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

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Appeal from State Industrial Commission.

Application by Arnold W. Lynch to the State Industrial Commission for an award for personal injuries, opposed by Chestnut & Smith, employers, and the Consolidated Underwriters, insurer, and from an award therein, the employer and insurer appeal. Affirmed.

Breck Moss, of Oklahoma City, for petitioners.

S. P. Freeling, Atty. Gen., R. E. Wood, Asst. Atty. Gen., and Lydick & Hood and Irvin L. Wilson, all of Oklahoma City, for respondents.

McNeill, J. This is an appeal from the award of the State Industrial Commission by Chestnut & Smith and Consolidated Underwriters, wherein the State Industrial Commission awarded Arnold W. Lynch compensation for facial disfigurement in the sum of $1,800, and the further sum of $11.75 per week.

[1] It is first contended that the evidence is insufficient to support the finding of the Commission relative to the monthly pay of Arnold W. Lynch at the time he was injured. The Commission found that prior to the time of the injury the claimant was receiving compensation amounting to $185 per month. There is evidence in the record to support this finding, as complainant testified that he was receiving a salary of $125 per month and expenses when away from home, and that his board and room amounted to $2.50 per day, and he was away six days in a week. This involves a question of fact, and there is evidence to support this finding. This court, in the case of Wilson Lumber Co. v. Wilson, 77 Okl. 312, 188 Pac. 666, stated as follows:

"In a suit instituted in this court to review an award of the State Industrial Commission, the suit must be to review an error of law, and not an error of fact. The decision as to all matters of fact is final."

[2] The next question involved is the sufficiency of the evidence to substantiate the finding of the Commission of the permanent partial disability of claimant. It is sufficient to say there is evidence in the record to support the finding of the Commission, and this, being a question of fact, cannot be reviewed.

[3] The third proposition presented is stated as follows:

"We are asking this court to construe this expression: 'Provided that compensation for the loss of hearing or permanent disfigurement shall not be in addition to the other compensation provided for in this section, but shall be taken into consideration in fixing the compensation otherwise provided.' We shall cite no authority of any view that we might entertain with respect to the meaning of this little provision, but we are willing to submit our cause to the sound discretion and splendid analytical judgment of the highest tribunal of our state. We are not constrained to argue against this young man receiving some compensation for disfigurement, for such he certainly has suffered, but if there is no impairment than that of disfigurement the hand of the commission has been thrust into darkness to find something upon which to predicate its award, and we believe that finding is a shadow, and nothing real."

On appeal to this court the judgment of the lower court is presumed to be correct, and the burden is on the party assailing the judgment to point out wherein it is erroneous. Plaintiff in error cites no authorities to support the contention that the judgment of the lower court is erroneous. This court has announced the following rule:

"A plausible, but not convincing, argument in the brief, unsupported by citation of authority, is not sufficient to overcome the presumption indulged by the Supreme Court in favor of the correctness of the judgment of the trial court." Blue v. Board of County Commissioners of Garvin County, 198 Pac. 851.

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Calling the court's attention to one section of the statute without any argument or authorities to show wherein the judgment is erroneous is not sufficient to overcome the presumption that the judgment of the trial court is correct.

For the reasons stated, the judgment is affirmed.

Pitchford, C. J., and Elting, Miller, and Nicholson, JJ., concur.

GREEN ET AL. v. GREEN. (No. 6627.)

(Court of Civil Appeals of Texas. San Antonio. Nov. 30, 1921. Rehearing Denied Jan. 4, 1922.)

235 Southwestern Reporter, 980.

3. MASTER AND SERVANT—CLAIMANT HELD NOT ENTITLED TO COMPENSATION AS SURVIVING WIFE.

Even though the first wife of an employee had deserted him without cause, so as not to be entitled to compensation for his death under Employers' Liability Act, as amended in 1917 (Vernon's Ann. Civ. St. Supp. 1918, art. 5246—15), a woman who subsequently married the employee was not his legal wife, and could not claim the compensation as such.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

Appeal from District Court, Bexar County; Robert W. B. Terrell, Judge.

Suit by Catherine Green against Louisa Green and others to set aside an award made by the Industrial Accident Board in favor of defendant Louisa Green. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

T. H. Ridgeway, of San Antonio, and H. T. Cooper, of Fort Worth, for appellants.

Allan V. McDonnell and G. B. Rogers, both of Waco, for appellee.

FLY, C. J. This is a suit instituted by appellee against the appellants, Louisa Green, T. H. Ridgeway, and Miller's Indemnity Underwriters, to set aside an award made by the Industrial Accident Board in favor of Louisa Green for the death of Jerry Green, claimed by her to be her husband, who was accidentally killed while in the employment of the Texas Refining Company, a subscriber under the Employers' Liability Act of the state of Texas (Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246h–5246zzzz). Ridgeway, an attorney for Louisa Green, had been awarded a portion of the award to his client by the Industrial Accident Board. The cause was submitted to a jury on two issues; one being the identity of the Jerry Green who married Catherine in Waco with the Jerry Green who married Louisa in San Antonio; and the other, that Catherine had not abandoned Jerry without just cause. The jury answered that it was one and the same man that had married both women, and that the abandonment was not without just cause, and judgment was rendered in favor of Catherine for $2,300, who had taken the first turn with Jerry in matters of matrimony, at least so far as this case is concerned.

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The evidence of Catherine tended to show that she married a negro man named Jerry Green, in East Waco, in 1907, and that he had previously been married to Betty, who had died. Catherine lived with Jerry for two years, when he became ill and left to go to his sister in Navasota. He wrote only two letters to her. Catherine had two marital experiences prior to marrying Jerry. Catherine did not hear from Jerry after 1909, until she heard of his death in 1918. She said:

"I didn't know if he got well, but I just thought this; I said, 'Well, if he died, she was a sorry sister-in-law if she wouldn't let me know;' but by him not coming back home I knew he wasn't dead."

She said he was 50 years old in 1907, which would make him 61 years old when he died.

It was shown by the testimony of Louisa that she took her first step in matrimony by marrying Jerry Green in December, 1916, in the city of San Antonio. At that time he was about 50 years of age, and was about 52 when he died. When she married him, he was hale and hearty.

The evidence tended to show that the Waco Jerry Green "was a low, chunky man, looked like a man of about 50" in 1907; that "he was a right black man, he was so black until his finger nails looked blue, but his hair was just as straight as could be." No description of the San Antonio Jerry was given. Although it was testified by Catherine that her Jerry had a sister, Ella Breedlove, and a brother-in-law named Dave Watson, neither of them was placed on the stand, and the evidence left in doubt as to whom the Industrial Accident Board Jerry belonged.

The vital question was whether the two Jerrys were really one and the same, and whether Catherine had lost any right, title, or interest by about 10 years of indifference to his welfare and happiness. Her interest became strong and burning when she learned that he was dead and had left money to which his wife was entitled.

The facts in this case, as given by Catherine alone, are that she was married to Jerry Green in 1907. No license was produced; no person present at the ceremony was called as a witness. The marriage rests in the first instance on her uncorroborated testimony. The evidence of his relatives, which Catherine said he had, was not produced as to any point in the case. Catherine testified:

"We were married in the courthouse in Waco, in McLennan county. Elder McJunkins married us; he was a white Baptist preacher. Jerry got the license in the courthouse. I and him went up to the courthouse, and he got the license, and we stood and married."

She was very uncertain and contradictory in her testimony. She testified on this trial that she got two letters from Jerry after he left to go to his sister at Navasota; but, being recalled, she testified:

"I had never heard from Jerry from the time he went to see his sister."

In Austin she swore she did not write to the sister, but on this trial swore she had written to her, asking about Jerry. The mind of Thomas was much illuminated between the time he was on the stand in Austin, and on the trial of this case in San Antonio. He testified on this trial that he saw the Jerry Green in San Antonio, who was known to him. In his testimony in Austin he testified to nothing of the kind. He was very unsatisfactory and contradictory in his testimony. No one corroborated Catherine as to her marriage to Jerry. The issue of marriage was not submitted to the jury, but was assumed by the court. It was one of the vital issues in the case. The Waco Jerry and the San Antonio Jerry might be the same man; but, unless there was a legal marriage in Waco, there could be no recovery by Catherine.

[1] In this state of the record an attorney for Catherine, in the closing argument to the jury, said:

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"You gentlemen perhaps noticed on yesterday a very unusual proceeding in this case. After the evidence was closed, you gentlemen were sent out of the courtroom, and were then recalled, and more evidence was introduced on the issue as to the identity of the Waco Jerry Green as being the same as the San Antonio Jerry Green. The reason of that was that the attorneys on the other side of this case, by trickery, undertook to raise an issue as to whether or not the Waco Jerry Green was the same as the San Antonio Jerry Green. At the beginning of the trial of this cause, all of the attorneys entered into a solemn agreement in this cause in which it was agreed that the Waco Jerry Green and the San Antonio Jerry Green were one and the same person."

No such agreement was placed in evidence. When the argument was objected to, the court merely remarked that the question of identity was an issue in the case, but did not rebuke the attorney, nor instruct the jury not to consider the argument. The only qualification to the bill of exceptions is that counsel for appellants did not request the court to instruct the jury to not consider the remark. The argument was very improper, being about one of the vital points in the case, and, not meeting with the condemnation of the court, doubtless influenced the verdict of the jury. The court should have reprimanded the attorney for using reprehensible and inexcusable language, whether he instructed the jury not to consider it or not. In most of the cases, if not all, cited by appellee, the court had verbally instructed the jury to disregard the argument. In the case of Bonner & Eddy v. Glenn, 79 Tex. 531, 15 S. W. 572, cited by appellee, the language was used in the opening argument and the court said:

"There may be cases in which language used, especially in a closing argument, is so well calculated to arouse the prejudices of a jury as to make it proper to reverse a judgment, although the court may have done all in its power to destroy their effect."

[2] In this case the court expressed no disapproval whatever of the argument, although it was an attack upon the honor and integrity of an attorney, in regard to the vital issue in the case, and without one particle of evidence upon which the argument could be based. It will be presumed that the argument influenced the verdict of the jury.

[3] The amendment of 1917 to the Employers' Liability Act, as embodied in Vernon's Ann. Civ. St. Supp. 1918, art. 5246-15 provides:

"The compensation provided for in the foregoing section of this act shall be for the sole and exclusive benefit of the surviving husband who has not for good cause and for a period of three years prior thereto abandoned his wife, * * * the wife who has not at the time of the injury * * * abandoned her husband and the minor children," etc.

In this case there was no technical abandonment by Catherine of her husband; but if, on a further development of the facts of the case it should appear that she had by her cruelty or indifference to his sickness driven him off, it might preclude her from a recovery of the award, even though she was legally married to him. However, if there was a legal marriage in Waco, there could have been no second legal marriage, and Louisa could not recover. If Catherine abandoned her husband for three years, and could not recover, that fact would not constitute the woman of the last marriage a beneficiary, because she would not be a wife.

The judgment is reversed, and the cause remanded.

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MILLERS' MUT. CASUALTY CO. v. HOOVER ET AL.
(No. 250-3453.)

(Commission of Appeals of Texas, Section B. Dec. 21, 1921.)

235 Southwestern Reporter, 863.

MASTER AND SERVANT—CORPORATE DIRECTOR SUPERINTENDING MILL HELD "EMPLOYEE" PROTECTED BY COMPENSATION ACT.

Under Workmen's Compensation Act, as amended by Laws 1917, c. 103, pt. 4, §§ 1; 1a (Vernon's Ann. Civ. St. Supp. 1918, arts. 5246-82, 5246—83), defining "employee" as one in the service of another under a contract of hire, and excluding corporate officers and directors, one injured in the performance of his duties as superintendent and head miller, who is subject to discharge, and receives a monthly salary, is not excluded from the benefits of the act, though he is also director of the corporation conducting the mill; the language of statute not being plain, but open to construction.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

(For other definitions, see Words and Phrases, First and Second Series, Employee.)

Error to Court of Civil Appeals of Fifth Supreme Judicial District.

Proceedings under the Workmen's Compensation Act by Mrs. Louise E. Hoover, opposed by the G. B. Smith Milling Company, employer, and the Millers' Mutual Casualty Company, insurer. An award of compensation was sustained by the Court of Civil Appeals (216 S. W. 475), and insurer brings error. Affirmed on the recommendation of the Commission of Appeals.

Hamp P. Abney, of Sherman, for plaintiff in error.

G. P. Webb, of Sherman, for defendants in error.

McCLENDON, P. J. The sole question presented in this case is whether an employee of a corporation is precluded from the benefits of the Workmen's Compensation Act as amended by the Act March 28, 1917 (Laws 1917, c. 103 [Vernon's Ann. Civ. St. Supp. 1918, arts. 5246—1 to 5246—91]) by virtue of his also being a director of the employing corporation.

The facts of the case as found by the Court of Civil Appeals follow:

"The G. B. Smith Milling Company is a private domestic corporation, and conducts a flour mill at Sherman. It had a board of seven directors, consisting of G. B. Smith, Guy Frank Hoover, and five others. G. B. R. Smith was its president and general manager. Guy Frank Hoover was its superintendent and head miller. Generally his duties were to direct the operation of the plant machinery, the making of flour, overlook and direct repairs, and at times do the actual work in connection with such matters. He was without authority to employ and discharge servants, though he did at times exercise that authority to a limited extent. The ultimate authority to direct the mill and its operation, to employ and discharge servants, was reposed in G. B. R. Smith, the president and general manager, who employed Hoover and had authority to discharge him. Hoover received a salary of $165 per month. Whether any part of said sum was paid him as a director of the corporation the evidence does not disclose. Hoover was accidentally killed at the mill while engaged in the performance of his duties as superintendent and

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head miller. Thereafter, within the time and manner directed by the act, his claim was presented to the Industrial Accident Board, and the award indicated was made."

The 1917 act defines an "employee" as follows:

"'Employee' shall mean every person in the service of another under any contract of hire, expressed or implied, oral or written, except masters of or seamen on vessels engaged in interstate or foreign commerce, and except one whose employment is not in the usual course of the trade, business, profession or occupation of his employer." Part 4, § 1 (Vernon's Ann. Civ. St. Supp. 1918, art. 5246—82).

Section 2 of part 1 (article 5246—2) exempts from the provisions of the act domestic servants, farm laborers, or the employees of a person, firm, or corporation employing less than three employees or engaged in operating any steam, electric, street, or interurban railway as a common carrier.

Section 1a of part 4 (article 5246—83), which is the section calling for construction, reads as follows:

"The president, vice president or vice presidents, secretary or other officers thereof provided in its charter or by-laws and the directors of any corporation which is a subscriber to this act shall not be deemed or held to be an employee within the meaning of that term as defined in the preceeding section hereof."

Plaintiff in error contends that the proper construction of this section is that an officer or director of a corporation is precluded from the benefits of the act, regardless of whether, aside from his official duties, he be also a bona fide employee of the corporation within the meaning of the act; in other words, that the language employed in section 1a refers to the person, and not to the office. Defendants in error contend, on the other hand, that only the officers named as such are excluded from the benefits of the act; and, where they occupy the dual position of officers and employees within the meaning of the act, they are entitled to its benefits if injured while engaged in the performance of their duties as employees. This view was upheld by the trial court and Court of Civil Appeals. 216 S. W. 475.

We have reached the conclusion that the case has been properly decided by those courts.

If the language employed in section 1a were so plain as not to admit of doubt or uncertainty as to its meaning, it would be the duty of the courts to give effect to that meaning regardless of whether such construction harmonize with the general purposes or policy of the act. But, where the language is of doubtful or uncertain meaning, resort may be had to canons of construction, and inquiry made into the purposes of the legislation. We are not prepared to say that the language of section 1a is so plain and free from doubt as not to call for construction and invite inquiry into the legislative intent. It has been held in a number of states that there is nothing in the relation of an executive officer or director of a corporation which is irreconcilably inconsistent with his being also an ordinary employee of the corporation within the provisions of Workmen's Compensation Acts. The cases upon this subject are collated in 1 Honnold on Workmen's Compensation. 173, and 28 R. C. L. 764, 765. Stockholders of a corporation are, in a sense, the owners of the corporation. Its directors have the sole management of its affairs, and their acts as such are its acts. The same may be said of its officers while acting within the powers delegated to them by the board of directors. But, as individuals, the stockholders, directors, and officers of a corporation are distinct legal entities, and are as entirely free to deal with the corporation by contract or otherwise, within certain well-defined limitations not essential to enumerate, as any other individual.

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It is readily conceivable that one might occupy the dual relation of an ordinary employee coming within the benefits of the act, and of an employee coming within one of the excepted employments enumerated in the act. As, for example, a person operating a small manufacturing plant might have one in his employ in the plant who also performed services for him as a domestic servant. Under such circumstances, we think it would be held that the fact that he performed duties which were not within the protection of the act would not preclude him from receiving the benefits of the act if injured while performing the duties of an employee within the protection of the act. Why should not the same course of reasoning apply to one who is both officer and employee of a corporation? The only necessary construction to be placed upon section 1a is that officers and directors as such are precluded from the benefits of the act. Beyond that the express language is silent. To give it either of the constructions contended for would require supplementing the language used, if all uncertainty is to be removed. Plaintiff in error would supply after "directors of any corporation" the words "whether acting in their official capacity, or otherwise"; while defendants in error would supply at the same place the words "as such." It seems quite plain to us that in order to arrive at the legislative intent we must look beyond the mere language of section 1a.

In treating generally the subject of canons of construction applied to Workmen's Compensation Acts, 28 Ruling Case Law. p. 755, deduces the following from the authorities:

"In the construction of Workmen's Compensation Acts, the courts are, of course, guided by the general rules of statutory interpretation. It has been thought, inasmuch as the statute is in derogation of the common law, that it should be given a strict construction, but the courts have very generally held that a spirit of liberality should characterize its interpretations, for the reason that it is to be classed as remedial legislation. Indeed, some of the acts contain an express provision that the construction of the courts shall be liberal. There are, however, reasonable limitations upon the rule, and the operation of the law should not be stretched by an extravagant principle of inclusion. On the other hand the courts should be alert to check any reactionary tendencies, because a law, however much needed for the promotion of the public welfare, and however wisely framed, may be made so unsatisfactory by the spirit of it not sufficiently pervading its administration as to defeat its purpose and create danger of its abrogation, and a return to the conditions which gave rise to the effort for relief. Though a court may profess adherence to the rule of liberality, some doubt must rest in respect of its sincerity, where decisions are in the closer cases against the statute, and where support for such decisions is sought in definitions and references to lexicographers. To define is to limit; and a refinement of definition discloses opposition to the spirit of the act."

A succinct statement of the purposes of this character of legislation is given in an extended note in L. R. A. 1917D, page 82, as follows:

"The general theory of the acts is that the industries should bear the burden of injuries to employees as it does the breakage of machinery; and consequently the element of negligence on the part of either the employer or the employee, unless it is willful, does not enter into the case. In place of the lengthy, costly, and uncertain remedy which the employee had in cases in which he was injured by the negligence of the employer, he is given a remedy, inexpensive and immediate, in all cases in which he suffers injury. The procedure is summary and replaces the old system of action for negligence which was so often unjust to employer and employee alike."

It may not be amiss also to quote from same leading cases upon this subject:

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"The common-law and liability statutes furnished an uncertain measure of relief to the limited number of workmen who could trace their injuries proximately to the master's negligence. Compensation laws proceed upon the theory that the injured workingman is entitled to pecuniary relief from the distress caused by his injury, as a matter of right unless his own willful act is the proximate cause, and that it is wholly immaterial whether the injury can be traced to the negligence of the master, the negligence of the injured employee or a fellow servant, or whether it results from an act of God, the public enemy, an unavoidable accident, or a mere hazard of the business which may or may not be subject to more exact classification; that his compensation shall be certain, limited by the impairment of his earning capacity, proportioned to his wages, and not dependent upon the skill or eloquence of counsel or the whim or caprice of a jury; that, as between workmen of the same class who suffer like injuries, each shall receive the same compensation, and that, too, without the economic waste incident to protracted litigation and without reference to the fact that the injury to the one may have been occasioned by the negligence of the master, and to the other by reason of his own fault." Lewis & Clark Co. v. Industrial Accident Board (1916) 52 Mont. 6, 155 Pac. 268, L. R. A. 1916D, 628.

"Our act came of a great compromise between employers and employed. Both had suffered under the old system; the employers by heavy judgments of which half was opposing lawyers' booty; the workman through the old defenses or exhaustion in wasteful litigation. Both wanted peace. The master in exchange for limited liability was willing to pay on some claims in future where in the past there had been no liability at all. The servant was willing, not only to give up trial by jury, but to accept far less than he had often won in court, provided he was sure to get the small sum without having to fight for it. All agreed that the blood of the workman was a cost of production, that the industry should bear the charge." Stertz v. Industrial Ins. Commission (1916) 91 Wash. 588, 158 Pac. 256. Ann. Cas. 1918B, 354.

"They [Compensation Statutes] have apparently been passed in response to a widespread public opinion that a common-law action to recover damages for injuries suffered by employees from accidents while in the performance of their work under present industrial conditions is, in most cases, an imperfect and inadequate remedial instrumentality." Sayles v. Foley, 38 R. I. 484, 96 Atl. 340.

The following is from an opinion of the Supreme Court of the United States, delivered by Mr. Justice Pitney:

"In support of the legislation, it is said that the whole common-law doctrine of employer's liability for negligence with its defenses of contributory negligence, fellow servant's negligence, and assumption of risk, is based upon fictions, and is inapplicable to modern conditions of employment; that in the highly organized and hazardous industries of the present day the causes of accident are often so obscure and complex that in a material proportion of cases it is impossible by any method correctly to ascertain the facts necessary to form an accurate judgment, and in a still larger proportion the expense and delay required for such ascertainment amount in effect to a defeat of justice; that under the present system the injured workman is left to bear the greater part of industrial accident loss, which because of his limited income he is unable to sustain, so that he and those dependent on him are overcome by poverty and frequently become a burden upon public or private charity; and that litigation is unduly costly and tedious, encouraging corrupt practices and arousing antagonisms between employers and employees." Railway v. White, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1. Ann. Cas. 1917D, 629.

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The underlying reason for excluding the officers and directors of a corporation as such from the provisions of the act is apparent. The officers and directors of a corporation do not come within the ordinarily accepted meaning of the terms "workmen" and "employees," for whose benefit the legislation is primarily enacted. Their duties toward the corporation and its business are those of managing and directing heads, and they do not, as a rule, perform the ordinary tasks, nor are they subjected to the ordinary risks, of employees or workmen engaged in the service of the corporation. Nor, as a general rule, is their compensation affected by their temporary disability caused by injury while engaged in their employment. On the other hand, where, although occupying an official position with the corporation, they are employed as workmen or employees in the ordinary sense of those terms, and come clearly within the provisions of the act, there would appear to be no substantial reason for excluding them from those benefits merely because they also hold official positions with the corporation; and the Legislature should not be presumed to have intended so to exclude them unless the language employed be clearly not susceptible of any other construction.

As throwing some light upon the legislative intent, both sides have adverted to the fact that on February 3, 1916, the Attorney General's Department addressed a letter to the commissioner of insurance and banking, which reads as follows:

"You have presented to the Attorney General through your deputy insurance and banking commissioner, a request for an opinion as to whether or not the officers of a corporation engaged in operating its business are to be considered as employees of the corporation under the Texas Employers' Liability Act, passed by the Thirty-Third Legislature in 1913.

"We beg to advise you that, in the opinion of this Department, officers of the corporation are employees within the meaning of this act, and are entitled to the privileges thereof and subject to its disabilities.

"Section 1 of part 4 of this act, which is article 5246yyy of Vernon Sayles' Civil Statutes of this state, defines the word 'employee' as used throughout this act and declares that 'employee' shall include every person in the service of another under any contract of hire, expressed or implied, oral or written, except one whose employment is but casual or is not in the usual course of the trade, business, profession or occupation of the employer. This definition is comprehensive enough and as a matter of fact does embrace every person whether a laborer or an officer 'in the service of another under any contract of hire.' This act of the Legislature not only applies to the servants of corporations but to the servants of partnerships and individuals as well. Partnerships and individuals, of course, have no corporate officers and nothing in the act lends color to the proposition that corporate officers are not to be considered as employees. It is true that the word "employee" in its general acceptation does not apply to officers of the government of a corporation. Palmer v. Van Santvoord, 153 N. Y. 612, 47 N. E. 915, 38 L. R. A. 402.

"At the same time the word 'employee' is comprehensive enough to embrace any one whether an officer or workman in the service of another. The authorities say 'an employee' is one who works for and under the control of his employer.' Employers' Indemnity Co. v. Kelly Coal Co., 149 S. W. 992; Employers' Indemnity Co. v. Kelly Coal Co., 41 L. R. A. (N. S.) 963.

"The Century Dictionary defines 'employee' in part as follows: 'One who works for an employer; a person working for salary or wages.'

"It is true that this authority says that the term is usually applied only to clerks, working laborers, etc., and but rarely to the higher officers of a corporation or government or to domestic servants, but we are convinced that the use of the term 'employee' in the Texas statutes must

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be construed to apply to all persons in the service of another, because this application follows the plain and simple meaning of the definition given in the statute.

"It will be noted that in section 2, part 1, of the act, which is now article 5246hh of Vernon's Sayles' Civil Statutes, that certain classes of employees were excepted from the general terms of the act, and, among others, domestic servants and farm laborers. This exception is persuasive of the construction which we give the definition of employee as contained in article 5246yyy. Our definition of employee is a copy of the definition contained in a Massachusetts act, and Mr. Boyd in his work on Workmen's Compensation, section 406, declares that the Massachusetts act covers all employees engaged in employments affected by the law.

"You are therefore advised that 'every person in the service of another under any contract of hire,' in this state, unless within the specially excepted classes, as specified in section 2 of the act above referred to, are within the protective features of our employee's compensation act and are likewise subject to the liabilities of that act."

This opinion antedates the amendment of 1917 by a little over a year, and it is contended by both sides that the purpose of the amendment as contained in section 1a above quoted was to prevent the construction given by the Attorney General to the definition contained in the 1913 act, plaintiff in error contending that the purpose was to exclude officers and directors acting as such or in any other capacity, and defendants in error contending that the amendment was only intended to exclude officers and directors while acting as such.

We are inclined to think that this opinion if it were the occasion for the amendment, leaves the matter as much in doubt as it was before. The particular question whether the act of 1913 embraces officers as such or officers while acting in any capacity is not referred to in the opinion and clearly we think that it was the intention of the Attorney General to hold that "the officers of a corporation engaged in operating its business are to be considered as employees of a corporation" while acting in their official capacity. It is quite clear that section 1a does exclude from the benefits of the act officers while acting in their official capacity. Whether the Legislature intended by the language used to exclude them under all circumstances is a question which we think the Attorney General's letter had no reference to. If, therefore, the only purpose of the Legislature in enacting section 1a was to prevent the class of persons named in the Attorney General's letter from participating in the benefits of the act, and no more, then it may be said, we think, that the letter gives some color to the interpretation contended for by defendants in error.

Aside from this however, we feel quite confident in the conclusion first expressed that by the language employed, it was the intention of the Legislature to preclude only the class of persons enumerated in section 1a from the benefits of the act as a class, and not the individuals of that class who might fall under other relations they might sustain to the corporation, within the clear purview of the act. We are not called upon here to construe the meaning of the term "officers" as employed in section 1a, nor to consider the effect of a subterfuge resorted to for the purpose of bringing an officer or director within the provisions of the act. It is clear, and in fact conceded, that Hoover was head miller of the corporation; that his employment was bona fide; that he lost his life in the discharge of his duties as head miller; that in such employment he was not acting as officer or director of the corporation; and that he clearly came within the provisions of the act, unless precluded by section 1a.

We conclude that the judgments of the district court and Court of Civil Appeals should be affirmed.

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CURETON, C. J. The judgment recommended in the report of the Commission of Appeals is adopted, and will be entered as the judgment of the Supreme Court.

BAMBERGER ELECTRIC R. CO. v. INDUSTRIAL COMMISSION OF UTAH. (No. 3720.)

(Supreme Court of Utah. Dec. 24, 1921.)

203 Pacific Reporter, 345.

MASTER AND SERVANT — WORKMAN SERVING TWO EMPLOYERS HELD NOT ENGAGED IN JOINT EMPLOYMENT MAKING BOTH LIABLE UNDER COMPENSATION ACT; "ARISING OUT OF AND IN COURSE OF EMPLOYMENT."

Where deceased, employed by an electric railroad company, and also by an electric power company, spent part of the time operating railroad company's transformers on one side of a building and a part of his time attending to the power company's machinery on other side of building, his death from injuries sustained while attending the power company's machinery, at a time when he was performing no duties for the railroad company, was not the result of an accident arising out of or in the course of his employment with the railroad company, and the railroad company was not liable for any part of the compensation awarded under the Workmen's Compensation Act, but the full amount of the award based upon the total amount of his earnings from both companies should be made against the power company alone.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.

Proceedings under the Workmen's Compensation Law (Comp. Laws. 1917, §§ 3061–3165) by Elise Berg, for compensation for the death of her son, Walter Berg, opposed by the Bamberger Electric Railroad Company and the Utah Power & Light Company, employers. Award by Industrial Commission of Utah for claimant against both employers, and first-named employer petitions for a writ of review. Commission instructed to vacate award as to first-named employer.

De Vine, Howell, Stine & Gwilliam, of Ogden, for plaintiff.

Harvey H. Cluff, Atty. Gen., and J. Robert Robinson, Asst Atty. Gen., for defendant.

WEBER, J. Walter Berg was killed by accident at Ogden, Utah, on June 2, 1921. His mother, Mrs. Elise Berg, applied to the Industrial Commission for compensation from the Bamberger Electric Railroad Company, hereinafter referred to as Railroad Company, and the Utah Power & Light Company, hereinafter called Power Company, claiming that at the time of his death her son was in the employ of both companies, and that both companies were liable for compensation. The commission made an award to be paid by both companies. The Railroad Company obtained a rehearing, upon which the previous award was confirmed. In accordance with plaintiff's petition for a writ of review, the record is now in this court.

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The Railroad Company contends that the Commission was without any jurisdiction or authority to make an award against it, for the reason that Berg was not in the service of that company in doing the particular work in which he was engaged at the time of his death, and that therefore the relation of employer and employee did not exist between him and the plaintiff at that time.

At the hearing before the Commission the first proceeding had was the entrance by the parties concerned into a stipulation to this effect: On June 2, 1921, Walter Berg, of Ogden, Utah. was fatally injured by reason of an accident arising out of or in the course of his employment; that at the time he was killed he was engaged in his duties in performance of work for the Utah Power & Light Company, and that he met with the accident on the side of the station owned and operated exclusively by the Utah Power & Light Company. It was further stipulated that deceased was 31 years of age, single, and a citizen of the United States; that there is unpaid a funeral expense of $420.25 due George W. Larkin & Sons, and that the Utah Power & Light Company is a self-insurer. paying compensation direct to its injured employees and their dependents.

With proof of the earnings of deceased from both companies and the dependency of the mother supplementing the agreed facts, the case would seem to have been complete for awarding compensation to the mother to be paid by the Power Company, basing such award upon his aggregate earnings from both companies. However, witnesses were produced whose testimony established substantially the following facts. Plaintiff operates an electric railroad between Salt Lake City and Ogden, Utah. The electric substation at Ogden in which Berg was killed is a building divided into two parts, with an opening in the center. On one side of the building are the electric transformers of the Railroad Company, and on the other side are the Power Company's arc light rectifiers and distributing power lines for supplying light to Ogden city. Berg's duty to the railroad company was to operate its transformers at its substation, and he also attended to the Power Company's machinery on its side of the building. The transformers and machinery of the Railroad Company were not operated between 1:35 and 5:30 a. m., as no trains were being run during that time. The record kept by Berg indicated that the machines of the Railroad Company were shut down at 1:30 a. m., and they were not started at 5:30 a. m., showing that Berg, who was the only one to start the machinery, had been killed before 5:30 a. m. His dead body was found between 7 and 8 a. m., and apparently Berg had been dead two or three hours. Burns on his body indicated that he had been killed by electricity, and other evidence pointed unmistakably to the fact that he had come in contact with an electric current while working for the Power Company, and on its side of the building. The work he was doing at that time for the Power Company had no connection with the business of the Railroad Company in any manner. Berg worked for both companies, and each paid him for four hours. one-half of his time, each day. His pay was according to the schedule of the company paying him.

The Commission found that—

"The decedent on the date of his death was paid the sum of $61.25 per month by the Utah Power & Light Company, and the sum of $54.50, plus 10 per cent. bonus. or a total of $59.95 per month, by the Bamberger Electric Railroad Company, making his aggregate salary received per month from both companies $121.20, working seven days per week."

Without going into further details as to the evidence, it is sufficient to say that no joint contract existed between the Railroad Company and the Power Company to pay Berg's wages; that each company was liable for its share of Berg's wages. and no more; that either company could have discharged the deceased from its employ, but neither could have

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discharged the deceased from the employ of the other. Therefore, while doing work for the Power Company the condition of employer and employee existed between the deceased and the Power Company, but not between him and the Railroad Company. For some hours prior to his injury and resulting death Berg had no duty to perform for the Railroad Company, nor was he rendering any service for the Railroad Company at the time of his death in the Power Company's part of the station building. The relation of employer and employee not then existing between the Railroad Company and the deceased, it was not in the course of his employment with plaintiff that he was killed. Moreover, at the time of his death the Railroad Company had no control over deceased, and he was entirely, according to the undisputed evidence, under the direction of the Power Company, and hence there was no joint employment, and the Railroad Company cannot be held liable for any part of the compensation awarded to the mother of the deceased.

In support of its claim that Berg, as matter of law, under the circumstances of the case, was in the employ of both companies all the time when at work, and that it was a joint employment, the defendant cites San Francisco-Oakland Term. Ry. v. Industrial Acc. Com. of Cal., 180 Cal. 121, 179 Pac. 386; Employers' Lia. Assur. Corp. v. Industrial Acc. Com. of Cal. 179 Cal. 432, 177 Pac. 273; Vary v. B. C. R. & M. R. Co., 42 Iowa. 246; Atlantic Coast Line v. Treadway, Adm'x, 120 Va. 735, 93 S. E. 560. 10 A. L. R. 1411; G. C. & S. F. R. R. Co. v. Dorsey, 66 Tex. 148, 18 S. W. 444; Wis. Cent. R. Co. v. Ross, 142 Ill. 9, 31 N. E. 412, 34 Am. St. Rep. 49; Mo. P. R. R. Co. v. Bond, 2 Tex. Civ. App. 104, 20 S. W. 930; and G. H. & S. A. R. R. v. Croskell, 6 Tex. Civ. App. 160, 25 S. W. 486.

In the first of the above cases, in which the award by the Industrial Commission was affirmed, the proceeding was against the San Francisco-Oakland Term, Railway and the Southern Pacific Company upon the theory that they were joint employers of the deceased. The deceased was employed by both companies as a flagman, and his duties were to warn and signal indiscriminately the operators of the trains of both defendants at or approaching the street crossing at which he was stationed, and to warn and signal pedestrians and the drivers of vehicles as to the approach at said crossing of the trains of both defendants. At the time of the accident the flagman who was killed was actually engaged in rendering service for both of the defendants. No award was made against the Southern Pacific Company, as it was at said crossing at all times engaged indistinguishably in interstate and intrastate commerce, and therefore as to the Southern Pacific Company the flagman was engaged in interstate commerce. As we read the record the facts here are not similar to those in the case cited. Here the deceased was not at the time of his death, engaged in rendering service for both companies. His duties to the Railroad Company were distinctly separate from those to the Power Company. Save that each employed the same man, there is no element of joint employment in the instant case. The other cases cited by defendant are equally inapplicable to the case at bar.

In Western Metals & Supplies Co. v. Pillsbury, 172 Cal. 407, 156 Pac. 491, Ann. Cas. 1917E, 390, it was held that a night watchman employed by six different firms was an employee of the one on whose premises he was killed while in the discharge of his duty. The award, however, was properly based upon the aggregate amount he received from the six firms by whom he was employed, and not upon the earnings he received from the employer in whose service he was killed.

In our opinion Berg was not in the service of the Railroad Company in doing the work in which he was engaged when killed, but at that time he was in the service of the Power Company, who should pay the full amount of the award, based upon the total amount of his earnings re-

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ceived by him from both companies. The Commission is therefore directed to vacate the award, and proceed in accordance with the views herein expressed. Each party to pay its own costs.

Corfman, C. J., and Gideon, Thurman, and Frick, JJ., concur.

HOFFMAN v. HANSEN ET AL. (No. 16700.)

(Supreme Court of Washington. Dec. 19, 1921.)

203 Pacific Reporter, 53.

1. MASTER AND SERVANT — COMPENSATION ACT PROVISION FOR ELECTION OF REMEDIES HELD INAPPLICABLE.

Though the occupation of street car conductor is extrahazardous, within Workmen's Compensation Act, Rem. Code 1915, §§ 6604—2, 6604—4, section 6604—3, requiring a workman injured while away from his employer's plant by the negligence or wrong of another not in the same employ to elect in advance of any suit under such section, whether to take under the act or seek a remedy against such other, is inapplicable to a street car conductor struck by an automobile driven by one not in the same employ, while walking for exercise or pastime, away from the car barns, after registering in for duty, but before taking out his car for the day's run; his injury not occurring in the course of his employment or at the plant of his employer.

(For other cases, see Master and Servant, Dec. Dig. § 354.)

Department 1.

Appeal from Superior Court, King County; King Dykeman, Judge.

Action by W. E. Hoffman against Jens L. Hansen and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Roberts & Skeel, of Seattle, for appellants.

Crowder & Crowder, of Seattle, for respondent.

MITCHELL, J. This is a personal injury action brought by W. E. Hoffman against Jens L. Hansen and Hansen Bread Company. The defendants have appealed from a judgment against them.

Many of the facts are in dispute, but there is ample evidence to show that the accident causing the injuries happened February 2, 1920, before daylight. The respondent was a motorman operating an electric street car for the city of Seattle out of its car barns situated on the east side of Fifth Avenue North and north of its intersection with Republican street; the two streets crossing at right angles. His run for the day commenced from the car barns at 6 a. m. He was required to register in not less than ten minutes before his service commenced (he could register in as much earlier as he wished), and after registering in until the service started the time was his own to do as he pleased. On the morning in question he registered in at 5:35, after which, as was his habit, he took a walk on the street. He went south on Fifth avenue and returned on the west side of it. Upon reaching a point about midway between Republican street and Harrison street (the latter being the next street south of Republican street), he decided to cross over diagonally from that point to the Roslyn Cafe in the building at the southeast corner

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of the avenue and Republican street to get a cup of coffee. This was about 5:50 a. m. Upon stepping off the curb he noticed a well-lighted touring car approaching from the north in or near the middle of the avenue at the rate of 50 to 60 miles an hour. He stepped back onto the curb until the car disappeared to the south. Thereupon he again started to cross the avenue, and on taking one or two steps into the street he noticed an unlighted car, about 75 feet away, near the center of the avenue. approaching from the north at 25 to 35 miles an hour. He hollered, "Put on your lights," and stepped back towards the curb and instantly was struck by the car and knocked some 15 to 20 feet on to the parking strip. He was seriously injured. After striking him the car ran up on the parking strip for a distance of 15 to 20 feet, then turned to the left and stopped, standing across the avenue with the rear wheels near the curb. The auto was a Ford delivery truck belonging to the appellants and was being driven by an employee in the delivery of bread from their bakery near by.

[1] It is contended the respondent was under the Workmen's Compensation Act at the time he was injured, and that if he was not the trial court erred in not holding he could not maintain this action without having first made and filed an election to sue. Unquestionably the occupation or employment as street car conductor is classified as extrahazardous and is within the terms of the act, sections 6604—2, 6604—4. Rem. Code; but section 6604—3 in defining words employed in the act says:

"Workman means every person in this state, who, after September 30, 1911, is engaged in the employment of an employer carrying on or conducting any of the industries scheduled or classified in section 6604—4. whether by way of manual labor or otherwise, and whether upon the premises or at the plant or, he being in the course of his employment away from the plant of his employer: Provided, however, that if the injury to a workman occurring away from the plant of his employer is due to the negligence or wrong of another not in the same employ, the injured workman, or if death result from his injury, his widow, or children, or dependents, as the case may be, shall elect whether to take under this act or seek a remedy against such other, such election to be in advance of any suit under this section. * * *"

Situated and engaged as he was at the time of the accident, it cannot be said, upon a liberal construction of the act, that he was upon the premises or at the plant of his employer. He was upon the sidewalk and street in a sense entirely disassociated from the street railroad and its service. Nor can it be said that while thus away from the plant of his employer he was in the course of his employment. At the time he was injured he was engaged in the exercise or pastime of walking and was no more in the course of his employment than if at that time he had been away engaged in the exercise or pastime of boating or automobiling. The complaint being that his injuries were due to the negligence or wrong of another who it appears was not in the same employ, and it appearing he was injured at a time he was not in the course of his employment and was away from the plant of his employer, it follows that the provisions of the act requiring him to elect whether to take under the act or seek a remedy against such other and that such election shall be in advance of any suit under this section is not applicable.

[2] It is claimed the challenge of the defendants to the sufficiency of the evidence and a motion for judgment notwithstanding the verdict should not have been denied. The contention involves the defense of contributory negligence, and it is argued that, as the accident occurred between street intersections, the respondent assumed the risk, and that the driver of appellant's automobile had the absolute right of way. The argument goes too far. The case of Crowl v. West Coast Steel Co., 109

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Wash. 426. 186 Pac. 866, is relied on by appellants. That case is not in point. It considers an ordinance of Tacoma that differs materially from the one in this case. The one here provides:

"Pedestrians shall have the right of way over vehicles at street intersections and crossings; vehicles the right of way over pedestrians between street intersections and crossings."

Of this ordinance it was said in the Crowl v. West Coast Steel Co. Case, quoting from the case of Johnson v. Johnson, 85 Wash. 18, 147 Pac. 649:

"If the conceded right of way means anything at all, it puts the necessity of continuous observation and avoidance of injury upon the driver of the automobile when approaching a crossing, just as the necessity of the case puts the same higher degree of care upon the pedestrian at other places than at crossings."

The matter of absolute right is not involved here, but only the degree of care exacted.

[3, 4] With reference to the motions, in another aspect it is contended the respondent could not have been injured as he claims considering other testimony as to the portion of the automobile with which he came in contact in the collision, but without giving the details of it that was a matter for the jury. Further it is argued generally that upon all of the evidence the motions should have been granted. From the facts already mentioned the jury had a right to believe that the driver, when it was dark, without lights, at an excessive rate of speed, swerved or came at an angle (as one of the witnesses put it) from near the middle of the street to a point at or near the curb and ran down the respondent at a time he was undertaking to save himself. There is a dispute whether there was any other traffic on the street at the time of the accident. Altogether the case was one for the jury.

[5] It is further claimed a new trial should have been granted for the reasons: (1) Newly discovered evidence to the effect that the respondent in 1904 had been convicted of a crime. After that date and for eleven years it appears that respondent had been steadily engaged as a street railroad employee in Seattle. This court has held a new trial should not be granted for newly discovered evidence which merely goes to the credibility of the opposite party as a witness, rather than to the right of recovery. Harvey v. Ivory, 35 Wash. 397, 77 Pac. 725. "This court has several times held that, where the only purpose of newly discovered evidence is to impeach or discredit evidence produced by the trial, a new trial will be denied." Orr v. Schwager & Nettleton, 74 Wash. 631, 134 Pac. 501. See, also, Armstrong v. Yakima Hotel Co., 75 Wash. 477, 135 Pac. 233.

[6] (2) That respondent swore falsely about his child. He gave no testimony as to the child until on cross-examination he said:

"Q. You are a married man, are you? A. Yes, sir. Q. Any children? A. One. Q. How old is the child? A. Eleven years old. Q. Living with you? A. No, sir. Q. Where is the child? A. My mother has got her."

The affidavit for a new trial showed that the child had been adopted, with the consent of its parents, by the respondent's mother. The matter was incidental, brought out on cross-examination, and the respondent was not questioned with reference to the support of the child.

[7, 8] (3) Instructions to the jury: It is claimed the court erroneously instructed the jury "that by an ordinance of the city automobiles are required to keep as near the right-hand curb in the direction in which they are going as it is practicable for them to drive." because it was not pleaded in the complaint. But the record shows that the appellants introduced this section of the traffic ordinance in evidence, and clearly the situation at the scene of the accident made the instruction proper. The

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criticisms made of the court's instructions as to the effect of the respondent's ability to see the automobile although it was without lights, and the effect or legal consequences of the violation of positive laws as related to the subject of negligence and proximate cause, are made as if those instructions stood alone in the whole body of the law given to the jury. They were only portions of the instructions on the subjects of negligence and proximate cause. The rule requires a consideration of all of the instructions given, and from that viewpoint, in this case, it appears there was no partiality in the instructions nor cause for the claim of errors.

Affirmed.

Parker, C. J., and Fullerton, Bridges, and Tolman, JJ., concur.

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GUMILLA ET AL. v. INDUSTRIAL ACCIDENT COMMISSION OF STATE OF CALIFORNIA ET AL. (S. F. 10090.)

(Supreme Court of California. Dec. 24, 1921.)

203 Pacific Reporter, 397.

2. MASTER AND SERVANT—CERTIORARI WILL NOT LIE TO REVIEW ORDER GRANTING REHEARING IN COMPENSATION CASE.

In a proceeding under the Workmen's Compensation Act, where the Industrial Commission, after awarding compensation, made an order granting a rehearing on petition allowed to be filed nunc pro tunc, such order was not reviewable on certiorari until after final decision of the case on the rehearing.

(For other cases, see Master and Servant, Dec. Dig. § 417[3¼].)

In Bank.

Application for certiorari to review and annul an order of Industrial Accident Commission.

Proceedings under Workmen's Compensation Act (St. 1917, p. 831) by Elias Gumilla and others for compensation for the death of Miguel Gumilla, opposed by California & Hawaiian Sugar Refining Company, employer, and others. Award made by the Industrial Accident Commission. Application by employer for rehearing granted, and petitioners bring certiorari. Writ denied.

Russell P. Tyler, of San Francisco, for petitioners.
A. E. Graupner, of San Francisco, for respondents.

SHAW, C. J. On August 26, 1921, the Industrial Accident Commission made an award in favor of the petitioners herein allowing them compensation as dependents of one Miguel Gumilla, on account of the death of said Gumilla from an injury received by him while in the employment of the California & Hawaiian Sugar Refining Company. Notice of this award was served upon the adverse parties on the same day. The time for filing a petition for rehearing by the adverse parties expired on September 16, 1921. No petition was filed within that time, but on September 20, 1921, the said adverse parties filed with the Industrial Accident Commission a petition for a rehearing of the award made on August 26th aforesaid. Thereafter, on November 16, 1921, an affidavit was filed on behalf of said parties in effect showing that the failure to file the said petition for rehearing in time was the result of the inadvertence or neglect of their attorney. Thereupon, on November 19, 1921, the Industrial Accident Commission made an order declaring that the failure to file the petition within the 20 days allowed by the law was the result of inadvertence, surprise, and excusable neglect sufficient to excuse the failure. and thereupon it made an order as follows:

"It is ordered that the petition for rehearing be, and it is hereby, ordered filed nunc pro tunc as of September 16, 1921."

At the same time the Industrial Accident Commission made an order granting the application for a rehearing, and ordered the case to be submitted on the testimony already taken without further hearing. No decision of the matter on such submission has been made, and the matter is still pending. The matter now before the court is the petition of Elias Gumilla and Paulina Gumilla to review and annul the order of the Industrial Accident Commission granting a rehearing, and that this court thereupon order that the findings and award originally made are final.

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[1, 2] A writ of certiorari does not lie to review an order made in a matter prior to the final adjudication thereof. The Industrial Accident Commission proposes to decide the case again after the order granting the rehearing, but it has not yet done so. Final action thereon has not yet been taken. Under these circumstances, the application for a writ of review of the order granting a rehearing is premature. Holabird v. R. R. Comn., 171 Cal. 691, 154 Pac. 831; Gauld v. Board, 122 Cal. 18, 54 Pac. 272. The petitioners' remedy in such a case is to await the final decision and ask for a rehearing of the matter. This, of course, will search the record for lack of jurisdiction, and, if there is such lack anywhere down the line which deprives the Industrial Accident Commission of jurisdiction to make the final decision, the proceedings will be annulled so far as may be necessary to give the petitioners appropriate relief. But until such final decision of the Commission we cannot consider the validity of the order granting the rehearing in this manner.

It may be that effectual relief could be given by this court or the District Court of Appeal under its general jurisdiction by means of a petition for a writ of prohibition. As the question is not before us, we express no opinion on that subject.

For the reasons above set forth, the petition for a writ of review is denied.

We concur: Shurtleff, J.; Wilbur, J.; Sloane, J.; Lennon, J.; Waste, J.

YOSEMITE LUMBER CO. ET AL. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA ET AL. (S. F. 9556.)

(Supreme Court of California. Jan. 27, 1922. Rehearing Denied Feb. 23, 1922.)

204 Pacific Reporter, 226.

2. MASTER AND SERVANT—LEGISLATURE MAY ONLY CONFER ON INDUSTRIAL COMMISSION POWER TO SETTLE DISPUTES UNDER WORKMEN'S COMPENSATION LEGISLATION.

Under Const. art. 20, § 21, as amended in 1918, giving the Legislature power to create a system of workmen's compensation, and giving the Legislature power to provide for the settlement of disputes under "such legislation" by an Industrial Accident Commission or otherwise, the Legislature can only confer on the commission jurisdiction of disputes arising under legislation authorized by that section.

(For other cases, see Master and Servant. Dec. Dig. § 347.)

3. MASTER AND SERVANT — CONSTITUTIONAL PROVISION FOR CREATION OF COMPENSATION SYSTEM DOES NOT AUTHORIZE CREATION OF LIABILITY FOR COMPENSATION.

So much of Const. art. 20, § 21, as amended in 1918, as authorizes the Legislature to create a system of workmen's compensation, does not touch on the subject of liability, and does not authorize the creation of liability on any person to pay such compensation, or require any person to contribute funds to support the proposed system.

(For other cases, see Master and Servant. Dec. Dig. § 347.)

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4. MASTER AND SERVANT—CONSTITUTION ONLY AUTHORIZES CREATION OF LIABILITY ON PART OF EMPLOYER TO COMPENSATE HIS OWN WORKMEN AND THEIR DEPENDENTS.

Const. art. 20. § 21, as amended in 1918, giving the Legislature unlimited plenary power and authority to create a system of workmen's compensation, and in that behalf to create a liability on all persons to compensate their workmen for injury or their dependents for death, does not authorize the creation of liability on the part of any person to compensate any one but his own employees and their dependents, and does not authorize the Legislature to enlarge the liability to include compensation to workmen in general, or a contribution to a fund to be applied to the benefit of disabled workmen generally.

(For other cases, see Master and Servant. Dec. Dig. § 347.)

6. MASTER AND SERVANT—STATUTE PROVIDING FOR PAYMENT TO STATE, WHEN DECEASED LEAVES NO ONE ENTITLED TO COMPENSATION, HELD TO IMPOSE A "TAX" UNAUTHORIZED BY CONSTITUTION.

St. 1919, p. 273, providing that the employer of one receiving a fatal injury of a kind compensable under the Workmen's Compensation Act, and not leaving surviving any person entitled to a death benefit shall pay $350 to the state for the promotion of vocational reeducation and rehabilitation of persons disabled in industry, imposes a tax, and is unauthorized by Const. art. 20, § 21, as amended in 1918, relative to workmen's compensation, as a "tax" includes every charge on persons or property, imposed by or under the authority of the Legislature for public purposes.

(For other cases, see Master and Servant. Dec. Dig. § 347.)

(For other definitions, see Words and Phrases, First and Second Series, Tax—Taxation.)

7. MASTER AND SERVANT—COMPENSATION STATUTE, GIVING COMMISSION JURISDICTION OF DISPUTES CONCERNING LIABILITY WHERE DECEASED LEAVES NO DEPENDENT, HELD VOID.

Since St. 1919, p. 273, requiring the employer of one receiving a fatal injury compensable under the Workmen's Compensation Act, and not leaving surviving any person entitled to a death benefit, to pay $350 into the state treasury, is unauthorized by Const. art. 20, § 21, as amended in 1918, relative to workmen's compensation, the Legislature had no authority to confer on the Industrial Accident Commission jurisdiction to determine disputes concerning the liability of employers thereunder, in view of the limitation on the power of the Legislature to create new courts or tribunals under Const. art. 6.

(For other cases, see Master and Servant. Dec. Dig. § 347.)

8. MASTER AND SERVANT—CONSTITUTION HELD NOT TO AUTHORIZE LEGISLATURE TO GIVE COMMISSION POWER TO ENFORCE A CONTRIBUTION FROM EMPLOYERS FOR RE-EDUCATION OF INJURED EMPLOYEES.

Const. art. 20, § 17½, authorizing the Legislature to provide for the general welfare of employees, and to confer on any commission such authority as necessary to carry out the provisions thereof, refers to the comfort, health, etc., of employees during their employment, and gives no authority to the Legislature to authorize the Industrial Accident Commission to levy contributions on employers to raise revenue for the re-education of disabled employees, or for any other state purpose.

(For other cases, see Master and Servant. Dec. Dig. § 347.)

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In Bank.

Proceeding under the Workmen's Compensation Insurance and Safety Act, by the People of the State of California, for an award for the death of John Moore, opposed by the Yosemite Lumber Company and others. Compensation was awarded, and the defendants bring certiorari. Award annulled.

A. E. Bolton and Arthur W. Bolton, both of San Francisco, for petitioners.

Adolphus E. Graupner and U. S. Webb, both of San Francisco (Warren H. Pillsbury, of San Francisco, of counsel), for respondents.

SHAW, C. J. This is a proceeding in certiorari, under the Workmen's Compensation Insurance and Safety Act (St. 1917, p. 831), to review an order of the Industrial Accident Commission requiring the Yosemite Lumber Company to pay to the state of California the sum of $350 for the death of John Moore, who was killed by an injury arising out of and in the course of said employment, and the further fact that he left no dependents surviving him. The order was made under the authority of the act of 1919, Stats. 1919, p. 273. The sole question for decision, as we view the case, is whether or not the said act gives the commission jurisdiction to adjudicate the liability of the employer to the state.

The act provides that when an employee receives a fatal injury, of a kind that is compensable under the provisions of the Workmen's Compensation Insurance and Safety Act, and "does not leave surviving him any person entitled to a death benefit, the employer * * * shall pay into the treasury of the state of California the sum of three hundred and fifty dollars for each such fatal injury in addition to any other payments under the provisions of said Compensation Act," not exceeding three times the average annual earnings of such employee, and that the moneys so paid "shall be covered into a special fund to be known as the "industrial rehabilitation fund,' which fund is hereby created and appropriated for the purposes set forth in this act." Section 1.

It further declares that said fund may be used by the Industrial Accident Commission "for the promotion of vocational re-education and rehabilitation of persons disabled in industry in this state" (section 2); that the remainder of the fund which may be left after the commission shall have used so much thereof as they deem best in such promotion, shall be placed "semiannually, to the credit of the accident prevention fund, established by said compensation act" (section 3; also section 51, Compensation Act, Stats. 1917, p. 865). When $5,000 "shall have been accumulated in said fund," it is to be deposited "with the state compensation insurance fund as a revolving fund." From this "revolving fund" the payments so required by the aforesaid sections 1, 2, and 3 are to be made, on the order of the Industrial Accident Commission, and the "state treasurer shall from time to time, upon the order of the Commission, reimburse said state compensation insurance fund from the industrial rehabilitation fund for expenditures made from said revolving fund." The expenses of administration of the state compensation insurance fund in carrying out the duties imposed by the act are also "to be paid from said state industrial rehabilitation fund," all under the direction of the commission. Section 4. The commission is given jurisdiction to determine the liability of such employer and to require the payment by him of the $350 to the state in such cases by proceedings before it in the same manner as provided in the Workmen's Compensation Insurance and Safety Act, "provided further" that at any time after it is paid into the state treasury any person claiming to be a dependent of the employee may establish such dependency to the satisfaction of the commission, and thereupon the state may be required to pay to said dependent the said $350, or whatever thereof is necessary to meet his claim. Sections 5 and 6.

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The accident prevention fund referred to is used to support the "department of safety" carried on by the Industrial Accident Commission. Sections 33 to 52, Workmen's Compensation Act. The state compensation insurance fund mentioned is established by the Workmen's Compensation Act for the purpose of enabling the commission to carry on the business of an insurance carrier for employers, with respect to their liability under the act.

It will be seen from these provisions that the act makes no provision for compensation by the employer to the person injured, nor to the dependents of such person. The "compensation" contemplated by the act is only to be made when the workman who is killed by the injury leaves no dependents to be compensated, and it goes to other persons not related to the deceased workman nor connected with his employer. It goes to the state to enable it to carry on a benevolent enterprise for the benefit of a class of workmen throughout the state, and to provide funds for the insurance bureau of the Industrial Accident Commission. The true intent of the act is to provide for the creation of a general fund for these purposes.

The proceeding in which the order or award in question was made was begun by the state of California after the death of John Moore. In its petition it averred that Moore left surviving him no person dependent on him for support, nor any person entitled to a death benefit under the Compensation Act, and that, on account thereof, $350 was owing by the Yosemite Lumber Company to the state, under and by virtue of said act of 1919. The act of 1919 purports to confer upon the commission the power to make orders determining and enforcing the liability which the act creates. It is contended on behalf of the commission that legislative authority to confer such power upon the commission is found in section 21, article 20, of the Constitution, as amended in 1918. This claim is contested by the petitioner, who asserts that it has no such effect.

Prior to the amendment of 1918, section 21 of article 20 read as follows:

"The Legislature may by appropriate legislation create and enforce a liability on the part of all employers to compensate their employees for any injured incurred by the said employees in the course of their employment, irrespective of the fault of either party. The Legislature may provide for the settlement of any disputes arising under the legislation contemplated by this section, by arbitration, or by an industrial accident board, by the courts, or by either, any or all of these agencies, anything in this Constitution to the contrary notwithstanding."

The following is the section as amended in 1918 (see St. 1919, p. lxxv):

"The Legislature is hereby expressly vested with plenary power, unlimited by any provision of this Constitution, to create and enforce a complete system of workmen's compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workmen for injury or disability, and their dependents for death incurred or sustained by the said workmen in the course of their employment, irrespective of the fault of any party. A complete system of workmen's compensation includes adequate provisions for the comfort, health and safety and general welfare of any and all workmen and those dependent upon them for support to the extent of relieving from the consequences of any injury or death incurred or sustained by workmen in the course of their employment, irrespective of the fault of any party; also full provision for securing safety in places of employment; full provision for such medical, surgical, hospital and other remedial treatment as is requisite to cure and relieve from the effects of such injury; full provision for adequate insurance coverage against liability to pay or furnish compensation; full provision for reg-

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ulating such insurance coverage in all its aspects, including the establishment and management of a state compensation insurance fund; full provision for otherwise securing the payment of compensation; and full provision for vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute or matter arising under such legislation, to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character; all of which matters are expressly declared to be the social public policy of this state, binding upon all departments of the state government.

"The Legislature is vested with plenary powers, to provide for the settlement of any disputes arising under such legislation by arbitration, or by an industrial accident commission, by the courts, or by either, any, or all of these agencies, either separately or in combination, and may fix and control the method and manner of trial of any such dispute, the rules of evidence and the manner of review of decisions rendered by the tribunal or tribunals designated by it: Provided, that all decisions of any such tribunal shall be subject to review by the appellate courts of this state. The Legislature may combine in one statute all the provisions for a complete system of workmen's compensation, as herein defined.

"Nothing contained herein shall be taken or construed to impair or render ineffectual in any measure the creation and existence of the Industrial Accident Commission of this state or the state compensation insurance fund, the creation and existence of which, with all the functions vested in them, are hereby ratified and confirmed."

[1, 2] The power to determine whether or not the liability referred to in the first paragraph of the above section and imposed by this law exists against any person is judicial power. Western, etc., Co. v. Pillsbury, 172 Cal. 411, 156 Pac. 491, Ann. Cas. 1917E, 390; Pacific C. C. Co. v. Pillsbury, 171 Cal. 322, 153 Pac. 24; Carstens v. Pillsbury, 172 Cal. 579, 158 Pac. 218; Marin W. & P. Co. v. R. R. Comn., 171 Cal. 712, 154 Pac. 864, Ann. Cas. 1917C, 114. It is claimed that the new section authorizes the creation of a liability on employers in favor of the state for the benefit of workmen in general, and that it gives the Legislature power to confer on the Industrial Accident Commission jurisdiction to determine disputes concerning such liability. The second paragraph of the section is the part which purports to give this power, if it is contained anywhere in the section. It gives no authority to create a tribunal for any other purpose or with any other judicial power than to settle the "disputes arising under such legislation," referring to the legislation provided for in the first paragraph of the section. It is therefore apparent that, when we have ascertained the kind and character of the disputes that may arise under the legislation authorized by the first part of the section, we have found the limits beyond which the judicial power and jurisdiction of the Industrial Accident Commission cannot go.

[3] The first grant to the Legislature by the new section is the grant of power "to create and enforce a complete system of workmen's compensation." This does not authorize the creation of a liability on any person to pay such "compensation." or require any person to contribute funds to support the proposed system. It does not purport to touch upon the subject of liabilities.

[4] The next phrase of the new section empowers the Legislature "in that behalf to create and enforce a liability on the part of any and all persons to compensate any and all of their workmen for injury or disability and their dependents for death incurred or sustained by the said workmen in the course of their employment." This does not authorize the creation of a liability on the part of any person to compensate the workmen of other persons, nor the dependents of workmen of other persons. The phrase "their workmen" necessarily confines the persons to

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be compensated to workmen who are in the employ of the person who is made liable. This is also shown by the provision that if the workman is killed by an injury in the course of his employment, the compensation is to be made to his "dependents" thus excluding any idea of liability in such a case to provide for the welfare of workmen in general, or of a particular class of disabled workmen, in no way connected with the employer who is made liable for the particular injury. Nothing is added to the force of the provision by the use of the word "plenary." If the Legislature has power to do a certain thing, its power to do it is always plenary. It is merely surplus verbiage.

The use in this clause of the words "any and all persons," in describing those made liable, and the words "any and all of their workmen," in describing those to be compensated, do not show an intent to empower the Legislature to enlarge the liability against a particular employer for a particular injury so as to include compensation to workmen in general as a class, or a contribution to a fund to be applied to the benefit of a class of persons, instead of to the dependents of the workman who may be killed by the injury.

Nor is such enlarged meaning given to the section by the use of the phrase "complete system of workmen's compensation," in the opening clause, or by the elaborate definition of that phrase which follows the first sentence. The section mentions and describes but one kind of liability: The liability of "any or all persons" to compensate "any or all of their workmen." This is in effect a provision for any person to compensate his workmen, which is but another form of saying that any employer shall compensate his employee, for an injury arising out of the ployment, or the dependents of such employee, if the injury causes death to him. The language of neither one of these parts of the section shows or expresses an intent to add another liability to that expressly stated. In these circumstances the maxim, "expressio unius, est exclusio alterius," is applicable, and the meaning to be inferred is that only which is explicitly stated. And particularly it should not be inferred or implied from such language that so novel and different a thing was intended as the liability to the state which is imposed by the act of 1919.

[5] That there was no such thought in the minds of those who framed the amendment, or of the Legislature that proposed it, is clearly indicated by the argument in favor of the amendment in the pamphlet distributed to the voters with the ballot at the election at which the amendment was adopted. The amendment was proposed by the Legislature of 1917. Under section 1195 of the Political Code, when the Legislature proposes an amendment to the Constitution to be voted upon by the electors of the state, the author of such amendment and one member of the same house who voted with the majority in submitting the same shall be appointed as a committee to draft an argument giving the reasons for the adoption of such amendment. This argument is to be printed in a pamphlet and distributed to the voters with the sample ballot, to be used by the voter in preparing his vote and in studying the questions upon which he is to act. Pol. Code, § 1195a. It is to be assumed that the arguments prepared by the author of the amendment state fairly and with reasonable fullness the meaning of the amendment and the effect it is expected to produce. The argument printed and distributed with the ballot upon the amendment here under consideration refers to the fact that the Workmen's Compensation Act had been in force for several years; that section 21 of the Constitution, as it was, "failed to express sanction for the requisite scope of the enactment to make a complete and workable plan." which plan embraced, as essential components, compulsory compensation for injury and death irrespective of fault, safety provisions, insurance by the state, and administration of the system, and it then states that the original section contained nothing covering safety or insurance,

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and only meager authority for administration; that the law in force had apparently exceeded the scope of the amendment authorizing it, and that the amendment was designed to give authority for the legislation already enacted and to sanction the plan then in existence. This obviously refers to the extensive revision of the original Workmen's Compensation Act that was enacted at the same session, as well as to the original act, neither of which attempted to create such a liability as that provided by the act of 1919. There is no suggestion in the argument that the proposed amended section was intended to authorize the Legislature to impose any liability upon employers of a character different from that already provided by the original section, and nothing to suggest to any voter the idea that it was for carrying on a system for the benefit of disabled workmen in general or for the levy of contributions to support such system upon employers in whose service men having no dependents were killed by injuries received in the course of their employment. It cannot be supposed that the author of the amendment, or the Legislature that proposed it, intended to provide for such a scheme as that contained in the act of 1919 by language so illy adapted to suggest the idea as that contained in this section and that the voters should be inveigled into voting for it by an argument presented to them with the ballot which does not even mention it.

[6] In so far as the act purports to exact from employers a sum to be used by the state for disabled workmen in general, it is in reality a taxing law, a revenue measure. It requires any employer to pay to the state the sum of $350 whenever one of his workmen who has no dependents is killed by an injury received in the course of his employment, and the fund thus raised is to be used for vocational re-education of workmen not connected in any way with such employer, and the surplus, if any, to go to pay the expenses of the state in carrying on the department or bureau administered by the Industrial Accident Commission, all of which are public purposes. This is purely a tax. "A tax is a charge upon persons or property to raise money for public purposes." Perry v. Washburn, 20 Cal. 350. A tax "includes every charge upon persons or property, imposed by or under the authority of the Legislature, for public purposes." Madera v. Black, 181 Cal. 310, 184 Pac. 400; 1 Cooley on Taxation, p. 6. The amended section of the Constitution contains no suggestion of a design to provide for raising revenue by a tax of such an extraordinary character as this statute proposes. We need not consider the question whether as a tax it would not be void because of its unfair discrimination. We are of the opinion that the language of the section gives no warrant for the conclusion that it was intended to provide for taxation of any kind.

[7] Our conclusion is that section 21 of article 20, as amended in 1918, did not authorize the Legislature to impose a liability on an employer to pay money to the state for the purposes specified in the Act of 1919. It follows by necessity that said section gives no authority to the Legislature to confer on the Industrial Accident Commission jurisdiction to determine any dispute that may arise concerning the liability of employers sought to be imposed by said act of 1919. It may be conceded that under its general powers the Legislature might provide a fund for the benefit of persons disabled in industry in this state and commit the administration of the fund to the Industrial Accident Commission, and might also levy a tax in some form to raise such fund. But any disputes that might arise concerning such tax would be cognizable only by the courts established by or under the provisions of article 6 of the Constitution, since no section of the Constitution gives the Legislature power to confer jurisdiction thereof upon the Industrial Accident Commission. Pacific, etc., Co. v. Pillsbury, 171 Cal. 322, 153 Pac. 24; Western M. S. Co. v. Pillsbury, 172 Cal. 407, 156 Pac. 491, Ann. Cas. 1917E, 390; Car-

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stens v. Pillsbury, 172 Cal. 579, 158 Pac. 218; Employers' L., a Corp., v. Ind. Acc. Comn., 177 Cal. 775, 171 Pac. 935.

Counsel for the commission cite the case of State Ind. Comn. v. Newman, 222 N. Y. 363, 118 N. E. 794, as contrary to our views as aforesaid. The case is not in point. The Constitution of New York contains no provision limiting the power of the Legislature of that state to create new courts or tribunals such as are contained in our article 6. The question which we have discussed—that is, the power of the Legislature to confer judicial power of this character upon the Industrial Accident Commission—could not arise in New York, for that state has not the constitutional limitations upon the legislative power to create courts which give rise to the question here and control our decision thereof.

[8] It is further claimed that authority for the imposition of this liability and for the giving of this jurisdiction to the commission is found in section 17½ of article 20, which reads as follows:

"The Legislature may, by appropriate legislation, provide for the establishment of a minimum wage for women and minors and may provide for the comfort, health, safety and general welfare of any and all employees. No provision of this Constitution shall be construed as a limitation upon the authority of the Legislature to confer upon any commission now or hereafter created. such power and authority as the Legislature may deem requisite to carry out the provisions of this section."

The arguments printed on the ballot for the election of 1914, at which this section was adopted, indicate that its main purpose was to authorize the establishment of a minimum wage for women and minors. Nothing whatever is said in the arguments upon any other subject except that there is a suggestion that all employers, bad as well as good, should be compelled to provide proper living and working conditions for their employees. The part of the section authorizing the Legislature to "provide for the comfort, health, safety and general welfare of employees" was, as we think, intended to refer to the comfort, health. safety and welfare of employees during the time of their employment and to have no reference to general provisions, such as are here involved, for the vocational re-education of those who have been injured and are not able to pursue their former occupation. It certainly furnishes no authority and has no reference to authority for giving the Industrial Accident Commission power to enforce the levy of contributions upon employers for the purpose of raising revenue with which to carry on a school for the re-education of employees or for any other state purpose.

We find no ground upon which the jurisdiction of the commission can be upheld. Many other objections are made to the constitutionality of the act, but, in view of the conclusion above stated, we deem it unnecessary to consider them.

It is ordered that the award of the Industrial Accident Commission aforesaid be annulled.

We concur. Lennon, J.; Sloane, J.; Wilbur, J.; Shurtleff, J.

I concur in the judgment: Lawlor, J.

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PACIFIC ELECTRIC RY. CO. v. COMMONWEALTH BONDING & CASUALTY INS. CO. ET AL. (STATE OF CALIFORNIA, INTERVENER). (Civ. 4048.)

(District Court of Appeal, First District, Division 2. California. Dec. 19, 1921.)

204 Pacific Reporter, 262.

2. MASTER AND SERVANT — ASSIGNMENT OF COMPENSATION AWARD "PAID" BY ASSIGNEE HELD INVALID AS WITHIN PROHIBITION AGAINST ASSIGNMENT OF "CLAIM."

The provision of Workmen's Compensation Act 1913, § 29a, that no "claim" for compensation shall be assignable "before payment," covers both claims and awards; the word "claim" being used in this broad sense. Where an award against an insurer becoming a bankrupt was paid by the state by an appropriation act, claimant's assignment of the award to the state by reason of the payment to him was contrary to the statute and void; the award not being "paid" within the meaning of the act, until paid by the employer or person against whom it was made.

(For other cases, see Master and Servant, Dec. Dig. § 388½, New, vol. 14A Key-No. Series.)

(For other definitions, see Words and Phrases, First and Second Series, Claim; Paid.)

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by the Pacific Electric Railway Company against the Commonwealth Bonding & Casualty Insurance Company and others, in which the State intervened. From an adverse judgment, intervener appeals. Affirmed.

See, also, 42 Cal. App. 573, 184 Pac. 29.

U. S. Webb, Atty. Gen., and Arthur Keetch, Deputy Atty. Gen., and John W. Maltman, of Los Angeles, for the State.

E. B. Drake, of Los Angeles, for respondent Makley.

Newlin & Ashburn, of Los Angeles (J. W. McKinley, of Los Angeles, of counsel), for respondents Lennox and Los Angeles Stone Company.

LANGDON, P. J. This action was brought by the plaintiff by complaint in interpleader to determine ownership of certain moneys owing by the plaintiff by reason of a judgment against it. The state of California intervened and the trial court found in favor of the defendants George L. Makley, Los Angeles Stone Company, and E. J. Lennox, and against the intervener. This appeal is taken by the intervener. The facts are:

On or about the 29th day of August, 1914, George L. Makley, was injured through the negligence of the Pacific Electric Railway Company, a corporation. At that time the Commonwealth Bonding & Casualty Insurance Company, a corporation, was a duly empowered and acting insurance company in the state of California and was carrying the liability insurance covering the injuries received by the said Makley. In November, 1914, Makley filed his application with the Industrial Accident Commission of this state for compensation under the Workmen's Compensation, Insurance, and Safety Act (St. 1917, p. 831), and after due and proper proceedings upon said application the Industrial Accident Commission made an award against said bonding company in favor of said

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Makley of $8.44 a week for 240 weeks. Under this award the bonding company paid $422 in cash and various sums to doctors, hospital, etc., in payment of bills growing out of said injuries, and amounting in all to the sum of $1,509.95.

In October, 1915, James L. Boone was appointed receiver for and on behalf of the bonding company in proceedings duly and regularly taken to have said bonding company declared a bankrupt. Subsequently, and on April 27, 1916, the Industrial Accident Commission, by an amended finding, made an award to Makley against the said bonding company and its receiver in the sum of $3,613.21, which compensation was in addition to the sums already paid by the said bonding company for and on account of said Makley.

On January 28, 1915, by reason of the provisions of said Workmen's Compensation, Insurance, and Safety Act, the bonding company filed an action in the superior court of the state of California in and for the county of Los Angeles to recover the sum of $30,000 from Pacific Electric Railway Company because of the injuries to Makley. Said cause resulted in a judgment for $8,000 in favor of plaintiff entered therein on November 22, 1915. Before the trial of said action James L. Boone, the receiver, and George L. Makley were substituted as plaintiffs in the place and stead of the bonding company. In said action an appeal was taken by the defendant to the Supreme Court of this state, and said judgment was affirmed on August 7, 1919. Following this affirmance, the Pacific Electric Railway Company paid into court the amount of the judgment, with interest, and filed its complaint in interpleader herein.

On August 25, 1917, the state of California paid to Makley the sum of $3,613.21, by virtue of an act of the Legislature which recited that the said amount was appropriated to pay a claim of said Makley. On the same day, by reason of said payment to him, Makley made and executed an assignment to the state of California; said assignment being in words and figures as follows:

"For and in consideration of the sum of $3,613.21, lawful money of the United States, to me in hand paid by the state of California, the receipt whereof is hereby acknowledgd, I hereby sell, assign, transfer, and set over unto the said state of California all that certain award heretofore made and rendered in my favor and against Commonwealth Bonding & Casualty Insurance Company, a corporation, and J. L. Boone, the receiver of said corporation, by the Industrial Accident Commission of the said state of California, on or about the 23d day of January, 1915, and 1st day of May, 1916, together with all moneys due and to become due to me under and by virtue of said award, and all claims demands and causes of action, of every kind and nature whatsoever, in any manner arising from or growing out of said award, against said Commonwealth Bonding & Casualty Insurance Company, a corporation, and the said J. L. Boone as receiver thereof, as well as against all other receivers and stockholders of said corporation.

"And I hereby authorize my said assignee to take any and all such steps, actions, and proceedings, both legal and equitable, in my name or otherwise, as it may be advised, which are or may become necessary or proper to recover from said corporation, its receivers and stockholders, all moneys due and to become due me under and by virtue of said award, and to retain for the use and benefit of said state of California all moneys and other things of value which may be so recovered."

Because of the foregoing assignment, the state of California claims an interest in the money paid into court by the Pacific Electric Railway Company in satisfaction of the judgment against it. The award of $3,613.21 made against the receiver for the bonding company was never paid by him, or any one, and said receiver did not claim reimbursement for payment of said award in this suit, but merely asked for and received, by

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the judgment, reimbursement for the amount paid by the bonding company to Makley for weekly compensation, doctors' bills, etc., under the first award, together with interest thereon. The portions of the judgment in favor of defendants Lennox and Los Angeles Stone Company do not concern us here, as these defendants received the amount of their claims by reason of stipulations entered into between them and the defendant Makley. The only possible theory upon which the appellant would have an interest in this fund would be based upon the contention that the assignment of the award was a valid one, and that the receiver was bound to pay the amount of the award to appellant and to be reimbursed for such payment out of the money paid by the Pacific Electric Railway Company, and that, the receiver failing to set up such matters and protect the rights of appellant, it was entitled to protect its own interests in the present action by reaching the fund directly instead of indirectly.

[1, 2] So we are brought squarely to the question of the validity of said assignment. Let us concede, for the purposes of this opinion, the appellant's contention that the act of the Legislature was valid on its face and is conclusive on this court. We may also concede the rule to be well settled that a party to an ultra vires contract will not be allowed to plead ultra vires while at the same time retaining benefits thereunder. This, however, only in part meets the objections made by Makley to the validity of the assignment. For there is a limitation upon the above rule to the effect that, where the contract is illegal or against public policy, the courts will refuse to enforce it and will leave the parties where it finds them, regardless of the fact that one of them may be retaining benefits received thereunder. Visalia Gas, etc., Co. v. Sims, 104 Cal. 326, 27 Pac. 1042, 43 Am. St. Rep. 105. A contract that is unlawful as being against the express provisions or general policy of any particular statute is void and will not be enforced by the courts. See note to In re Assignment Mutual Guaranty Fire Insurance Co., 107 Iowa, 143, 77 N. W. 868, 70 Am. St. Rep. 149, at page 170, and cases cited thereunder. These legal principles become decisive of the present appeal, because, under the Workmen's Compensation Act as it stood at the time of this purported assignment, there was the following provision:

"No claim for compensation shall be assignable before payment. * * *" Section 29a. 1913 W. C., I., and S. Act (St. 1913, p. 294).

Appellant contends that this refers only to "claims" as distinguished from "awards." There is much reason in his argument that a restriction upon the assignment of "claims" which are uncertain in amount is more necessary than a restriction upon the assignment of "awards" which are fixed amounts, under technical definitions of these terms. We are not concerned with this argument here, however, and this court is bound to hold that the above provision obviously was intended to cover both claims and awards, and that the word "claim" is used in this broad sense. The act states that no assignment shall be made "before payment." Claims are not paid until they become awards, and it is clear that the only thing payable under the provisions of the act is awards. It is evident that the Legislature intended that there should be no assignment of claimant's rights whatsoever, and that the award should be paid by the one against whom it was made directly to the claimant and to no one else.

Appellant argues that, as the state paid the full amount of the award to Makley, his award or claim was paid, within the language of the act, and thereafter could be assigned. Such reasoning is, we think, fallacious, and would give to the language of the act no force and effect. The award is not "paid," within the clear meaning of the act, until it is paid by the person against whom it is awarded. Any payment of the same amount or of double or triple the amount by an outsider would not discharge and pay the award, but the award would still be due and unpaid, and would always remain so until paid by the person against whom it was made.

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We are of the opinion that the assignment upon which the appellant bases its contention is contrary to the express provisions of the Workmen's Compensation Act, and is therefore illegal and of no force and effect under the authorities above cited, and the appellant could acquire no rights thereunder.

The judgment is affirmed.

We concur: Nourse, J.; Sturtevant, J.

NELSON v. INDUSTRIAL ACCIDENT COMMISSION ET AL.
(Civ. 2402.)

(District Court of Appeal, Third District, California. Dec. 16, 1921.)

204 Pacific Reporter. 23.

1. MASTER AND SERVANT — EVIDENCE OF COMPENSABLE DISABILITY HELD INSUFFICIENT.

In proceedings under Workmen's Compensation Act for compensation for disability consisting of abscesses on employee's knees caused by streptococcus infection, where the only expert witness sworn for him testified that injuries by a fall were not contributing causes of the abscesses, the Industrial Accident Commission's conclusion that the evidence was insufficient to show that the disability was proximately caused by such fall was justified.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

2. MASTER AND SERVANT—COMPENSATION CLAIMANT REQUIRED TO PRODUCE OWN WITNESSES.

While the Industrial Accident Commission can summon witnesses of its own motion, this is only done where the Commission finds the parties unable or unwilling to produce testimony necessary to a decision; and where a party claiming compensation has full opportunity to produce his own witnesses, he cannot complain because the Commission did not relieve him from the burden of producing them.

(For other cases, see Master and Servant, Dec. Dig. § 414.)

3. MASTER AND SERVANT—REHEARING FOR ABSENCE OF WITNESSES AS TO COMPENSABLE DISABILITY HELD PROPERLY DENIED.

In proceedings under Workmen's Compensation Act, in which employer denied that employee's injuries caused the disability complained of. the Industrial Accident Commission's denial of petition for rehearing for absence of witnesses was proper where the materiality of their testimony was not shown, and none of them could qualify as expert witnesses.

(For other cases, see Master and Servant, Dec. Dig. § 414.)

Proceeding under the Workmen's Compensation Act (St. 1917, p. 831) by Charles Nelson, for compensation for injuries, opposed by the Yosemite Lumber Company. employer, and the Manufacturers' Indemnity Exchange, insurer. Claim for compensation denied by the Industrial Accident Commission, and petitioner brings certiorari to review the Commission's order. Order affirmed.

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Henry F. Price, of Merced, for petitioner.

A. E. Graupner and Warren H. Pillsbury. both of San Francisco, for respondents.

FINCH, P. J. This is an application to review the decision of the Industrial Accident Commission denying the petitioner's claim for compensation for disability alleged to have been caused by two accidents to his knees arising out of and in the course of his employment by the Yosemite Lumber Company.

The petition alleges:

"1. That the Commission acted without and in excess of its powers; (2) that the order and decision was unreasonable; (3) that the findings of fact do not support the order, decision and award under review."

The Commission found:

"That * * * applicant fell from a pile of lumber while in the course of his employment, but the evidence is insufficient to establish as a fact that the disability complained of was proximately caused by said fall."

[1] Dr. H. Jalmer Kyleberg, a contract surgeon for the Yosemite Lumber Company, who gave applicant professional treatment for the injuries resulting from the alleged accidents, was sworn as a witness for the applicant, and testified that the alleged disability consisted of abscesses on both knees caused by streptococcus infection; that the accidents alleged were slight, and, in the opinion of the witness. were not contributing causes of the abscesses. No other expert witness testified. The abscesses developed about three weeks after the last accident, the applicant having been engaged in his usual employment in the meantime. The application for compensation was not contested in the sense in which the word "contest" is usually understood. R. C. Dracey, manager of the lumber company, and who represented the defendants at the hearing, being called as a witness for the petitioner, stated:

"I think there is no disposition on the part of the company to avoid any issue raised by the man or meet any condition that the man is entitled to."

Neither party was represented by an attorney. The referee conducted the examination in a manner eminently fair to both parties, and the conclusion reached is the only one which could reasonably be drawn from the evidence.

[2, 3] Attorneys for the Industrial Accident Commission fairly state the facts and the law bearing upon the further contentions of petitioner as follows:

"Two hearings were held in the case. of which petitioner concedes he had notice and full opportunity to present all the testimony he desired to offer. He does not complain that any testimony offered by him was ruled out, that he was misled by erroneous advice into omitting to secure necessary testimony, or that any reasonable request for continuance for the purpose of producing such testimony was refused. His only complaint is that the Commission did not itself subpœna and produce the witnesses named by him. Obviously this is not a valid ground. While the Industrial Accident Commission, as pointed out by petitioner, can summon witnesses of its own motion. the fee to be paid by the state, it is not required to do so, and very seldom does so. The state has not appropriated sufficient funds to permit this to be done in routine cases. This is only done where the Commission itself finds the parties unable or unwilling to produce testimony necessary to the decision of the case, and the Commission deems the testimony of such witnesses to be vitally necessary to the decision. As in all other civil actions, the burden is primarily upon each party to produce his own witnesses to establish his case, and where the party has full opportunity to produce his own witnesses he cannot complain because the Commission did not relieve him from the burden.

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"Furthermore. respondent Commission found and determined in its order denying petition for rehearing, that such testimony, if received, would not be sufficient to affect the decision. It will be noted that petitioner has at no time indicated what these witnesses would testify to if called. The burden is upon petitioner to show the materiality of their testimony, which petitioner has failed to do. And, judging from the facts as shown by the record, it seems impossible to see any materiality to their testimony.

"It will be noted from the Commission's findings and award that decision was in favor of applicant as to the occurrence of the injuries alleged by petitioner, and as to the fact that such injuries occurred in the course of and arose out of his employment. Further testimony on behalf of petitioner was therefore unnecessary to establish these contentions. The point upon which compensation was denied was that petitioner had failed to show that his injuries were the cause of the later abscesses in his knees. Neither of the witnesses whom petitioner wished produced could testify upon this point, as this is purely a medical question, and neither of the witnesses could qualify as physicians or expert witnesses."

The decision of the Commission is affirmed.

We concur: Burnett, J.; Hart, J.

GENERAL CHEMICAL CO. ET AL. v. THOMAS ET AL. (No. 10241.)

(Supreme Court of Colorado. Jan. 9, 1922.)

203 Pacific Reporter, 660.

1. MASTER AND SERVANT — LIMITATION FOR TRANSMISSION OF RECORD TO INDUSTRIAL COMMISSION NOT ABROGATED BY STAY OF EXECUTION.

Under Industrial Commission Act, § 106, requiring the record in any case to be transmitted to the Industrial Commission within 20 days after the order or judgment of the district court, unless a writ of error shall be obtained in the meantime, a stay of execution for 30 days, if valid at all, did not abrogate the 20-day requirement entirely, but merely postponed the time which the 20 days began to run.

(For other cases. see Master and Servant, Dec. Dig. § 417[9].)

2. MASTER AND SERVANT—WRIT OF ERROR IN COMPENSATION CASE HELD SUBJECT TO DISMISSAL FOR DELAY; "IN THE MEANTIME."

Under Industrial Commission Act, § 106, requiring the record in any case to be transmitted to the Industrial Commission within 20 days after the order or judgment of the district court, unless in the meantime a writ of error shall be obtained from the Supreme Court, a writ of error issued more than 20 days after the expiration of a stay of execution will be dismissed, though issued before the record was transmitted to the commission; the words "in the meantime" meaning "within the 20 days," and not "before the issue of the writ of error."

(For other cases, see Master and Servant, Dec. Dig. § 418[3½].)

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3. MASTER AND SERVANT—STATUTE REQUIRING DISTRICT COURT TO TRANSMIT RECORD TO INDUSTRIAL COMMISSION AT EXPIRATION OF 20 DAYS MANDATORY.

Industrial Commission Act, § 106. relative to the transmission of the record to the commission following an order or judgment of the district court, is mandatory, and it is the duty of the district court to send the record to the commission at the expiration of 20 days from the order or judgment, or within 20 days from the expiration of a stay of execution, assuming that such stay is proper.

(For other cases. see Master and Servant, Dec. Dig. § 417[9].)

Department 2.

Error to District Court, City and County of Denver; Clarence J. Morley, Judge.

Proceeding under the Industrial Commission Act by Emily Ann Thomas, opposed by the General Chemical Company, and the Fidelity & Casualty Company of New York. An award of the Industrial Commission was affirmed by the District Court, and defendants bring error. On motion to dismiss the writ. Motion granted.

Fred W. Varney, of Denver, for plaintiffs in error.

Henry E. May and A. J. Gould, Jr., both of Denver, for defendants in error.

DENISON, J. This is a writ of error to the Denver district court upon a judgment rendered October 5, 1921, affirming an award by the Industrial Commission in favor of Emily Ann Thomas. Sixty days were allowed for a bill of exceptions, which was signed November 10th, and 30 days' stay of execution. December 12th this writ of error was sued out.

The Industrial Commission Act (Laws of 1919, page 744, § 106) provides:

"The record in any case shall be transmitted to the commission within twenty days after the order or judgment of the court, unless, in the meantime, a writ of error addressed to the district court s'.all be obtained from the Supreme Court, for the review of such order or judgment."

The defendants in error move to dismiss the writ, because it was sued out neither within said 20 days nor within 20 days from the expiration of the said 30 days. The motion must be granted.

[1] The plaintiff in error claims that the point was waived, because the defendants in error did not object at the time the 30 days for the bill was granted. Whether this waived the transmission of the record within 20 days from the judgment we do not determine; but it did not waive the requirement that such transmission be made within 20 days from the end of the 30 days' stay granted by the court. If the court had power to grant that 30 days at all, which we do not determine, the most that the plaintiff in error could claim for it would be that it postponed the time at which the 20 days began to run, not that it abrogated the 20-day requirement entirely.

[2, 3] It is claimed that, since the writ of error was actually issued before the record was transmitted to the commission, it ought not to be dismissed; but this argument is not sound. The words "in the meantime" mean "within the twenty days," not "before the issue of the writ of error," and the delay of the clerk in transmitting the record, being a disobedience of the law, cannot avail. The statute is an express mandate in form, its purpose is to secure speedy compensation for those in need, to relieve from the law's delay those unable to bear it, by doing away with just such delays as have occurred here; it is, then, mandatory in substance.

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It was the duty of the district court to send the record to the commission as soon as the 20 days expired, or, if the allowance of the 30 days for the bill was proper, then within 20 days from the end thereof.

The motion is granted.

Teller, Acting C. J., and Whitford, J., concur.

INDUSTRIAL COMMISSION OF COLORADO ET AL. v. GENERAL ACCIDENT, FIRE & LIFE ASSURANCE CORPORATION, LTD., ET AL. (No. 10239.)

(Supreme Court of Colorado. Feb. 6, 1922.)

204 Pacific Reporter, 338.

1. MASTER AND SERVANT—COURT MAY NOT SET ASIDE INDUSTRIAL COMMISSION'S FINDING OF FACT AS AGAINST EVIDECE AND ORDER COMPENSATION AWARD AMENDED ACCORDINGLY.

The district court has no right to set aside or amend a finding of fact by the Industrial Commission as having no support in the evidence, and order the award amended accordingly, but under Laws 1919, c. 210, § 103, it can set aside the Commission's order or award only on the grounds (a) that the Commission acted without or in excess of its powers; (b) that the finding, order. or award was procured by fraud; or (c) that the Commission's findings of fact do not support the order or award.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

2. MASTER AND SERVANT — LOSS OF PARTS OF FINGERS COMPENSABLE AS PARTIAL LOSS OF USE OF HAND.

In case of loss of parts of thumb and fingers, award of compensation need not be by adding the scheduled benefits for such losses in the first part of Laws 1919, c. 210, § 73, but may be for partial loss of use of the hand under section 73g.

(For other cases, see Master and Servant, Dec. Dig. § 385[12].)

3. MASTER AND SERVANT—PAYMENT BEFORE COMPENSATION AWARD CREDITED ON AWARD.

Whatever has been paid by the insurer to an injured employee before award of the Industrial Commission is to be credited on the award, which does not purport to be of an additional compensation.

(For other cases, see Master and Servant, Dec. Dig. § 385[17].)

Error to District Court, City and County of Denver; Clarence J. Morley, Judge.

Action by the General Accident, Fire & Life Assurance Corporation, Limited, and another, respectively, insurer and employer, against the Industrial Commission of Colorado and Ralph McConnell, to avoid an award made by it to him. There was a judgment remanding the cause to the Commission, with directions to amend, and the Commission and claimant bring error; the employer and insurer assigning cross-error. Reversed and remanded, with directions.

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Victor E. Keyes, Atty. Gen., and John S. Fine, Asst. Atty. Gen., for the Industrial Commission.

H. I. Garbutt, of Ft. Collins, for Ralph McConnell.

Frank L. Grant, of Denver, for defendants in error.

ALLEN, J. In a proc ding for compensation under the Workmen's Compensation Act (Laws 1919, c. 210), the Industrial Commission made an award in favor of the claimant, Ralph McConnell. The employer and the insurer brought an action in the district court to set aside the findings and award. Upon a hearing, the district court remanded the cause to the Industrial Commission, with directions to amend the award. The defendants, the Commission and the claimant, bring the cause here for review, and cross-error is assigned by plaintiffs, the employer and the insurer.

[1] The plaintiffs in error complain of the district court's directions to amend the award. The Commission made a finding as to the average weekly wage of the claimant. The district court set aside the finding on the ground that it had no support in the evidence, and substituted a finding of its own, and ordered the award amended accordingly. This was error. The court had no right to set aside or to amend a finding of fact, and then order the award to be amended accordingly. The only grounds upon when a court may set aside an order or award of the Commission are set forth in section 103, c. 210, Session Laws of 1919, namely: (a) That the Commission acted without or in excess of its powers; (b) that the finding, order, or award was procured by fraud; and (c) that the findings of fact by the Commission do not sup ort the order or award.

The assignments of cross-error raise the q estion whether the Commission correctly designated the loss for which ccident benefits are allowed. The claimant's injury resulted from get his hand into a sausage grinder. A physician and surgeon testified at the claimant suffered the loss of thumb, index finger, and middle fi er, each being taken off at the proximal joint; that the hand has been ipaired 70 per cent. The witness was asked:

"How do you determine the basis of disability, Doctor, as 70 per cent.?"

His answer was:

"Loss of action of the hand from the wrist down. e has lost the thumb, both the index and middle fingers, and he has lost the gripping power of his hand."

The Commission found, and made the award accordingl.

"That the claimant has sustained a permanent disability ual to a 70 per cent. loss of the use of his right hand measured from t. wrist."

[2] The contention of the defendant in error is claimant was ntitled only to compensation for the loss of the thumb and fingers; in other words, that the Commission was bound to act only under the first part of section 73 of the act of 1919, which, so far as material here, reads as follows:

"In cases included in the following schedule the disability in each case shall be deemed to continue for the period specified and the compensation to be paid for such loss shall be specified herein, to wit: * * * The loss of hand 104 weeks. * * * The loss of a thumb at the proximal joint 35 weeks. * * * Loss of an index finger at the proximal joint 18 weeks. * * * Loss of a middle finger at the proximal joint 13 weeks."

The Commission proceeded under subdivision (g) of section 73, which, so far as material in this connection, reads as follows:

"Where an injury causes the loss of use or partial loss of use of any member or members specified in the foregoing schedule, the Commission

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may determine the disability suffered and the amount of compensation to be awarded. by awarding compensation which shall bear such relation to the amount stated in the above schedule for the loss of a member or members as the disabilities bear to the loss produced by the injuries named in the schedule."

This provision authorizes the finding and award of the Commission in respect to the matter now under consideration. The schedule, heretofore quoted, includes "the loss of a hand." Under subdivision (g) the Commission could, as it did, award compensation for the "partial loss of use" of the hand.

In North Beck Mining Co. v. Industrial Commission (Utah) 200 Pac. 111, the claimant had suffered the total loss of some of his fingers and the partial loss of others, and it was held that the Commission was not obliged to compensate for the loss by adding the scheduled benefits for the loss of each finger, or proceed under the schedules for specific losses, but could act under that clause of the statute which allowed compensation for the loss of a "bodily function not otherwise provided for," and thereby make an award, as it did in that case, for the partial loss of the use of the hand. The conclusion we reach is also supported by Rockwell v. Lewis, 168 App. Div. 674, 154 N. Y. Supp. 893, holding that—

"Where the loss or injury to fingers and thumb result in the permanent loss of the use of the hand, * * * the Commission is authorized to recognize this fact and to treat the hand as lost in fixing the compensation," instead of confining the compensation to the schedule rate for fingers.

In the instant case the Commission correctly treated the partial loss of the use of the hand as being the compensable loss sustained. It committed no error in not designating the injury as a loss of the thumb and fingers and awarding the scheduled benefits for the loss of such members.

[3] It is further argued that the Commission could not award compensation for the loss of thumb and fingers under the schedule and then add thereto the compensation allowed for the loss or partial loss of the use of the hand. With this contention we agree, but not with the further assertion, or the assumption, that there was an award of double compensation in this case. It is admitted by the pleadings that the insurer, prior to the hearing and the award, paid to claimant the amount of compensation, where the average weekly wage is $10, which the statute provides for the loss of thumb and two fingers. The Commission's award does not purport, however, to be one of an additional compensation. The award is the full or entire compensation, and whatever the insurer has already paid may and should be credited upon the award.

The judgment is reversed, and the cause remanded, with directions to affirm the findings and award of the Industrial Commission.

Teller, J., sitting for Scott, C. J., and Whitford, J., concur.

INDUSTRIAL COMMISSION OF COLORADO ET AL. v. PEPPAS. (No. 10224.)

(Supreme Court of Colorado. Jan. 9, 1922.)

203 Pacific Reporter, 664.

1. MASTER AND SERVANT — CLAIM FOR COMPENSATION HELD BARRED BY FAILURE TO GIVE NOTICE.

Under Laws 1915, p. 551, § 62, providing that the failure to give notice of claim for compensation within 30 days shall not bar recovery if the

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claimants were nonresidents, but that if no such notice is given and no payment of compensation has been made within one year from the accident the right to compensation shall be wholly barred, the wife of a deceased employee cannot recover compensation, though she resided in Greece, and that country was blockaded at the time of the accident, where no claim was made by her within one year after the time she received actual notice of the accident, even if the blockade would have excused delay before receiving such notice.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

2. MASTER AND SERVANT — APPLICATION TO INDUSTRIAL COMMISSION PREREQUISITE TO REVIEW BY COURT "HEARING."

Under Laws 1915, p. 556, § 77, prohibiting an action to set aside an award of the Industrial Commission unless the plaintiff shall have first applied to the Commission for a hearing thereon, the hearing required is a hearing upon the application to set aside or vacate the award, and the condition is not satisfied by the original hearing upon which the award was based.

(For other cases, see Master and Servant, Dec. Dig. § 417[1].)

(For other definitions, see Words and Phrases, First and Second Series, Hearing.)

3. MASTER AND SERVANT—AMENDMENT REGULATING REVIEW OF COMPENSATION AWARD RETROACTIVE.

The amendment to the Workmen's Compensation Act by Laws 1919, p. 741, § 98, so as to provide that no action to vacate an award of the Commission shall be brought unless the plaintiff has first applied to the Commission for a review, is remedial, and applies to an award made after its enactment, though the injury was received before it was enacted.

(For other cases, see Master and Servant, Dec. Dig. § 417[1].)

Department 3.

Error to District Court, City and County of Denver; Clarence J. Morley, Judge.

Proceedings by Sophia James Pappas under the Workmen's Compensation Act to recover compensation for the death of her husband, opposed by the Tioga Coal Company, employer, and the Employers' Mutual Insurance Company. An award by the Industrial Commission denying the claim was reversed by the district court, and the Industrial Commission, the employer, and insurer bring error. Reversed and remanded, with directions to affirm the award of the Commission.

Decedent, Peppas, a citizen of Greece, was the husband of defendant in error (hereinafter referred to as plaintiff) and she and her children still reside there. Pappas was injured November 14, 1916, and from the effects of that injury died four days later. Greece was blockaded from November, 1916, to August, 1917. Plaintiff received information of the death in November, 1917, and executed and sent to the United States a power of attorney, authorizing two persons named therein to represent her in connection with any rights or claims she might have by reason of said injury and death. No action was taken under said power of attorney. January 6, 1920, the Consul of Greece, stationed at San Francisco, filed claim for compensation with the Industrial Commission. August 16, 1921, the Commission rendered its findings and award, denying the claim. An appeal was taken to the district court, where the findings and award were reversed. To review that judgment the cause is now before us.

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Victor E. Keyes, Atty. Gen., and John S. Fine, Asst. Atty. Gen., for Industrial Commission.

Frank C. West, of Denver, for Tioga Coal Co. and Employers' Mut. Ins. Co.

N. C. Calogeras, of Denver, for defendant in error.

BURKE, J. (after stating the facts as above). [1] The findings and award of the Industrial Commission can be upheld, and the judgment of the district court reversed. only upon two grounds: (1) That the claim was not filed in time; (2) that no motion for a rehearing was presented to the Commission.

1. Section 62, ch. 179, Laws 1915, reads in part:

"No claim to recover compensation under this act shall be maintained unless, within thirty days after the occurrence of the accident which is claimed to have caused the injury or death, notice in writing, stating the name and address of the person injured, the time and place where the accident occurred, the nature and cause of the injury, and making a claim for compensation with respect to injury and signed by the person injured, or by some one in his behalf, or in case of death, by a dependent or some one on his behalf, stating also the names and addresses of each dependent, shall be served upon the commission: * * * Provided, however, that the failure to give any such notice or any defect or inaccuracy therein, shall not be a bar to a recovery under this act, if it is found as a fact in the proceedings for the collection of the claim, * * * that said claimants were nonresidents; and, provided further, that if no such notice is given, and no payment of compensation has been made within one year from the date of the accident, the right to compensation therefor shall be wholly barred."

It is undisputed that no such notice was given and no payment made within one year from the date of the accident. It is contended that the existence of the war and the blockade of Greece prevented such action and excused the failure. This would be true only in so far as those facts were responsible for the failure. Plaintiff received actual information of the death in November, 1917. Conceding everything claimed on her behalf, the statute would begin to run on that date. The claim would be barred in November, 1918, and it was not filed for more than one year thereafter.

2. Section 77 of said Act of 1915 reads in part as follows:

"No action, proceeding or suit to set aside, vacate or amend any finding, order or award of the commission, or to enjoin the enforcement thereof, shall be brought unless the plaintiff shall have first applied to the commission for a hearing thereon as provided in this act."

This chapter was amended in 1919, and appears as chapter 210 of the acts of that year. Section 98 thereof reads in part as follows:

"No action, proceeding or suit to set aside, vacate or amend any finding, order or award of the Commission, or referee, or to enjoin the enforcement thereof, shall be brought unless the plaintiff shall have first applied to the Commission for a review as herein provided."

[2, 3] No application herein was made to the Commission for a "review," or for a "hearing" save the original hearing upon the claim. Plaintiff contends that the act of 1915 is applicable, and that that portion of it, above quoted, does not relate to a review. With this position we cannot agree. The "hearing" there referred to is a hearing upon the "action, proceeding, or suit to set aside, vacate or amend," and the construction to be given the section is exactly the construction which the particular language of the act of 1919 makes inevitable. They both mean the same thing. But even this construction is unnecessary because the section is remedial and the law in force January 6, 1920, at the time of the ruling of the Commission is the law applicable. That law is the act of 1919.

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In view of the foregoing, the consideration of other incidental questions raised by this record is unnecessary. The judgment is reversed, and the cause remanded, with directions as to district court to enter judgment affirming the findings and award of the Commission.

Teller, J., sitting for Scott, C. J., and Allen, J., sitting for Bailey, J., concur.

McNEIL v. PANHANDLE LUMBER CO. ET AL. (No. 3814.)

(Supreme Court of Idaho. Dec. 31, 1921.)

203 Pacific Reporter, 1066.

1. MASTER AND SERVANT — WORKMEN'S COMPENSATION LAW LIBERALLY CONSTRUED.

The Workmen's Compensation Law of this state and all proceedings under it are to be liberally construed with a view to effect the object of said law and to promote justice.

(For other cases, see Master and Servant, Dec. Dig. § 348.)

2. MASTER AND SERVANT — EVIDENCE TO SUSTAIN FINDINGS IN COMPENSATION CASE CONSIDERED ACCORDING TO RULES APPLICABLE TO COURTS.

In reviewing hearings before the Industrial Accident Board upon the question as to whether the evidence submitted sustains the findings of the Board, the courts will consider the competency, relevancy, and materiality of the evidence according to the rules applicable to trials in courts.

(For other cases, see Master and Servant, Dec. Dig. § 405[1].)

3. MASTER AND SERVANT—FINDINGS OF INDUSTRIAL ACCIDENT BOARD CONCLUSIVE ON APPEAL.

The findings of fact of the Industrial Accident Board, when supported by competent evidence, are conclusive on appeal to the district court or to this court; the jurisdiction of said courts being limited to a review of questions of law.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

4. MASTER AND SERVANT — "ACCIDENT" WITHIN COMPENSATION LAW DEFINED.

The word "accident" is used in the Workmen's Compensation Law of this state in the "popular and ordinary sense of the word as denoting an unlooked-for mishap or an untoward event which is not expected or designed."

(For other cases, see Master and Servant, Dec. Dig. § 371.)

(For other definitions, see Words and Phrases, First and Second Series, Accident—Accidental.)

5. MASTER AND SERVANT — FIXING TIME OF COMPENSABLE ACCIDENT WITH REASONABLE PROBABILITY SUFFICIENT.

In case of claims under the Workmen's Compensation Law, if the accident is one whose happening cannot be fixed as of a specific date, it is sufficient to establish such time with reasonable probability.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

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6. MASTER AND SERVANT — "TOTAL DISABILITY" WITHIN COMPENSATION LAW DEFINED.

"Total disability" as used in the Workmen's Compensation Law of this state takes no account of a state of partial disability or impaired health existing in the claimant previous to the happening of the accident claimed to have caused such "total disability."

(For other cases, see Master and Servant, Dec. Dig. § 385[5].)

7. MASTER AND SERVANT — APPEAL LIES TO SUPREME COURT FROM JUDGMENT AFFIRMING OR REVERSING COMPENSATION AWARD.

Appeal lies to this court from a judgment of a district court affirming or reversing an award of compensation by the Industrial Accident Board.

(For other cases, see Master and Servant, Dec. Dig. § 418[1].)

Appeal from District Court, Kootenai County; John M. Flynn. Judge.

Application by S. E. McNeil for an award under the Workmen's Compensation Law, opposed by the Panhandle Lumber Company, employer, and Ætna Casualty & Surety Company, insurer. Award for the applicant, and the employer and insurer appealed to the district court. Findings of the Board sustained, and the award affirmed. Defendants appeal, and respondent moves for dismissal. Judgment of the district court affirmed.

Harry M. Morey, of Boise, and Post, Russell & Higgins and A. O. Stuberb, all of Spokane, Wash., for appellants.

Potts & Wernette, of Cœur d'Alene, for respondent.

DUNN, J. In January, 1920, respondent was in the employ of appellant Panhandle Lumber Company, hereinafter called the Lumber Company, and was engaged in building roll ways and handling sawlogs. He worked alone, and the undisputed testimony as shown by the record is that the labor he performed involved a considerable amount of heavy lifting. He claims to have lost the sight of his right eye by detachment of the retina as a result of this labor and to have been totally disabled thereby; the sight of his left eye having been lost through an accident some eight years before. He applied to respondent, the insurer of the Lumber Company, the Ætna Casualty & Surety Company, hereinafter called the Surety Company, for compensation on account of said injury, but said Surety Company denied liability. Thereafter respondent demanded of the Industrial Accident Board a hearing before a committee of arbitration, which was granted, and the arbitration committee found according to respondent's contention, awarding him $12 per week for a period of 13 weeks and 3 days, that being the period of temporary total incapacity for work, and $12 per week for a period of 400 weeks.

Appellants thereupon made application to the Industrial Accident Board, hereinafter called the Board, for a review of the decision of the committee of arbitration, which was granted. By stipulation of the attorneys for appellants and respondent the testimony taken before the arbitration committee was admitted and considered by the Board the same as if the witnesses were personally present and testifying before said Board, and in addition thereto certai· oral and written testimony was introduced on behalf of appellants. The Board made findings of fact and rulings of law and awarded respondent the sum of $12 per week for 15 weeks and 3 days, the period of temporary total incapacity for work, and $12 per week for a period of 384 weeks and 4 days, for the reason that the injury sustained by respondent had caused total disability, and further awarded him $6 per week during the remainder of his life, said allowance

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of $6 per week to begin after the expiration of said period of 384 weeks and 4 days. The Board further found that there was then due respondent the sum of $816, the amount of compensation that had accrued from the 1st day of February, 1920, to the date of said decision. The award made by said Board required further that after the payment of said sum of $816 the remainder of said award should be paid to respondent in monthly payments commencing 30 days from the date of said decision.

Appeal was taken from the decision of the Board to the District court of Kootenai county, and said court on reviewing said decision made findings of fact sustaining the decision of the Board in every particular and entered its decree affirming in toto the award made by said Board.

Appeal was taken from the judgment of the district court, which respondent now moves to dismiss on the ground that the law of this state makes no provision for such appeal, and on the further ground that this court has no jurisdiction to consider such appeal.

[7] Section 9, art. 5, of the state Constitution provides:

"The Supreme Court shall have jurisdiction to review, upon appeal, any decision of the district courts, or the judges, thereof."

C. S. § 7149, provides that—

"A judgment or order, in a civil action, except when expressly made final, may be reviewed as prescribed in this code, and not otherwise."

C. S. § 7151, provides:

"Any party aggrieved may appeal in the cases prescribed in this code."

Section 6270a of the Workmen's Compensation Law (Session Acts 1921, p. 479), referring to the action to be taken by the district court on deciding a matter appealed to said court from the Board, provides that—

"The record in any case shall be transmitted to the board within 20 days after the order or judgment of the court, unless appeal has been taken from such order or judgment."

Section 6272a of the Workmen's Compensation Law (Session Acts 1921, p. 480) provides that—

"Whenever any question involving compensation of an injured employee, or his dependents, is appealed to the district court or Supreme Court by the employer and the appellate court finds in favor of the employee in an amount equal to or greater than the award of the board, then the employer shall pay," etc.

Section 6271 of the Workmen's Compensation Law as amended (Session Acts 1921, pp. 479 and 480) provides for filing in the proper district court of the state a certified copy of a decision of the Industrial Accident Board awarding compensation from which no appeal has been taken and for the rendering of a decree or judgment of said court in accordance therewith and providing that such decree or judgment shall have the same effect as though it had been rendered in a suit duly heard and determined by said court, except that there shall be no appeal therefrom.

Nowhere does the law make final such a judgment of the district court as is under consideration in this case. The language in the sections of the Workmen's Compensation Law quoted and referred to above clearly imply a legislative intent that judgments of the district courts in such cases as this shall be appealable. While the law does not expressly limit the time within which such appeal shall be taken, we think a fair and reasonable construction of the language of section 6270a, supra, justifies the conclusion that it was the intention of the Legislature that such appeals should be taken within 20 days after the order or judgment appealed from, and before the return of the record to the Industrial Accident Board. The motion to dismiss the appeal is denied.

Appellants filed what they termed a demurrer to the first notice of injury and preliminary application for compensation and also to the findings of fact of the arbitration committee and to the findings of fact of

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the Board on the ground that the facts stated in the notice and application for compensation and the findings of the arbitration committee and Board are not sufficient to constitute a compensable claim under the Workmen's Compensation Law (C. S. §§ 6213–6339). They also filed a motion for an order of the district court setting aside, vacating, and holding for naught the award of the committee of arbitration and of the Board on the ground, in substance, that the evidence submitted by the claimant is insufficient to sustain the findings of the arbitration committee or the Board or the award made by them to respondent. Attorneys for the respondent objected to the hearing of said demurrer and motion for the reason that there is no authority under the laws of this state for filing such demurrer or motion. The court held that the filing of the demurrer and motion was without authority, and that this was improper practice under the law of this state, and therefore overruled said demurrer and denied the said motion. The court suggested, however, that the better practice on appeal to the district court in such cases as this would be for appellant to set out, either in the notice of appeal or in some other formal manner, the errors of law upon which the appeal is based. That not having been done in this case, the district court considered all the questions raised either in the demurrer or motion before making the rulings above noted.

Appellants assign on their appeal to this court the following errors:

(1) The court erred in overruling appellants' demurrer.

(2) The court erred in denying appellants' motion to set aside the findings of fact, conclusions of law, and award of the Industrial Accident Board.

(3) There is no evidence to sustain the judgment of the trial court to the effect that there was an "accident" sustained by plaintiff while working for the Panhandle Lumber Company.

(4) The evidence is insufficient to sustain the amount of the judgment in that there is no evidence to show that claimant would, under any conditions, be entitled to compensation at the rate of $12 per week under the terms of the Workmen's Compensation Law of the state of Idaho.

(5) The court erred in granting judgment for a specific indemnity based on a permanent total disability.

(6) There is no evidence to sustain the judgment of the trial court to the effect that there was a personal injury by accident arising out of and in the course of the employment of McNeil by defendant Panhandle Lumber Company.

(7) The court erred in granting judgment in favor of respondent and against appellants.

The court did not err in overruling appellants' demurrer or in denying their motion to set aside the findings of fact, conclusions of law, and the award of the Board, and we approve its suggestions as to the proper procedure in cases of this kind in bringing to the attention of the district court the errors of law relied on.

[4] As we understand the position taken by appellants with regard to the finding that respondent suffered personal injury by accident arising out of and in the course of his employment by the Lumber Company, their contention is that the evidence is insufficient to show that the injury of which respondent complains was brought about as a result of heavy lifting done by respondent while he was in the employ of appellant Lumber Company, and also that, if the injury complained of was the result of an accident occurring in the manner claimed by respondent, still the evidence is insufficient by reason of the fact that respondent has not been able to fix with sufficient certainty the time of the alleged accident.

Webster's New International Dictionary defines the word "accident" as follows:

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"An event that takes place without one's foresight or expectation; an undesigned, sudden, unexpected event; an undesigned and unforeseen occurrence of an afflictive or unfortunate character."

The New Standard Dictionary gives the following definition:

"Anything that happens; anything occurring unexpectedly, or without known or assignable cause."

"The word 'accident,' as used in the Compensation Act, requiring the injury compensated for to be by 'accident,' is held to be employed in its ordinary sense as meaning an unlooked for and untoward event which is not expected or designed." C. J. "Workmen's Compensation Acts," p. 64.

In the case of Fenton v. Thorley, [190] English Appeal Cases, p. 443. it is said:

"That the expression 'accident' is used in the popular and ordinary sense of the word as denoting an unlooked-for mishap or an untoward event which is not expected or designed."

C. S. § 6217, provides:

"If a workman receives personal injury by accident arising out of and in the course of any employment covered by this chapter his employer or the surety shall pay compensation in the amounts and to the person or persons hereinafter specified."

Section 1 of the Workmen's Compensation Act of England, passed in 1897. which our Compensation Law closely follows as to this provision, declares that, "if in any employment to which this act applies personal injury by accident arising out of and in the course of the employment is caused to a workman," his employer shall be liable to pay compensation.

The evidence taken before the Arbitration Committee and the Board is conflicting as to the cause of respondent's injury, but it is ample to sustain the findings of the Board on that point as follows:

"That said claimant commenced working for the said Panhandle Lumber Company on or about the 15th day of January, 1920, and remained in their employ as such laborer until, to wit, the 1st day of February, 1920; that the work of said claimant while in the employ of said defendant Panhandle Lumber Company consisted of building rollways, he, the said claimant, being required to lift logs out of a trough-shaped skidway, in which the logs were skidded, to the rollway, and then roll such logs over the embankment onto the rollway; that the logs that he was required to handle alone averaged from 50 to 500 feet, board measure, and many of said logs were extremely heavy and required extraordinary lifting; that oftentimes when the said logs were taken out of the skidways and rolled over the embankment onto the rollway they would roll crosswise, and said claimant was required to straighten out the logs on said rollway, which at times required extraordinary lifting, and which caused unusual and extraordinary strain on the body of said claimant; that on one day a short time prior to the date that said claimant left the employ of said defendant company he was required and did lift an unusually and extraordinary heavy log, which was designated by said claimant as the 'blue butt,' which said last-mentioned log was considerably heavier and harder to handle than the other logs handled by said claimant.

"That on or about the 20th day of January, 1920, by reason of the heavy lifting of one of the said logs required by said claimant, the said claimant suffered a detachment of the retina of the right eye, as a result of the strain from said heavy lifting; that by reason of said detachment of the retina of the right eye the said claimant lost the entire sight of his said right eye, and which said loss of sight to his said right eye is permanent; that, the claimant having previously lost the sight of his left eye, he, the said claimant, is now totally blind.

"The Board expressly finds that the said claimant lost the total sight of his said right eye, caused by detachment of the retina, due to heavy

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lifting of one of said logs above mentioned, on or about the 20th day of January, 1920, and not from any other cause whatsoever, and the said Board further finds that at the time the said claimant went into the employ of said Panhandle Lumber Company the eyesight of said claimant in his right eye was good, and his said right eye was in a sound and healthy condition; that the loss of the sight of said right eye was caused by said accidental injury as above set forth, which did arise out of and in the course of the employment of said claimant."

[3] The well-settled rule that forbids this court to reverse a trial court in cases in which the evidence is conflicting, but sufficient to sustain a decision, applies to the findings of fact made by the Industrial Accident Board in cases of this kind, and is applicable likewise to the district court in reviewing the decisions of said Board; the jurisdiction of said courts in such cases being limited to a review of questions of law.

The cause of the injury is not required to be proved with absolute certainty. It is sufficient if the respondent proves to the satisfaction of the Board with reasonable probability that the accident occurred in the manner claimed by him while he was performing labor as an employee of the Lumber Company and fixes approximately the date of the accident. The evidence submitted by respondent is clear and satisfactory to the effect that the kind of labor respondent was engaged in, namely, heavy lifting, while he was in the employ of the Lumber Company, is one of the well-known causes of detachment of the retina. Dr. Hopkins testified that he reached the conclusion that the detachment of the retina in this case was caused by the strain from the heavy lifting that McNeil had recently performed by taking up in succession the various causes known for detachment of the retina and eliminating them one by one as he found them incapable of explaining the injury in this case, finally having left only the one cause, namely, heavy lifting, which could reasonably furnish such explanation. The physicians who testified in behalf of respondent did not pretend to have actual knowledge of the cause of respondent's injury, but, upon the examination of respondent and obtaining a history of the case from him, they gave it as their deliberate judgment that the heavy lifting done by him in the course of his employment by the Lumber Company was the cause of the detachment of the retina of his right eye. They also testified that in such an accident as this the detachment might come on suddenly, but that it usually came on slowly. On this point Dr. Hopkins, a witness for respondent and the first specialist to examine respondent after the accident, testified as follows on crossexamination:

"Q. Now, Doctor, you say that you think that detachment of the retina may be brought about from heavy lifting and strain caused by heavy lifting? A. Yes.

"Q. Now, would that come on suddenly or gradually? A. Well, in the majority of cases that I have seen personally they have come on gradually. However, they can come on quickly, but in the majority of cases they come on slowly.

"Q. Isn't there some manifestation of something wrong with the vision of the eye almost immediately after the alleged strain? A. No; they don't usually tell you that. It is seldom that they say that. They will say that a day or two afterwards they began to notice a black speck in their field of vision, and then this keeps getting a little greater, till they say, 'I see a cloud about here,' in some particular field of their vision, and in the majority of these cases where we see them early and where we can look in and see immediately, why, the most of these cases I find the detachment has started in the up and outer field of vision, and then in the matter of a couple of weeks this begins to come down and touches the retina all the way down, until we find the greater portion of the detachment below instead of up high.

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"Q. This case that came under your observation, was that one where the detachment or evidence of detachment came on suddenly? A. No, he didn't notice it for a couple of days afterwards, two or three days; something like that.

"Q. When you say coming on gradually, you mean days or weeks or what? A. Well, it might take a week or two weeks or longer for this to show itself sufficient to bother their vision. They could look straight ahead, unless this detachment is right in the central field. If it is out in the field of vision, they might have it there for a considerable length of time without being conscious of it. * * *

"Q. Sometimes these things come on without any cause that you can denominate? A. Absolutely.

"Q. In the case of Mr. McNeil, Doctor, as I understand, you went over the whole field of causes of detached retina. and began to eliminate from them? A. Yes; that is the only way we can do, and the only possible reason that we could find for this detachment was some strain that he had in the past; that was the only thing that we could see."

As against this no witness testifying on behalf of appellants went further than to say that it was possible the injury might have occurred without any known cause. Some of the physicians testifying on behalf of appellants claimed that they had never known a case of detachment of the retina to be produced by the strain from heavy lifting, but other physicians testifying for appellants admitted this to be one of the known causes of detachment. The physicians testifying on behalf of respondent admitted the possibility of detachment from some unknown cause, but certainly it is not reasonable to reject a known probable cause for the injury and ascribe it to an unknown possible cause.

The respondent testified as follows:

"Q. Now, how long prior to the time that you went to Dr. Hopkins, and how long after you quit work, or when was it that you first noticed that there was something wrong with your right eye? A. Well, I noticed it a little in the bunkhouse, but I blamed the glasses for that.

"Q. The bunkhouse where? A. At Spirit Lake.

"Q. Before you went home? A. Yes, sir; then I noticed it, of course, right after I got home, that my eye was failing me; it was like a black cloud settling down over me; and then, of course, I went to Dr. Hopkins just as quick as I could get some money."

[2] The conclusion reached by the Industrial Accident Board, a part of whom heard all the testimony in the case, is fully sustained by evidence. In reviewing hearings before the Industrial Accident Board upon the question as to whether the evidence submitted sustains the findings of the Board, the courts will consider the competency, relevancy, and materiality of the evidence according to the rules applicable to trials in courts.

[1] Undoubtedly in most cases of accidental injury the claimant would be able to fix not only the day, but the hour, if necessary, when the accident occurred. But in a case of this kind, in which the injury may not appear for some time after it has been actually inflicted by the accident, it would be manifestly unfair and a denial of justice to refuse compensation because the claimant could not identify the very day of the accident, though he could fix the time with reasonable certainty. To so hold would be to misconstrue the humane provision of this law, whose purpose is declared by the Legislature to be to provide sure relief for injured workmen and their families and dependents. C. S. § 6214. The Workmen's Compensation Law, like other laws of this state, is to be liberally construed with a view to effect its objects and promote justice. C. S. § 9444; Fidelity & Cas. Co. of N. Y. v. Ind. Acc. Com. of California, 177

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Cal. 614, 171 Pac. 429, 430, L. R. A. 1918F. 856. This does not mean that the courts should endeavor by construction to extend its provisions to persons not intended to be included by it, but that it shall be so construed as to carry out its purposes, and, so far as is reasonably possible, secure its benefits to all those who were intended to receive them.

[5] While some courts have insisted upon too great exactness as to the time of receiving an injury and upon too narrow limits in defining the term "accident," other courts of equal ability and standing have adopted the rule indicated in this decision. As illustrating the very narrow limits fixed for the meaning of the word "accident" we cite Stombaugh v. Peerless Wire Fence Co. et al., 198 Mich. 445, 164 N. W. 537. a Michigan case, in which the Industrial Accident Board found one Edwin Stombaugh—

"received an accidental injury, namely, rupture of the right auricle of the heart, arising out of and in the course of his employment, which produced death. That the work he was doing for respondents on the day and at the time of death was, to Mr. Stombaugh, heavy and hard work. That he was not used to this heavy work and exertion. That the work he was doing for respondents at the time of death, and prior thereto, required him to strain, lift, pull, and lower heavy rolls of wire weighing 150 to 160 pounds, from their place in the tier in the car, and at the time of death, about chest high. to the floor, and then roll them to the car door, a distance of about five feet, and into the chute. That this straining, lifting, pulling, and handling these heavy rolls of wire weighing 150 to 160 pounds on the average, together with the weakened and thinned condition of the wall of the heart, we are convinced, caused the wall to part and the rupture of the right auricle of Mr. Stombaugh's heart and his death."

In reviewing the finding of the Industrial Accident Board, the Supreme Court of Michigan used this language:

"All of the foregoing, taken from the opinion of the Board, is sustained by some evidence, excepting only the conclusion that there was an accidental injury, which conclusion is wholly unsupported by evidence. The man died while doing the work he agreed to do, in the way he intended to do it. The exercise accounts for his death, and if he had been informed about the condition of his heart, he must have known that death was likely to result, at any time, from any considerable physical exercise. There is no evidence of mischance or miscalculation in what was being done, none of anything fortuitous or unexpected in the manner of doing it. There is undisputed evidence that he had a chronic trouble—disease—of the heart, of long standing, the wall of one auricle being so thin that 'any exertion at all might have been the cause of its breaking.' Death was merely hastened by the exertion."

It seems to us that so narrow a construction of the term "accident" would largely defeat the purpose of the Workmen's Compensation Law of this state and deprive many persons of the assistance to which they are entitled and which this law was intended to give them. It fails to take account of the conditions that led to the enactment of laws of this kind. Compensation laws were rendered necessary by the fact that the beneficiaries of such legislation are not people of independent means who can refuse to labor, even though such labor involves possible consequences such as befell Stombaugh in the Michigan case. There are many instances in which persons unfit for physical exertion willingly choose to take the chance involved in honorable, though hazardous, labor in preference to leaving their dependents to shift for themselves, and the Compensation Law is aimed for their relief in case of accident as well as for the physically sound and fit who may be accidentally injured. Much more in harmony with the purpose of such laws is the holding in the English Case of Fenton v. Thorley, supra, in which appellant ruptured himself

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by overexertion in trying to turn a wheel. In the course of the opinion Lord Macnaghten said:

"Fenton was a man of ordinary health and strength. There was no evidence of any slip, or wrench, or sudden jerk. It may be taken that the injury occurred while the man was engaged in his ordinary work, and in doing or trying to do the very thing which he meant to accomplish. * * *

"If a man, in lifting a weight or trying to move something not easily moved, were to strain a muscle or rick his back, or rupture himself, the mishap in ordinary parlance would be described as an accident. Anybody would say that the man had met with an accident in lifting a weight, or trying to move something too heavy for him.

"One other remark I should like to make. It does seem to me extraordinary that anybody should suppose that, when the advantage of insurance against accident at their employers' expense was being conferred on workmen, Parliament could have intended to exclude from the benefit of the act some injuries ordinarily described as 'accidents' which beyond all others merit favorable consideration in the interest of workmen and employers alike. A man injures himself by doing some stupid thing, and it is called an accident, and he gets the benefit of the insurance. It may even be his own fault, and yet compensation is not to be disallowed unless the injury is attributable to 'serious and willful misconduct' on his part. A man injures himself suddenly and unexpectedly by throwing all his might and all his strength and all his energy into his work by doing his very best and utmost for his employer, not sparing himself or taking thought of what may come upon him, and, then he is to be told that his case is outside the act because he exerted himself deliberately, and there was an entire lack of the fortuitous element. I cannot think that that is right. I do think that, if such were held to be the true construction of the act, the result would not be for the good of the men, nor for the good of the employers either, in the long run. Certainly it would not conduce to honesty or thoroughness in work. It would lead men to shirk and hang back, and try to shift a burthen which might possibly prove too heavy for them on to the shoulders of their comrades."

This is in accord with the construction that should be placed upon the Workmen's Compensation Law of this state.

As bearing upon the question of the time of the accident and tending to support our view, though not directly passed upon, attention is called to Fidelity & Casualty Company of New York et al. v. Industrial Accident Commission of California et al., supra, in which the Supreme Court of California upheld an award of compensation to one De Witt, a show card sign writer, who had used wood alcohol in connection with his work for 1½ years prior to the 7th day of January, 1914. Immediately before the holidays preceding this date he had used the alcohol in much greater quantities than formerly, and directly after the holidays had used an extraordinary quantity of it in cleaning the apparatus with which he worked and in washing and cleaning his hands. The injury to his eyes which the Commission held to be due to an accident began to manifest itself on the 7th, and had so progressed that by the 13th of January he could not use his eyes; the Board fixing the time of the accident as on or about the 7th day of January, 1914. See, also, Pettit v. Mendenhall, 2 Cal. Ind. Acc. Com. Decisions, 238; Smith v. Munger Laundry Co., 1 Cal. Ind. Acc. Com. Decisions, 168; Hartford Acc. & Indemn. Co. v. Ind. Acc. Com. et. al., 32 Cal. App. 481, 163 Pac. 225; Fleming v. Robert Gair Co., 176 App Div. 23, 162 N. Y. Supp. 298.

We have discussed at some length the evidence introduced before the Board in order to show that the findings complained of in assignments 3 and 6 are amply supported by evidence, and are not based upon "guess, surmise, or speculation." Being supported by evidence, such find-

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ings are binding upon the district court and this court, thus disposing of said assignments adversely to the contention of appellants.

Appellants urge that the evidence is insufficient to sustain the award of $12 per week to respondent. This is sufficiently answered by the fact that all the evidence in the record bearing upon the wages earned by respondent prior to his injury is that the Lumber Company was paying him at the rate of 60 cents per hour, or $28.80 per week. This is sufficient to support the award made by the Board.

[6] It is also urged by appellant that the court erred in granting judgment for a specific indemnity based on permanent total disability.

At the time McNeil entered the service of the Lumber Company he had been without the use of his left eye for about eight years. Appellants contend that for this reason he was at that time partially disabled, and that the loss of the other eye while he was in the employ of the Lumber Company does not entitled him to an allowance based upon total disability by reason of the loss of the right eye. As a simple problem in mathematics such a result might possibly be reached, but it is a result which cannot be sustained in actual practice nor in justice to the respondent. The record shows that at the time of his service to the lumber Company he was able to render and did render the service of an able-bodied man, and the evidence tends to show that he was performing labor which usually required the services of two men. The Lumber Company accepted his services in the condition in which he was and paid him wages presumably based upon his ability at that time. The loss of his right eye certainly placed him in a condition of total disability, entitling him clearly to the award made by the board. In a case involving an employee who had previously lost one eye and who met with an injury depriving him of the other, the Supreme Judicial Court of Massachusetts, in passing upon this very question, said:

"The employee, when he entered the service of the subscriber, had that degree of capacity which enabled him to do the work for which he was hired. That was his capacity. It was an impaired capacity as compared with the normal capacity of a healthy man in the possession of all his faculties. But nevertheless it was the employee's capacity. It enabled him to earn the wages which he received. He became an 'employee' under the act and thereby entitled to all the benefits conferred upon those coming within that description. The act affords a fixed compensation for a limited time 'while the incapacity for the work resulting from the injury is total.' It establishes no other standard. It fixes no method for dividing the effect of the injury and attributing a part of it to the employment and another part to some pre-existing condition, and it gives no indication that the Legislature intended any such division. The total capacity of this employee was not so great as it would have been if he had had two sound eyes. His total capacity was thus only a part of that of the normal man. But that capacity, which was all he had, had been transformed into a total incapacity by reason of the injury. That result has come to him entirely through the injury." In re Branconnier, In re Travelers' Ins. Co., 223 Mass. 273, 111 N. E. 792.

In Madden's Case, 222 Mass. 487, 111 N. E. 379, L. R. A. 1916D. 1000, the Industrial Accident Board found that, while engaged in the performance of the work for which she was hired, Honora E. Madden "received a personal injury arising out of * * * her employment, * * * aggravating and accelerating a weak heart condition to the point of total incapacity for work." The Board allowed her compensation based upon total disability. In discussing the argument of the insurer against such allowance the same Massachusetts court said:

"It has been urged with force on behalf of the insurer that, since the harm to the employee was not wholly the effect of the work, but came in large part from the previous weakened condition of the employee's

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heart, hence either there can be no award of compensation, or it should be restricted to that part of the injury which resulted directly from the work, and the part of the injury which flowed from the previous condition should be excluded. Even though the premise be sound, the conclusion does not follow. The act makes no provision for any such analysis or apportionment. It protects the 'employe.' That word is defined in part 5, § 2, as including 'every person in the service of another under any contract of hire' with exceptions not here pertinent. There is nothing said about the protection being confined to the healthy employee. The previous condition of health is of no consequence in determining the amount of relief to be afforded."

It is equally true that in our Compensation Law there is nothing that limits the provisions to "workmen" who were previously in sound condition of perfect health. C. S. § 6217, supra, applies to every "workman" who "receives personal injury by accident arising out of and in the course of any employment" covered by the Compensation Law, and C. S. § 6321, provides that—

"'Workman' is used as synonymous with 'employee' and means any person who has entered into the employ of, or works under contract of service or apprenticeship with an employer."

Following substantially the conclusion of the court in Madden's Case, it may truly be said that our Compensation Law makes no distinction between wise and foolish, skilled and unskilled, healthy and unhealthy employees. All who are rightly described as "workmen" or "employees" come within the act.

The judgment of the district court is affirmed, with costs to respondent.

Rice, C. J., Budge and McCarthy, JJ., and McNaughton, District Judge, concur.

CITY OF TAYLORVILLE v. CENTRAL ILLINOIS PUBLIC SERVICE CO. (No. 14291.)

(Supreme Court of Illinois. Dec. 22, 1921. Rehearing Denied Feb. 10, 1922.)

133 Northeastern Reporter, 720.

CONSTITUTIONAL LAW—MASTER AND SERVANT—COMPENSATION ACT PROVISION FOR SUBROGATION CONSTITUTIONAL.

Workmen's Compensation Act, § 29, providing that, where injury for which compensation is payable was not caused by employer's negligence, but by another who is bound by the act, the right of the employee shall be subrogated to his employer, who may sue to recover an amount not exceeding the compensation payable, does not authorize an action for the amount of the award, but authorizes an action for damages for the wrongful act in which recovery is limited to the amount payable under the act. and as so construed is not unconstitutional as denying due process of law.

(For other cases, see Master and Servant, Dec. Dig. § 347.)

Appeal from Circuit Court, Christian County; William B. Wright, Judge.

Action by the City of Taylorville against the Central Illinois Public Service Company. From judgment for plaintiff, defendant appeals. Reversed and remanded.

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Vause & Kiger, of Mattoon (Hogan & Reese, of Taylorville, of counsel), for appellant.

C. A. Prater, City Atty., and Leslie J. Taylor, both of Taylorsville, for appellee.

CARTWRIGHT, J. The appellee, the city of Taylorville, recovered a judgment in the circuit court of Christian county against the appellant, the Central Illinois Public Service Company, for $1,115.16, which the appellee had paid to its employee, John O'Brien, under the Workmen's Compensation Act (Hurd's Rev. St. c. 48, §§ 126–152i), or an injury which arose out of and in the course of his employment by the appellee, which injury was alleged to have been caused by negligence of appellant. An appeal was prayed to this court and was allowed for the reason that the validity of a statute is involved.

The suit was brought under the following provision of section 29 of the Workmen's Compensation Act:

"Where an injury or death for which compensation is payable by the employer under this act, was not proximately caused by the negligence of the employer or his employees, and was caused under circumstances creating a legal liability for damages in some person other than the employer to pay damages, such other person having also elected to be bound by this act, or being bound thereby under section three (3) of this act, then the right of the employee or personal representative to recover against such other person shall be subrogated to his employer and such employer may bring legal proceedings against such other person to recover the damages sustained in an amount not exceeding the aggregate amount of compensation payable under this act, by reason of the injury or death of such employee." Laws of 1917, p. 509.

The declaration alleged that on July 10, 1919, John O'Brien was employed by the plaintiff in the street department, under the general direction of the superintendent of streets; that the defendant was engaged in the business of generating and distributing electric currents in the city and occupied streets and alleys for that purpose and for the support and maintenance of electric wires; that, through negligence of the defendant in failing to remove from the street a broken wire charged with electricity, O'Brien, while engaged in his duties and in the exercise of due care and caution for his own safety, came in contact with the wire and became shocked, burned, and blistered to such an extent that he lost the use of two fingers of his right hand; that O'Brien filed an application with the Industrial Commission for compensation under the Workmen's Compensation Act; that the plaintiff contested the application, and the Industrial Commission made an award to O'Brien of $12.05 per week for 93 weeks and 4 days, in addition to $339.25 previously paid by plaintiff, as compensation; that afterward, on petition of O'Brien, the Industrial Commission entered an order commuting the award to $777.51 in addition to the $339.25 already paid; that the plaintiff, the defendant, and O'Brien were all operating under the Workmen's Compensation Act; and that plaintiff paid the award.

On the trial evidence was given tending to prove each allegation of the declaration, and the question arose whether the amount paid by the plaintiff to O'Brien was the measure of damages for which the defendant was liable in consequence of its negligent act. The court held that it was, and that, if the plaintiff was entitled to recover, the statute fixed the amount of recovery. The validity of section 29 was challenged as a violation of section 2 of the Bill of Rights of the Constitution, which provides:

"No person shall be deprived of life, liberty or property, without due process of law."

The defendant attempted to raise a question of the amount of damages resulting from the alleged negligent act by cross-examination and

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by evidence on that subject, but the court sustained objections in each case. The court gave four instructions, in one of them reciting the portion of section 29 above quoted, and in all of them advising the jury that, if they found O'Brien was injured and suffered damages while in the exercise of due care and caution for his own safety and engaged in his duties as an employee of the plaintiff, and the proximate cause of his injury was negligence of the defendant, the plaintiff was entitled to recover the amount of compensation fixed by the Workmen's Compensation Act, and the jury should assess damages in the amount which the plaintiff had paid to O'Brien.

Counsel for both parties interpret section 29 as authorizing an action for the amount of an award made under the Compensation Act, and their arguments are devoted to the question whether such a provision violates the constitutional guaranty safeguarding property rights by providing that no person shall be deprived of the same without due process of law. As so interpreted the section would violate the constitutional provision. It is an essential of due process of law that every person whose property rights are to be affected shall have notice and an opportunity to be heard to defend, enforce, and protect his rights. The Workmen's Compensation Act makes no provision for notice to a third party nor duty nor opportunity to be heard or to contest the amount of compensation to be awarded, and the defendant had neither notice nor hearing before the administrative body that fixed the amount to be allowed. A statute providing that the defendant should pay a certain sum as damages for its negligent act, without notice or a hearing as to the amount of such damage, would violate the Constitution. Campbell v. Campbell, 63 Ill. 462; Gage v. City of Chicago, 225 Ill. 218, 80 N. E. 127; Hultberg v. Anderson, 252 Ill. 607, 97 N. E. 216; 6 R. C. L. 450; 12 Corpus Juris, 1195.

In cases where private rights alone are involved, courts of review ordinarily decide questions submitted by counsel and do not go outside of or beyond such questions; but this case involves the validity of a statute of general public interest, and it ought not to be decided on views of counsel which do not appear to be correct. We do not find in the act any warrant for saying that the judgment is to be for the amount of compensation awarded by the Industrial Commission to an injured employee. The action is not to enforce any liabilitiy of the employer to his employee created by the Workmen's Compensation Act, but, if the employer is not at fault, section 29 gives to him the right to maintain an action for damages resulting from the wrongful act of a third person. The Workmen's Compensation Act does not rest on the theory of negligence, but on the theory that injuries to workmen and death caused by accident in any business shall be regarded as a part of the expense of the business and be borne by the business. The Workmen's Compensation Act fixes arbitrary standards regardless of actual damage, and the section gives to the employer a right of action against a third party for the amount of damage resulting from the negligent act of such party, which is the same action which the employee would have had but for the prohibition of section 6 (Hurd's Rev. St. c. 48, § 131). Whether the language of the section concerning subrogation is accurate in view of section 6, which prohibits an action by the employee, so that he has no right of action to which the employer succeeds or in which he is substituted, the provision is plain that the employer shall have a right of action for negligence causing the injury or death of his employee. Section 6 prohibits an action by any employee within the provisions of the act, or any one dependent upon him, or his legal representatives, to recover damages for an injury. This was held in Keeran v. Peoria, Bloomington & Champaign Traction Co., 277 Ill. 413, 115 N. E. 636, to prohibit such action against a third party, and this question was considered and the decision adhered to in Friebel v. Chicago City Railway Co., 280 Ill. 76, 117 N. E. 467. The

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condition of section 29 is that there shall be a legal liability for damages in some person other than the employer to pay damages, in which case the employer may bring an action against such person to recover the damages sustained, in an amount not exceeding the aggregate amount of compensation payable under the act. The language of the act is, that the amount recovered shall not exceed the aggregate amount of compensation payable under the act; and necessarily that would be so, because the amount paid by the employer is the limit of the damages suffered by him, regardless of the amount of the actual damage, which may greatly exceed such sum. Proof of the award by the Industrial Commission is admissible, not to prove damages or fix the amount to be recovered but to establish a limit to the recovery. It was for the plaintiff to prove the facts creating a legal liability of the defendant for damages and the resulting damage, just as O'Brien would have been called on to make such proof if his right of action had not been transferred to the plaintiff, and the defendant had a right to contest the same. The rulings of the court during the trial and the instructions to the jury as to the law were wrong.

The judgment is reversed, and the cause remanded.

Reversed and remanded.

J. E. PORTER CO. v. INDUSTRIAL COMMISSION ET AL.
(No. 14105.)

(Supreme Court of Illinois. Dec. 22, 1921. Rehearing Denied Feb. 9, 1922.)

133 Northeastern Reporter, 652.

1. MASTER AND SERVANT—COMPENSATION ACT INCLUDES ALL EMPLOYEES IN EXTRAHAZARDOUS BUSINESS.

As to employers engaged in extrahazardous business, no distinction exists since the amendment of the Workmen's Compensation Act of 1917, between an employee doing extrahazardous work and one whose work is not extrahazardous.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

2. MASTER AND SERVANT—COMPENSABLE ACCIDENT MUST ORIGINATE IN RISK OF EMPLOYMENT.

There is no fixed rule for determining what in a given case constitutes risk of employment within the Compensation Act. but the facts must show that the accident had its origin in some risk of the employment.

(For other cases, see Master and Servant. Dec. Dig. § 371.)

3. MASTER AND SERVANT—BURDEN OF PROOF ON COMPENSATION CLAIMANT.

The burden of proof is upon the applicant to sustain the award for compensation by showing that the injury arose out of and in the course of the employment.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

4. MASTER AND SERVANT—COMPENSABLE INJURY PROVABLE BY CIRCUMSTANTIAL EVIDENCE.

Proof that an injury to a servant arose out of and in the course of the employment may be established by circumstantial evidence, from which an inference can logically be drawn.

(For other cases, see Master and Servant Dec. Dig. § 405[4].)

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5. MASTER AND SERVANT—COMPENSABLE INJURY QUESTION OF FACT.

Whether one going to his place of employment is in the line thereof, in the sense that an injury there received arises out of and in the course of that employment, depends on circumstances and is largely a question of fact..

(For other cases, see Master and Servant, Dec. Dig., § 375[2].)

6. MASTER AND SERVANT — INJURIES TO SALESMAN REPORTING SALES HELD COMPENSABLE.

Where a traveling salesman arrived at his home from business of his employer about 11:40 a. m., stopped for lunch, and started to walk to the employer's factory to report sales and settle up for the week, turn in expense account, collect his salary, and get instructions for the next week, and was injured by an automobile while boarding a street car, *held*, that his injuries arose out of and in the course of the employment, within the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

Error to Circuit Court, La Salle County; Edgar Eldredge, Judge.

Proceeding under the Workmen's Compensation Act by George W. Yentzer for compensation for injuries, opposed by the J. E. Porter Company. The circuit court confirmed the award, and the J. E. Porter Company brings error. Affirmed.

McDougall, Chapman & Bayne, Ottawa, for plaintiff in error.

Lester H. Strawn, of Ottawa, for defendant in error.

STONE, C. J. George W. Yentzer, defendant in error, was employed by plaintiff in error as a traveling salesman, and on October 13, 1917, was injured by an automobile while attempting to board a street car on his way to the office of plaintiff in error. The Industrial Commission, on application for compensation, awarded $171:50 for hospital and surgical services, $48 per month between October 20, 1917, and August 22, 1918, and a further sum of $48 per month for 26¼ months for 60 per cent. loss of use of defendant in error's left leg. His salary for the year prior to the injury was $1,800. The circuit court of La Salle county confirmed the award, and the Porter Company brings the case here by writ of error.

Plaintiff in error urged before the circuit court, and urges here, the setting aside of the award on the ground that the work of defendant in error as a traveling salesman was such that he did not come under the provisions of the Compensation Act, although it is admitted that his employer was engaged in a hazardous occupation; also that the injury did not arise out of and in the course of the employment.

[1] The first contention of plaintiff in error was considered by this court in Illinois Publishing & Printing Co. v. Industrial Com., 299 Ill. 189, 132 N. E. 511, and McNaught v. Hines (No. 13861) 133 N. E. 53, where it was held that, since the amendment of the Compensation Act of 1917 (Hurd's Rev. St. 1919, c. 48, §§ 126–152i), no distinction exists between an employee doing extrahazardous work and one whose work is not extrahazardous. That decision is controlling here, and the first contention of plaintiff in error cannot obtain.

It is contended that the injury did not arise out of or in the course of the employment of defendant in error. The testimony of defendant in error is that on October 13, 1917, he had been in Peoria and Streator, Ill., on the business of his employer and arrived at Ottawa, his home, about 11:40 a. m. on an interurban electric car. As the car passed near to his house, in the southern part of the city, he stopped there for his

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lunch and then started to walk to the factory, which is in the northeast part of the city. He states that his purpose in going to the factory was to settle up for the week, turn in his expense account, collect his salary, and get instructions for the following week. It appears that there is a bridge spanning the Illinois river between his home and the business section of the city; that this bridge is crossed by a street car track; that when he reached the middle of the bridge a street car came from the southeast, which he signaled to stop; that while this was not the usual stopping place the car did stop for him, and while crossing from the sidewalk to board the car he was struck by an automobile and seriously injured.

[2-4] Plaintiff in error contends that the above facts, even if proven, do not show that the accident arose out of and in the course of the employment. There is no fixed rule for determining what in a given case constitutes a risk of the employment. The facts, however, must show that the accident in which the injury is received had its origin in some risk of the employment. City of Chicago v. Industrial Com., 292 Ill. 406, 127 N. E. 49; United Disposal & Recovery Co. v. Industrial Com., 291 Ill. 480, 126 N. E. 183. In the last case cited the general rule is laid down that—

"It is not sufficient that the injury occurs in the course of the employment; it must also arise out of the employment."

The burden of proof is upon the applicant to sustain the award for compensation by competent evidence showing that the injury arose out of and in the course of the employment. Hines v. Industrial Com., 295 Ill. 231, 129 N. E. 175. Such proof may be established by circumstantial evidence from which an inference can logically be drawn. Vulcan Detinning Co. v. Industrial Com., 295 Ill. 141, 128 N. E. 917. The testimony of the defendant in error tends to show that his services for the day had not closed; that by reason of his coming into the city from the south it was convenient for him to stop at his home for his midday lunch on his way to the factory rather than to secure it at some public eating house. It appears that the street car runs near his home in that portion of the city, extending across the city in the direction of the factory of plaintiff in error; that as soon as he had had his lunch he started for the office for the purpose of reporting sales, receiving instructions for the following week, and receiving his salary.

[5, 6] Whether one en route to his place of employment is in the line of his employment. in the sense that an injury received while so en route arises out of and in the course of that employment, depends upon the circumstances of each case and is largely one of fact. Wabash Railway Co. v. Industrial Com., 294 Ill. 119, 128 N. E. 290. The rule is that the accident must be suffered in the course of the employment, in the doing of something which the employee may reasonably do at any time during which he is employed and at a place where he may reasonably be during that time to do that thing. Dietzen Co. v. Industrial Board, 279 Ill. 11, 116 N. E. 684, Ann. Cas. 1918B, 764; Central Garage v. Industrial Com., 286 Ill. 291, 121 N. E. 587. It was held in Walsh Teaming Co. v. Industrial Com., 290 Ill. 536, 125 N. E. 331, that the act of obtaining a receipt was in the line of the employment or an incident of the same, and that an injury received by an employee while engaged in securing the receipt arose out of and in the course of his employment. Here a fair construction of the employee's testimony is that his services for the week had not ended; that he was on his way to the factory to report his sales, receive instructions as to his duties for the next week, and collect his salary. We are of the opinion that such shows him to have been within the line of his employment. Schweiss v. Industrial Com., 292 Ill. 90, 126 N. E. 566. The fact that he found it convenient on his way to the office to get his lunch at his home and stopped there for that purpose is not

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sufficient, of itself, to take the accident out of the provisions of the Workmen's Compensation Act. There was competent evidence in the record upon which to base the finding of the commission.

The judgment of the circuit court confirming the award is affirmed. Judgment affirmed.

S. J. PEABODY LUMBER CO. ET AL. v. MILLER ET AL. (No. 11150.)

(Appellate Court of Indiana, Division No. 1. Jan. 4, 1922.)

133 Northeastern Reporter, 591.

1. MASTER AND SERVANT.—COMPENSATION AWARD HELD NOT INVALIDATED BY WANT OF FINDING ON ISSUE OF MISCONDUCT.

The Industrial Board's failure to find specifically whether decedent was guilty of willful misconduct charged by his employer did not invalidate the award; the failure to find an essential fact being the equivalent of finding against the party having the burden of establishing such fact.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

2. MASTER AND SERVANT — CUMULATIVE TESTIMONY IN COMPENSATION CASE HELD PROPERLY EXCLUDED.

In view of Industrial Board rule 33, providing that the board may refuse to hear more than three witnesses produced by the same party to prove the same fact, the Board did not err, after having heard the testimony of three witnesses on the issue of willful misconduct, in excluding the testimony of a fourth witness, by whom it was sought to prove substantially the same facts.

(For other cases, see Master and Servant, Dec. Dig. § 415.)

Appeal from Industrial Board.

Proceedings for compensation under the Workmen's Compensation Act (Acts 1915, c. 106) by Mary B. Miller and others as dependents of Frank N. Miller, employee, opposed by S. J. Peabody Lumber Company, employer, and another. From an order of compensation, the employer appeals. Affirmed.

Howe S. Landers, of Indianapolis, for appellant.

REMY, J. Appellees, as dependents of Frank N. Miller, who lost his life while in the employment of appellant S. J. Peabody Lumber Company, filed with the Industrial Board their application for compensation. Appellants filed a special answer, charging willful misconduct. A hearing resulted in a finding by the Board that—

"On January 29, 1920, Miller was an employee of S. J. Peabody Lumber Company at an average weekly wage of $20.20; that on said date he was killed as a result of a personal injury of which defendant had knowledge, which was caused by an accident arising out of and in the course of his employment."

[1] It is the contention of appellants that, inasmuch as there was a plea of willful misconduct, and there was a failure on the part of the Board to find specifically that decedent was or was not guilty of willful

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misconduct, the finding does not sustain the award. This contention is without merit. It has many times been held, and is the law, that the failure of the Industrial Board to find an essential fact is the equivalent of a finding against the party having the burden of establishing such fact. Raynes v. Staats-Raynes Co., 68 Ind. App. 37, 119 N. E. 809; Chicago & Erie, etc., Co. v. Kaufman, 133 N. E. 399.

[2] A further contention of appellants is that the Board erred in the exclusion of certain testimony. Rule 33 of the Industrial Board provides that the Board "may refuse to hear more than three witnesses produced by the same party to prove the same fact." At the hearing, the Board, having heard the testimony of three witnesses on the issue of willful misconduct invoked the rule and excluded the testimony of a fourth witness by whom it was sought to prove substantially the same facts as had been testified to by each of the three witnesses previously heard. In this ruling there was no error. See Northern Ind. Gas. Co. v. Pietzvak, 69 Ind. App. 24, 118 N. E. 132.

The award is sustained by sufficient evidence.

Affirmed.

AMERICAN COAL MINING CO. v. LEWIS. (No. 10927.)

(Appellate Court of Indiana. Division No. 1. Jan. 25, 1922.)

133 Northeastern Reporter, 846.

5. MASTER AND SERVANT—REQUISITES OF ELECTION UNDER COMPENSATION ACT STATED.

One suing for death of servant on theory that defendant rejected Workmen's Compensation Act, and Acts 1917, c. 165, § 2, as provided in Acts 1915, c. 106, §§ 3, 4, cannot recover unless he shows that defendant filed with the Industrial Board a notice of election to reject the provisions of the act. that such filing was made prior to the accident, and that such notice was placed in a conspicuous place in the plant or it was served upon decedent personally.

(For other cases, see Master and Servant, Dec. Dig. § 358.)

Action by Harry R. Lewis, administrator de bonis non of James Elmer Cross, deceased, against the American Coal Mining Company. Judgment for plaintiff, and defendant appeals. Reversed, with instructions.

W. R. Gardiner, C. K. Tharp, C. G. Gardiner and Robert Woodson Tharp. all of Washington, Ind., and Hays & Hays, of Sullivan, for appellant.

Harry R. Lewis, of Vincennes, and Alvin Padgett, of Washington, Ind., for appellee.

BATMAN, P. J. This action is based on the alleged negligence of appellant, which it is claimed caused the death of appellee's decedent. The complaint is in two paragraphs, both of which are drawn under the Employers' Liability Act of 1911 (Laws 1911, c. 88). The first paragraph alleges in substance. among other things, that on December 19, 1915, appellant was engaged in mining coal, and had as a part of its plant used for that purpose a large amount of machinery, equipment, and appliances,

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upon the surface of the earth about its said mine, which was kept in repair by appellant's employees; that on said day appellee's decedent was in the employ of appellant. and it was his duty, as such employee, "to go from place to place upon defendant's said premises to inspect the machinery and equipment used by said defendant in carrying on its said business, and to inspect any repairs being made to said machinery or equipment"; that on said date some of the employees of appellant were engaged in making repairs by placing a false or dumping bottom in one of its hoisting cages; that in making said repairs said employees detached certain parts of the dumping apparatus connected with said hoisting cage, and failed to secure them after being so detached. but carelessly and negligently left them in such position that they were liable to fall and injure appellant's employees as the proceeded with their work; that while said parts were in said insecure condition said decedent, in the discharge of his duties, went to inspect the work being done by appellant's said employees in making said repairs, and while so doing said unsecured parts of said dumping apparatus fell on said decedent and killed him; that the negligence of appellant's said employees in failing to properly secure said parts of said dumping apparatus was the direct, proximate and sole cause of the death of said decedent; that more than 30 days prior to the decedent's said injuries appellant duly excepted itself from the operation of the Indiana Workmen's Compensation Act (Laws 1915, c. 106) by serving printed notice, in substantially the form prescribed by the Industrial Board, personally on appellee's decedent, and by posting the same in a conspicuous place at its said mine. The second paragraph of the complaint is substantially the same as the first, except that it charges that the detached parts of the dumping apparatus, connected with the hoisting cage being repaired, could have been so chained or otherwise fastened that they would not have fallen, and that it was appellant's duty to furnish chains or other means for making said detached parts secure, in order that said decedent's working place might be made safe; that appellant negligently failed to furnish such chains or other means for said purpose, and that by reason of such negligence said detached parts of said dumping apparatus fell upon said decedent and killed him; that appellant's said negligence was the direct, proximate, and sole cause of the death of said decedent. Appellant filed successive motions to require appellee to make his first paragraph of complaint more specific, and to state facts to sustain certain conclusions stated therein, each of which was overruled. It filed separate demurrers to each of said paragraphs of complaint. which were also overruled. The complaint as a whole was answered by a general denial. A special answer was filed to the first paragraph of the complaint which alleged, in substance, that the decedent was appellant's foreman and vice principal, and as such had in his charge and under his control the workmen engaged in making the repairs described; that it was their duty to obey, and they did obey, the decedent in making such repairs; that in the performance of said work he was the sole representative of appellant, and that the same was performed solely in accordance with the orders and directions given by him; and that, if there was any negligence in the performance thereof, resulting in his injuries, it was solely his own negligence. To this affirmative answer a reply in general denial was filed. The cause was submitted to a jury for trial. resulting in a verdict and judgment in favor of appellee. Appellant filed a motion for a new trial, which was overruled, and it is now prosecuting this appeal on an assignment of errors, which requires a determination of the questions hereinafter considered.

[1] Appellant's assignment of errors is based in part on the actions of the court in overruling its motions to require appellee to make the first paragraph of his complaint more specific in certain particulars, and to require him to state facts to sustain certain conclusions alleged therein. The overruling of the motion first named is not reversible error, as it

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does not appear that appellant was harmed thereby. Leimgruber v. Leimgruber (1909) 172 Ind. 370, 86 N. E. 73, 88 N. E. 593; Board, etc., v. State ex rel. (1913) 179 Ind. 644. 102 N. E. 97; Kinmore v. Cresse (1913) 53 Ind. App. 693, 102 N. E. 403; Adams, etc., Co. v. Welborn (1915) 59 Ind. App. 330, 108 N. E. 163, 109 N. E. 420.

[2] Appellant has waived any error based on the action of the court in overruling the second motion named by failing to make any reference thereto in that part of his brief devoted to the statement of propositions or points.

[3, 4] Appellant contends that the court erred in overruling its demurrer to each paragraph of the complaint. It cites the clause quoted above, with reference to the duties of appellee's decedent, which appears in each paragraph of the complaint, and asserts that said clause clearly shows that it had delegated to said decedent the duty of superintending the work of repairing the cage in question. and had thereby made him its vice principal in the performance of said work; that by reason of that fact it was his duty to see that proper equipment was supplied to carry on the work safely, and if it was not so conducted it was his duty to correct the method of performance; that under these circumstances any failure in this regard on his part would not constitute negilgence with which it would be chargeable in this action. Appellant's conclusion would be correct if it could be held that the paragraphs of complaint show that appellee's decedent was a vice principal as appellant contends. However, we cannot agree that said paragraphs show such fact. They merely allege that it was the duty of said decedent "to go from place to place upon appellant's said premises to inspect the machinery and equipment used by said defendant in carrying on its said business, and to inspect any repairs being made to said machinery or equipment." There are no allegations that it was his duty to superintend or direct the work in any way or that he had any authority in that regard, and there are no facts alleged from which such duty or authority can be properly inferred. Therefore we cannot apply the rule for which appellant contends. Neither paragraph expressly alleges that appellant had filed notice of its rejection of the provisions of the Workmen's Compensation Act with the Industrial Board, but such filing is implied in the conclusion alleged in that regard, which is sufficient, since appellant has waived any error in overruling its motion to have facts stated to sustain such conclusion. In view of the provisions of the Employers' Liability Act, under which this action is prosecuted. which abrogates the common-law rule of assumed risks, in so far as it applies to the particular risk of injury through the negligence of a fellow servant, we find no sufficient reason on which to base a conclusion that the court erred in overruling the demurrer to either paragraph of the complaint. J. Wooley Coal Co. v. Tevault (1917) 187 Ind. 171, 118 N. E. 921, 119 N. E. 485; Vandalia R. Co. v. Fry (1918) 70 Ind. App. 85, 123 N. E. 124.

[5] Appellant contends that the court erred in overruling its motion for a new trial. This contention must be sustained on the ground that the verdict is not sustained by sufficient evidence for the following reasons: The Workmen's Compensation Act makes the following provisions:

"Section 2. From and after the taking effect of this act, every employer and every employee, except as herein stated, shall be presumed to have accepted the provisions of this act * * * unless he shall have given prior to any accident resulting in injury or death notice to the contrary in the manner herein provided. This act shall not apply to railroad employees engaged in train service." Acts 1917, p. 673.

"Sec. 3. * * * The notice of exemption * * * shall be given thirty days prior to any accident resulting in injury or death. * * * The notice shall be in writing or print in a substantial form prescribed by the Industrial Board and shall be given by the employer by posting the same in a conspicuous place in the plant. shop, office, room or place where

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the employee is employed; or by serving it personally upon him; * * * a copy of the notice in prescribed form shall also be filed with the Industrial Board." Acts 1915, p. 392.

"Sec. 4. Every contract of service between any employer and employee covered by this act * * * shall be presumed to have been made subject to the provisions of this act; unless either party shall give notice, as provided in section 3, to the other party to such contract that the provisions of this act other than sections 10, 11 and 67 are not intended to apply." Acts 1915, p. 393.

By virtue of said sections 2 and 4 a presumption existed that appellant and appellee's decedent, at the time he received his alleged injuries, were bound by the provisions of the Workmen's Compensation Act, and such presumption continues to exist unless the evidence shows that one of them prior to the accident in question had taken the necessary steps to be exempted therefrom as provided in said section 3. There is no claim that appellee's decedent had taken such steps. and hence both must be held to be bound thereby unless the evidence shows that appellant had taken such steps. An examination of the record fails to disclose that such steps had been taken. It appears from the evidence that appellee's decedent had been in appellant's employ for more than two years, and that the latter had filed with the Industrial Board a notice of its election to reject the provision of the Workmen's Compensation Act, but it is not shown that such filing was made prior to the accident which resulted in the former's death, or that such notice was posted in a conspicuous place in the plant, shop, office, room or place where appellee's decedent was employed, or that said notice was served upon him personally, as the statute requires. By reason of these facts the presumption that the parties are bound by the provisions of the Workmen's Compensation Act still exists, and a verdict in favor of appellee cannot be sustained. Appellant makes the further contention in support of the alleged error under consideration that the evidence shows that appellee's decedent received his alleged injuries as the proximate result of his failure to discharge the duties which he owed it as a vice principal in charge of the repairs being made. There is evidence tending strongly to sustain this contention. but, as the judgment must be reversed for the reasons indicated, we need not consider whether there is any evidence which would have warranted the jury in finding the contrary.

[6-8] Notwithstanding the conclusion reached, we deem it advisable to consider other alleged errors, since the cause must be remanded for a new trial. The court, on the trial of the cause, gave the jury a number of instructions on its own motion, among which are Nos. 13, 15, and 16. Said instruction No. 13 informed the jury, in effect. that if it found that appellee's decedent was a construction foreman,, and the vice principal of appellant, in making the repairs in question, as it claimed, then "the plaintiff would not be entitled to recover of the defendant for the death of Cross unless said Cross did something beyond the scope of the authority vested in him by the defendant as construction foreman, which will be explained to you in later instructions." The court evidently undertook to make this explanation in said instructions numbered 15 and 16, which probably led the jury to believe that, if they found that appellee's decedent was appellant's construction foreman, with such authority as to make him its vice principal in the performance of said repair work, but that said decedent had theretofore personally assisted its other employees from time to time in making repairs, with appellant's knowledge and consent, and did assist in making the same on this occasion, and was injured in the manner alleged, the fact that he was such construction foreman would not relieve appellant from liability in this action. To so instruct the jury was clearly error. Although this action is prosecuted under the Employers' Liability Act of 1911, it must be grounded on negligence, as other-

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wise no cause of action would exist. Cleveland, etc., R. Co. v. Ropp (Sup.) 129 N. E. 475. The negligence to support it must be found in the violation of some duty which appellant owed said decedent. While it is the rule that an employer is bound to use ordinary care to make and keep the place in which his employees are required to work safe. and to use like care to furnish such tools and appliances as will enable his employees to perform their work safely, such rule has no application between a master and a servant employed by him to perform the duty which he owes to his other servants in this regard, where such servant so employed is injured because of a failure on his part to discharge such duty. Duffy v. Hobbs, etc., Co., 166 Cal. 210, 135 Pac. 1093, L. R. A. 1916F. 806; Sible v. Wells, etc.. Co., 148 Ill. App. 109; Baker v. Empire, etc., Co., 102 App. Div. 125, 92 N. Y. Supp. 355; Cline v. Southern R. Co., 101 S. C. 493, 86 S. E. 17; Texas City, etc., v. Winters (Tex. Com. App.) 222 S. W. 541; Conway v. Chicago, etc:. R. Co., 103 Iowa, 373, 72 N. W. 543; Conroy v. Inhabitants, etc., 158 Mass. 318, 33 N. E. 525; Sloss-Sheffield, etc., Co. v. Stapp, 195 Ala. 340, 70 South. 267; Erskine v. Chino, etc., Co. (C. C.) 71 Fed. 270. One reason for holding that such general rule has no application under the facts stated is that the master, having engaged a particular servant to discharge the duties owing by him to his other servants, ought not be required to engage still another servant to see that the particular servant discharges his duty in order to avoid a liability should he be injured because of his failure to perform the specific duties for which he was engaged. In reaching our conclusion with reference to the instructions under consideration, we have not been unmindful of the fact that the two instructions last named are based to some extent on a condition that the jury found that said decedent, although he was appellant's vice principal in making said repairs, had theretofore personally assisted its other employees, from time to time, in making repairs, with appellant's knowledge and consent, and did assist on the occasion in question. This fact, however, would not relieve appellee's decedent from the duty which he owed appellant as its vice principal, or create a liability in his favor if injured because such duty had not been performed. True, a servant may act in a dual capacity, and be regarded as a vice principal in the performance of certain acts and a mere fellow servant of other employees in the performnce of other acts, but we know of no authority which holds that a right of action exists in his favor, if injured while acting in the latter capacity, because he had failed to perform a duty which he owed his master as vice principal. The effect of the latter relationship might relieve the master from liability under certain circumstances, as shown by the cases cited by appellee, but it cannot give a right of action to a vice principal for an injury resulting from his failure to discharge a duty which he owes as such. Appellee contends, however, that, since each paragraph of the complaint alleges, and the evidence shows, that appellant had rejected the provisions of the Workmen's Compensation Act, it cannot defend on the ground that his decedent was negligent. But, if it be conceded that such defense is not available to appellant, it does not follow that appellee can recover in this action without showing that appellant failed to discharge a duty which it owed his decedent. This burden had to be discharged by appellee before appellant was required to offer any defense, and, if appellee failed to discharge the same, the question of what defense would have been available to appellant had a prima facie case been made against it is wholly immaterial. For the reasons stated, we hold that the court erred in giving each of said instructions.

Instructions Nos. 3, 5, and 8, given at the request of appellee, are clearly erroneous in the following particulars: No. 3 authorized a recovery, although the jury found that appellee's decedent was appellant's vice principal in making the repairs in question, and received his alleged injuries by reason of his failure to discharge his duties as such. No. 5

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would permit a recovery although it was the duty of an injured employee, as a vice principal of his employer to provide the particular device or appliance which was necessary to make his working place safe. No. 8 would permit a recovery by a vice principal, if he is injured while engaged in performing duties, other than those of vice principal, although his failure to discharge his duties, as such was the proximate cause of his injuries.

[9] Instruction No. 14, given at the request of appellee, contains the following:

"Where the duty is one owing by the master, and he intrusts its performance to an agent, such agent's negligence is that of a master, as the master is charged with the *imperative duty* of providing safe and suitable appliances and a safe and suitable place in which to work."

This statement renders said instruction erroneous, as a matter is not charged with the *imperative duty* named. His duty with reference to furnishing his servants safe and suitable places and appliances in which and with which to work is limited to the exercise of ordinary or reasonable care in that regard. Brazil, etc., Co. v. Young (1888) 117 Ind. 520, 20 N. E. 423; Hoosier, etc., Co. v. McCain (1892) 133 Ind. 231, 31 N. E. 956; Henry v. Prendergast (1912) 51 Ind. App. 43, 94 N. E. 1015; Southern R. Co. v. Ellis (1912) 53 Ind. App. 34, 101 N. E. 105.

The several errors committed by the court in instructing the jury would require a reversal of the judgment, even if it could be said that proper proof had been made that appellant had rejected the provisions of the Workmen's Compensation Act, as alleged. For the reasons stated, the judgment is reversed, with instructions to sustain appellant's motion for a new trial and for further proceedings consistent with this opinion.

McDOWELL ET AL. v. DUER. (No. 11140.)

(Appellate Court of Indiana. Jan. 26, 1922.)

133 Northeastern Reporter, 839.

1. MASTER AND SERVANT — INDEPENDENT CONTRACTOR DOCTRINE NO PART OF WORKMEN'S COMPENSATION ACT.

The doctrine of "independent contractor" is peculiar to the law of negligence, and has no proper place in the law of workmen's compensation.

(For other cases, see Master and Servant. Dec. Dig. § 367.)

3. MASTER AND SERVANT — EMPLOYER LIABLE FOR COMPENSATION FOR INJURIES IN SERVICE OF THIRD PERSON.

Where servants of one master are working for another, as where one hires out teams, wagons, and drivers, the fiction that such employees are the servants of the latter while engaged in the work has no place in the administration of the Workmen's Compensation Act, and the employees must look to the former for their compensation.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

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4. MASTER AND SERVANT—RELATION QUESTION OF FACT UNDER COMPENSATION ACT.

Whether an injured worker is an employee or a contractor is a question of fact for the Industrial Board under the Workmen's Compensation Act to be determined from the evidence.

(For other cases. see Master and Servant, Dec. Dig. § 417[7].)

5. MASTER AND SERVANT — FINDING OF EMPLOYMENT WITHIN COMPENSATION ACT SUSTAINED.

Finding that one employed to fell trees and to cut them into logs for $2.50 per thousand was an employee, within the Workmen's Compensation Act, and not a contractor, *held* warranted by the evidence.

(For other cases, see Master and Servant, Dec. Dig. § 405[2].)

7. MASTER AND SERVANT — WORKMEN'S COMPENSATION ACT DEFINING "EMPLOYEE" LIBERALLY CONSTRUED.

In construing the legislative definition of "employee" in the Workmen's Compensation Act a measure of liberality should be indulged in to the end that in doubtful cases an injured workman or his dependents may not be deprived of benefits of humane provisions of the compensation plan.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

Enloe, J., dissenting.

Appeal from Industrial Board.

Proceeding by Almeda Duer under the Workmen's Compensation Act to obtain compensation for the death of her husband, Charles Duer, opposed by Frank McDowell and others. doing business in the firm name of the Bluffton Hoop Company, the employer, and the insurance carrier. There was an award of compensation and the employer and insurance carrier appeal. Affirmed.

Everett W. Trook and Joseph W. Hutchinson, both of Indianapolis, for appellants.

Dore B. Erwin, of Decatur. for appellee.

DAUSMAN, C. J. The appellants are partners doing business in the firm name of Bluffton Hoop Company. One Charles Duer, while cutting timber for appellants, was injured by a falling tree, and died from the effects thereof a few days later. and this appeal is from an award of compensation to the appellee as his widow. The undisputed facts bearing on the controversy are as follows:

The hoop company had a manufacturing plant at Decatur, Ind. It had in its employ one Franks, whose business was to buy timber for the company and to employ men to cut and haul it. In February, 1920, Franks purchased some timber for the company in the community where Duer resided. Franks asked Duer if he could cut the timber, and Duer said he could. They agreed on the price to be paid for the cutting, viz. $2.50 per thousand. The quantity of timber was about 10,000 feet. Franks gave Duer specifications, measurements, and dimensions. and told him the length in which he wanted the timber cut. Duer's regular business was farming and also contracting for the construction of ditches and cement work. Duer furnished his own tools for cutting timber, and he engaged his son to help him do that work. Franks had control over the work, as to how the timber should be cut, and authority to see that it was cut according to specifications.

The company reported the accident to the Industrial Board before Duer died, and also made a report to the insurance carrier. The com-

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pany, in its report to the Industrial Board, consistently and throughout the document referred to Duer as its employee. The company bought timber at various places. It usually had two regular cutters at each place. The company's plan was to have a regular set of cutters; but sometimes it would cut timber in localities where it was hard for its men to go, and in such cases, or in case of a small job, it would pick up some one locally. At times when the factory was shut down the company would take men from the mill to the woods and have them cut. The company did not have any distinct understanding with any of its cutters that they were to do a certain amount of work or to do it in a certain way—only as to specifications, and not as to time.

The ultimate question to be determined is whether the Industrial Board was justified in finding that Duer was an employee. The appellant's contention is that Duer was not an employee, but that in truth he was an "independent contractor." In view of the evidence, it is certain that Duer was neither a trespasser nor a mere volunteer, and that he must have been either an employee or a contractor. It clearly appears from the Workmen's Compensation Act that the Legislature has recognized the distinction between an employee and a contractor. Acts 1915, p. 395, § 14, as amended, Acts 1919. p. 159. The concepts denoted by the words "employee" and "contractor" are therefore so related that we will consider the contention in its dual aspect.

In order that we may intelligently pursue our inquiry we must have an accurate conception of the significance or import of the terms "employee" and "contractor."

The legislative definition of "employee" is:

"Every person * * * in the service of another under contract of hire or apprenticeship, written [express] or implied."

The co-ordinate legislative definition of "employer" is:

"Any individual, firm, association or corporation * * * using the services of another for pay." Acts 1919, p. 175.

In the definition of "employee" the words "in the service of another" are the equivalent of "working for another"; and in the definition of "employer" the words "service" is the equivalent of "labor."

The general meaning of the word "contractor" is shown by the following definition:

"One who contracts; one of the parties to a bargain; one who covenants to do something for another." Webster's Dic.; Cent. Dic.

The specific meaning of the word "contractor" differs materially from its general meaning, as shown by the following definitions:

"Specifically, one who contracts to perform work on a rather large scale, at a certain price or rate, as in building houses or making a railroad." Webster's Dic.

"Specifically, one who contracts or covenants, either with a government or other public body or with private parties, to furnish supplies, or to construct works or erect buildings, or to perform any work or service, at a certain price or rate; as a paving contractor; a labor contractor." Cent. Dic.

The word "contractor" is sometimes used to denote a permanent occupation or business, as evidenced by the following:

"The term 'contractor' is applicable to all persons following a regular independent employment, in the course of which they offer their services to the public to accept orders and execute commissions for all who may employ them in a certain line of duty, using their own means for the purpose and being accountable only for final performance." Cooley. Torts, p. 1098.

See Shearman & Redfield, Negligence, § 164.

[1] The doctrine of "independent contractor" is peculiar to the law of negligence, and we are not aware that it is appropriate to any other

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branch of the law. Certainly it has no proper place in the law of workmen's compensation. We will eliminate that term, therefore, from further consideration.

[2, 3] The relation of employer and employee is contractual. It is created in every instance by a contract, express or implied. Rogers v. Rogers, 70 Ind. App. 659. 122 N. E. 778; Nissen v. Miller, 125 N. E. 652. There is an apparent exception to that statement. To illustrate: Where A. hires out his teams, wagons, and drivers to B. to do hauling or other work for B., and while doing the work B. has the right to control the working place and the drivers, it is commonly said in negligence cases that the drivers are the servants of B. while so engaged in his work. But in such cases the relation of master and servant is constructive, not real. It is a fiction resorted to by the courts to enable them with greater ease and facility to apply the law of negligence, especially the rule of respondeat superior. In truth, the relation of employer and employee continues to exist between A. and the team drivers; and under the Workmen's Compensation Act a team driver, receiving an injury by accident while doing B.'s work, must look to A. alone for compensation. The fiction utilized in the law of negligence has no place in the administration of the Workmen's Compensation Act. Rogers v. Rogers, 70 Ind. App. 659, 122 N. E. 778; Rongo v. Waddington, 87 N. J. Law, 395, 94 Atl. 408; Kirkpatrick v. Industrial Accident Commission, 31 Cal. App. 668, 161 Pac. 274.

[4] Having in mind the foregoing definitions, how was the Industrial Board to determine whether Duer was an employee or a contractor? The proposition must be regarded as settled that whether Duer was an employee of the hoop company at the time he received the fatal injury was a question of fact for the Industrial Board, to be determined from the evidence. Columbia, etc.. Co. v. Lewis, 63 Ind. App. 386, 115 N. E. 103; Id., 65 Ind. App. 339, 116 N. E. 1; Zeitlow v. Smock, 65 Ind. App. 643, 117 N. E. 665; Sugar Valley Coal Co. v. Drake, 66 Ind. App. 152, 117 N. E. 937; Mobley v. Rogers, 68 Ind. App. 308, 119 N. E. 477; Muncie F. & M. Co. v. Thompson, 70 Ind. App. 157, 123 N. E. 196; Nissen T. & S. Co. v. Miller, 125 N. E. 652; Coppes Bros. & Zook v. Pontius, 131 N. E. 845; Miller v. C. & W. Kramer Co., 10 N. & C. C. A. 1215.

[5] Since whatever relation existed between the company and Duer was created by their contract, naturally we must look to the contract itself, as disclosed by the evidence, to find that relation. They made an express contract. Now, what do we know about that contract? Merely this: That it was a contract whereby Duer agreed to fell trees and to cut them into logs, and whereby the hoop company agreed to pay him therefor at the rate of $2.50 per thousand. That is all the Industrial Board knew about their contract, and all we know about it. The timber on which Duer was bestowing his labor was the property of the hoop company; and, for aught that appears from the evidence. it had complete dominion over its own property. All that Duer agreed to give to the hoop company, as the consideration for his pay, was his services; and all that the hoop company expected to receive, or could receive. from him, as the thing for which it agreed to pay, was his services. The evidence. then, tends fairly to bring the hoop company fully within the legislative definition of "employer," and to bring Duer fully within the legislative definition of "employee," rather than within the specific definition of "contractor." It is a legitimate conclusion, therefore, that Duer was in the service of the hoop company under a contract of hire; that the hoop company was using the services of Duer for pay; and that their contract was a contract of employment which carried with it the obligation to pay compensation. Acts 1915. p. 393, § 4; Acts 1919, p. 175, § 76, clause (b). Perhaps it should be noted that Duer never held himself

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out to the public as a contractor in the line of work he was doing for the hoop company. It is clear therefore that the board was justified in finding that the hoop company and Duer were within the scope of the compensation plan as ordained by the Legislature. It is entirely reasonable to say that at the time of his injury Duer was not engaged in an independent employment—was not following an independent business of his own, but that on the contrary he was identified with the working force of the hoop company, and therefore the industry in which he was employed should be liable for compensation.

[6] It should be noted that, from the report of the accident which the hoop company made to the Industrial Board, it appears that the company regarded Duer as its employee and that it understood the contract to be a contract of employment within the scope of the compensation statute. Of course, that admission is not conclusive; but it should be given its proper weight in determining the effect of the contract. Hege & Co. v. Tompkins, 69 Ind. App. 273, 121 N. E. 677.

[7] It may be well also to state that this court is committed to the proposition that in construing the legislative definition of "employee" a measure of liberality should be indulged in, to the end that in doubtful cases an injured workman or his dependents may not be deprived of the benefits of the humane provisions of the compensation plan. Columbia. etc., Co. v. Lewis, 63 Ind. App. 386, 115 N. E. 103; In re Duncan, 127 N. E. 289. Nor should those intrusted with the administration of the compensation law be wholly unmindful of the interest of the public therein.

The award is affirmed.

ENLOE, J. (dissenting). I cannot give my assent to the reasoning nor to the result reached in the majority opinion in this case. In that opinion the terms "contractor" and "independent contractor" are practically shorn of all their meaning. They are limited to specific contracts to do specific work. The entire matter must be definite and certain. I also think that the law as applied to independent contractors should not be limited merely to the law of negligence, and that it has its proper place in the application of the compensation laws. It should not, as stated in the majority opinion, be eliminated from consideration.

In this case Duer agreed to furnish his own tools and cut the timber according to measurements and dimensions given to him, at $2.50 per thousand feet. What these tools were we do not know. The contract did not specify the tools to be used. and so far as it provisions are concerned Duer was at liberty to use his axe and cross-cut saw—simple tools; or he could, if he chose, use a gasoline engine, or other machinery, as his power plant by which his saws were operated. This was left to him; over this the so-called employer had no control. They had the right, upon this record, to see and demand that the said timber was cut according to "measurements and dimensions" which they had given Duer. They had no control over methods or means.

In the case of Kelley's Independents v. Hoosac Lumber Co., (Vt.) 113 Atl. 818, the court said:

"It was said in Rheinwald v. Builders' Brick, etc.. Co., 168 App. Div. 425, 153 N. Y. Supp. 598, that common-law decisions involving the liability of a master for injuries received by his servant are not controlling in cases under Compensation Acts, nor as valuable therein as cases under the acts themselves. But this idea was repudiated in Western Indemnity Co. v. Pillsbury, 172 Cal. 807, 159 Pac. 721, and we think rightly so; for we are satisfied that the learning of the common-law decisions affords the safest guide to a proper interpretation of such statutes. Accordingly, we look to our own cases for the rule to direct us to a correct decisions of the question in hand. * * * It is this: If under the contract the party for whom the work is being done may prescribe not only what the

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result shall be. but may also direct the means and methods by which the other shall do the work, the former is an employer, and the latter an employee. But if the former may specify the result only, and the latter may adopt such means and methods as he chooses to accomplish that result, then the latter is not an employee, but an independent contractor. So the master test is the right to control the work. And it is this right which properly differentiates service from independent employment."

As I view it, the above is an accurate statement of the law, and as such, upon proper occasion, should be applied in the administration of the Workmen's Compensation Law.

In the principal opinion it is said that—

"Whether Duer was an employee of the hoop company at the time he received his fatal injury was a question of fact for the Industrial Board, to be determined from the evidence."

While the above statement is, in a sense, literally true, yet as used in the majority opinion it is certainly misleading. And if it is meant in said opinion to place said fact in the class of all other simple facts, primary and inferential, it is an incorrect statement. The Industrial Board does find the facts—the primary facts. It does this from the evidence, which does, or tends to, directly establish the facts; or, as a matter of reasoning, by drawing inferences from facts directly established, it concludes that certain other facts exist. But, in determining whether B. is an employee or an independent contractor, reason, unaided by certain rules of law, is powerless. It can reach no conclusion.

The determination of the question as to the status of B. in such case can only be accomplished by the application thereto of certain well-known rules of law. The law furnishes us the measure the yardstick, by which the primary facts are measured and the said status determined. Hence the question is sometimes said to be a mixed question of law and fact; it is also sometimes spoken of as a conclusion of law.

In my opinion, under the facts of this case, Duer was a contractor, and the award should have been set aside.

WASMUTH-ENDICOTT CO. v. KARST. (No. 11135.)

(Appellate Court of Indiana. Jan. 5, 1922.)

133 Northeastern Reporter, 609.

1. MASTER AND SERVANT — DISABILITY FROM DISEASE CONTRACTED BY DRINKING POLLUTED WATER HELD COMPENSABLE AS "INJURY" BY "ACCIDENT."

A workman's disability from typhoid fever, developing from germs entering his intestines by reason of drinking polluted water furnished him by his employer for that purpose while in its employ, is compensable as an "injury" by "accident" arising out of and in the course of his employment within Workmen's Compensation Act, § 2, as amended by Acts 1917. p. 673, and the definition of "injury" and "personal injury" in section 76(d), as amended by Acts 1919, p. 176, excluding disease except as it results from injury; the word "injury" including whatever produces lesion or change in any part of the system which injuriously affects any

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bodily activity or capability, and an "accident" being any unlooked-for mishap or untoward event not expected or designed.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

(For other definitions, see Words and Phrases, First and Second Series, Accident—Accidental; Injury.)

2. MASTER AND SERVANT—"ACCIDENT" OCCURRING WHILE QUENCHING THIRST "ARISES OUT OF EMPLOYMENT" WITHIN COMPENSATION ACT.

Acts necessary to life, comfort, and convenience of a workman while at work, though personal to himself, are incidental to the work, so that an accident consisting of the entrance of typhoid germs into his system by reason of drinking polluted water to quench thirst while at work is one arising out of the employment within the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

McMahan, J., dissenting.

Appeal from Industrial Board.

Proceedings for compensation under the Workmen's Compensation Act by Clarence N. Karst, employee, opposed by the Wasmuth-Endicott Company, employer. From an award of compensation, the employer appeals. Affirmed.

Joseph W. Hutchinson, of Indianapolis, for appellant.

The Branyans, of Huntington, for appellee.

BATMAN, P. J. This is an appeal from an award by the Industrial Board in favor of appellee. No question is made as to the sufficiency of the facts to sustain the award but the sufficiency of the evidence to sustain the finding of facts is challenged. The following is a statement of so much of the finding of facts as is material to a determination of the question presented by this appeal:

"The full Board * * * finds that on the 9th day of February. 1920, plaintiff was in the employment of the defendant at an average weekly wage of $19.29; that on said date he received a personal injury by accident arising out of and in the course of his employment, of which the defendant had actual knowledge within 30 days thereafter, and which resulted in his total disability to work. * * *"

There is substantial evidence tending to establish the following facts: Appellee, with other workmen, was in the employ of appellant in its cabinet factory. It furnished its employees while at work drinking water from a well in its factory through pipes. This water was pumped by means of a steam engine, and flowed constantly during working hours. Without appellant's knowledge, the water from this well, so furnished its said employees, became contaminated by seepage from a toilet in its said factory. Appellee. while working for appellant under his employment, used said water for drinking purposes, without knowledge of such pollution, and thereby became infected with typhoid germs, and thereafter, by reason of said fact, was seized with typhoid fever, and was confined to his bed for several weeks as a result thereof. Based on the evi- which tends to establish these facts, the Industrial Board found that appellee received a personal injury by accident arising out of and in the course of his employment. Appellant contends that the evidence, tending to establish the foregoing facts does not sustain said finding. but merely

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shows that appellee suffered a disability from a disease, for which compensation is not authorized. It bases this contention on the following provisions of the Workmen's Compensation Act:

"Section 2. From and after the taking effect of this act, every employer and every employee, except as herein stated, shall be presumed to have accepted the provisions of this act respectively to pay and accept compensation for personal injury or death by accident arising out of and in the course of the employment. * * *" Acts 1917, p. 673.

"Section 76. * * * (d) 'Injury' and 'personal injury' shall mean only injury by accident arising out of and in the course of the employment and shall not include a disease in any form except as it shall result from the injury." Acts 1919, p. 175.

[1] In considering this contention we will first determine whether the evidence shows that appellee's disability was the result of an accident. This court, in determining questions of liability under the Workmen's Compensation Act (Acts 1915, c. 106), has adopted the following definition of that term:

"An accident is any unlooked-for mishap or untoward event not expected or designed." United Paper Board Co. v. Lewis (1917) 65 Ind. App. 356. 117 N. E. 276; Haskell, etc., Car Co. v. Brown (1917) 67 Ind. App. 178, 117 N. E. 555; Indian Creek, etc., Co. v. Calvert (1918) 68 Ind. App. 474, 119 N. E. 519, 120 N. E. 709; Puritan, etc., Co. v. Wolfe (1918) 68 Ind. App. 330, 120 N. E. 417.

Applying this definition to the facts disclosed by the evidence in this case, it is clear that the entering of typhoid germs into appellee's intestines. by reason of drinking the polluted water furnished him by appellant for that purpose, while in its employ. may rightfully be termed an "accident." Dove v. Alpena, etc., Co., 198 Mich. 132, 164 N. W. 253; Vennen v. New Dells, etc., Co., 161 Wis. 370, 154 N. W. 640. L. R. A. 1916A, 273, Ann. Cas. 1918B, 293; Monson v. Battelle, 102 Kan. 208, 170 Pac. 801. But the mere fact that an accident happens to an employee will not authorize the payment of compensation. unless it results in personal injury which causes disability to work. The resulting injury and disability to work, however, need not be concurrent with the accident in order to warrant payment of compensation. In re McCaskey (1917) 65 Ind. App. 349, 117 N. E. 268; Hornbrook-Price Co. v. Stewart (1917) 66 Ind. App. 400, 118 N. E. 315; John A. Schumaker Co. v. Kendrew (1918) 68 Ind. App. 466, 120 N. E. 722.

In the instant case appellant raises the question as to when the injury can be said to have occurred, if the drinking of the germladen water, under the circumstances, can be said to be an accident within the meaning of the Workmen's Compensation Act. It has been said that—

"In common speech the word 'injury,' as applied to a personal injury to a human being, includes whatever lesion or change in any part of the system produces harm or pain or a lessened facility of the natural use of any bodily activity or capability." In re Burns, 218 Mass. 8, 105 N. E. 601, Ann Cas. 1916A, 787.

It cannot be said that this definition is too comprehensive. In view of the settled policy of this court, in harmony with the courts of other jurisdictions, to give the provisions of the Workmen's Compensation Act a liberal construction in favor of the employee, in order that its humane purpose may be realized. Holland, etc., Co. v. Shraluka (1917) 64 Ind. App. 545, 116 N. E. 330; In re Loper (1917) 64 Ind. App. 571, 116 N. E. 324; In re Kelley (1917) 64 Ind. App. 594, 16 N. E. 306; United Paper Board Co. v. Lewis (1917) 65 Ind App. 356, 117 N. E. 276; In re Ayers (1917) 66 Ind. App. 458. 118 N. E. 386; Nordyke & Marmon Co. v. Swift, 123 N. E. 449; In re Stewart, 126 N. E. 42; In re Duncan, 127 N. E. 289. When we apply the foregoing definition of an injury to the facts of this case, it is not difficult to determine when the injury result-

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ing from the accident in question occurred. It is well known that typhoid fever is due to a specific micro-organism, known as the typhoid bacillus, taken into the intestines. Here the bacillus sets up a catarrhal inflammation of the mucus membrane of the intestines, causing ulcers and fever. When this occurs the individual evidently sustains an injury. The typhoid bacillus, when taken into the intestines, does not always create a catarrhal inflammation. If it does not, no fever follows, and no injury is sustained. In the instant case, however, such an inflammation occurred with resulting fever, which constituted an injury within the meaning of the Workmen's Compensation Act.

It has been suggested that, if compensation be awarded on account of disability to work arising from a disease contracted by an employee under the circumstances of the instant case, it will result in a violation of that part of said section 76, quoted above, in which the meaning of the words "injury" and "personal injury," as used in the Workmen's Compensation Act, is expressly limited, and from which "disease in any form, except as it shall result from injury." is expressly excluded, and, through a form of judicial legislation, render all employers, operating under said act, liable for compensation thereunder on account of disability to work, resulting from diseases generally, contracted by their servants while engaged in the discharge of the duties for which they are employed. We are clearly of the opinion, however, that no such result will follow. It will be observed that in the instant case we have clearly indicated the accident and the resulting injury, which caused the fever and consequent disability. Therefore it cannot be said that the decision in this case is not in harmony with the limitation of said section 76, with reference to awarding compensation for disability resulting from disease. It is obvious that in any given case involving disability so resulting the inquiry must always be, Did the disease result from an injury by accident, arising out of and in the course of the employment? If it did not, by the express provision of the statute, no compensation can be awarded. The injury, however, need not be produced by violence, as our statute, unlike those of some other states does not so provide. It suffices in that regard, whatever the accident may have been, if it produces a lesion or change in any part of the system which injuriously affects any bodily activity or capability. Where this occurs, and disease follows, causing disability, the right to compensation is not affected by the limitation contained in said section 76. But it must be borne in mind that the injury must be by accident arising out of and in the course of the employment. This limitation alone will have the effect of preventing a recovery of compensation for disability resulting from diseases generally, as it is clear that a disease contracted by an employee through such usual intercourse with his fellow workmen as is common among men, and not because of any unusual circumstance connected with his employment, cannot be said to be an accident within the meaning of the Workmen's Compensation Act. This is in harmony with the general rule, denying compensation for injuries arising from risks common to the general public. Union Sanitary Mfg. Co. v. Davis (1916) 64 Ind. App. 227, 115 N. E. 676; In re Harraden (1917) 66 Ind. App. 298, 118 N. E. 142; Central, etc., Co. v. Ind. Com., 291 Ill. 256, 126 N. E. 144, 13 A. L. R. 967; Cunningham v. Donovan, 93 Conn. 313, 105 Atl. 622; Re Donahue, 226 Mass. 595, 116 N. E. 226, L. R. A. 1918A, 215; Kunze v. Detroit, etc., Co. (Mich.) 158 N. W. 851, L. R. A. 1917A, 252; Re McNicol, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A. 306; Larke v. John Hancock, etc., Co., 90 Conn. 303, 97 Atl. 320, L. R. A. 1916E, 584.

[2] The fact that the accident involved in this case occurred while appellee was engaged in quenching his thirst, rather than in the actual performance of some duty which he owed appellant under his employment, is not a matter of controlling importance, as it is recognized that

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"such acts as are necessary to the life, comfort, and convenience of the workman while at work, though personal to himself, and not technically acts of service, are incidental to the service; and an accident occurring in the performance of such acts is deemed to have arisen out of the employment." Holland, etc., Co. v. Shraluka (1917) 64 Ind. App. 545, 116 N. E. 330; Archibald v. Workmen's Compensation Commission, 77 W. Va. 448, 87 S. E. 791, I. R. A. 1916D, 1013. We conclude that the award made by the Industrial Board is not contrary to law, and it is therefore affirmed.

McMahan, J.. dissents.

IN RE HART. (No. 11364.)

(Appellate Court of Indiana, Division No. 2. Jan. 26, 1922.)

133 Northeastern Reporter, 837.

MASTER AND SERVANT — COMPENSATION AWARDED FOR LOSS OF FINGERS HELD PROPER.

Injury requiring amputation of four fingers just beyond the knuckles, nearest the palm, causing a permanent loss of 90 per cent. of the natural use of the arm below the elbow joint, justifies an award of 180 weeks' compensation under Workmen's Compensation Act, § 31. subd. h, as amended by Acts 1919, c. 57, § 1, notwithstanding subdivision, a specifying period of compensation for injuries resulting in amputations of fingers.

(For other cases. see Master and Servant, Dec. Dig. § 385[12].)

Proceedings under the Workmen's Compensation Law by Ralph Hart for compensation for injuries, opposed by the Baldwin Tool Works, employer. Question certified by the Industrial Board of Indiana. Question answered.

NICHOLS, J. On the 18th day of April. 1921, one Ralph Hart was in the employment of the defendant Baldwin Tool Works, at Princeton, Ind; that on said date he received a personal injury by an accident arising out of and in the course of his employment, of which the employer had actual knowledge at the time; that a result of said injury it became necessary to amputate the four fingers of his right hand at a point just beyond the knuckles, nearest the palm; that his average weekly wages at the time of the injury were $18; that said injury resulted in the permanent loss of 90 per cent. of the natural use and function of the plaintiff's right hand, that is, of the right arm below the elbow joint. The said Ralph Hart has filed a claim before the Industrial Board of Indiana for compensation. The above facts are not disputed. The claimant and the employer disagree as to the provision of law applicable to said state of facts. The claimant contends that he is entitled to 180 weeks, under clause c of amended section 31 of the Indiana Workmen's Compensation Act (Acts 1919, p. 163). On the other hand. the employer contends that the compensation period should be 125 weeks under clause a of said section (Acts 1919, p. 162).

The Industrial Board is of the opinion that the injury and impairment resulting therefrom justifies an award for 180 weeks' compensation, if said award will be according to law. Upon the foregoing facts, the Industrial Board respectfully submits for our determination the follow-

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ing question of law: Would an award of 180 weeks' compensation be according to law? We answer this question in the affirmative under the provisions of subdivision h of section 31 of the Workmen's Compensation Act (Acts 1919, p. 163). See In re Cannon, 66 Ind. App. 1, 117 N. E. 658.

FRANKS v. CARPENTER ET AL. (No. 34319.)

(Supreme Court of Iowa. Feb. 14, 1922.)

186 Northwestern Reporter, 647.

1. MASTER AND SERVANT—SEWER BUILDER HELD A FOREMAN OF EMPLOYEE SUSTAINING COMPENSABLE INJURY AND NOT AN INDEPENDENT CONTRACTOR.

One experienced in sewer construction work who engaged himself to a contractor for a specified price per hour for his time. in addition to pay for the use of his automobile, with the understanding that he was to furnish the tools, secure the necessary help paid by the contractor, make the excavation and lay the pipe furnished to him, fix the working hours, and keep the time of himself and the men working under his direction, *held* a foreman and not an independent contractor, so that the contractor was liable for compensation for the death of one of the men killed by the caving of the sides of the excavation.

(For other cases, see Master and Servant, Dec. Dig. § 367.)

2. MASTER AND SERVANT—FORMAL NOTICE OF COMPENSABLE INJURY HELD UNNECESSARY.

One engaged by a contractor constructing a sewer to take charge of the work and of the employment of the men working under his direction *held* to be the contractor's foreman and representative, so that his actual knowledge of what occurred when one of the men was killed superseded the necessity of serving notice of death on the employer as required by Workmen's Compensation Act, § 2477m8.

(For other cases. see Master and Servant. Dec. Dig. § 398.)

Appeal from District Court, Iowa County; R. G. Popham, Judge.

Appeal from an award under the Workmen's Compensation Act. The facts are fully stated in the opinion. Affirmed.

L. N. Tillotson, of Marion, and Johnson & Donnelly, of Cedar Rapids. for appellants.

Redmond & Stewart and Charles Penningroth, all of Cedar Rapids. for appellee.

STEVENS, C. J. The appellant George W. Carpenter resides, and is gaged in the plumbing business, at Cedar Rapids, Iowa. Some time prior to November 1, 1918, he obtained a contract to do certain plumbing in a school building then in process of erection at Conroy, Iowa. Appellant also engaged to construct a sewer line from a septic tank, which he had placed near the schoolhouse. to a line of tiling about 300 feet distant, and arrangement or contract was made by him with one I. W. Hudson, who also resided at Cedar Rapids, and occasionally engaged as a contractor in putting in sewers. to go to Conroy and to make the excavations. and construct the sewer from the septic tank to the tile drain.

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One of the principal questions in the case is whether he was an independent contractor or whether he was an employee only of Carpenter.

On November 1, 1918, Bert Franks who had gone with Hudson from Cedar Rapids to assist in putting in the sewer, was killed by the caving of the sides of the excavation and covering him with dirt. This action is brought by her next friend on behalf of the deceased's minor daughter. Hudson had previously been employed on other jobs by Carpenter. He evidently knew him to be efficient in making excavations and laying sewers. The arrangement between Hudson and Carpenter was that the former would go to Conroy, secure such help as was necessary, make the excavation, and lay the sewer pipe or tile so as to connect the septic tank with the tile drain already installed. In addition to Franks. Hudson secured the assistance of two other men. He acted as foreman, provided the work, kept the time and determined the number of and what hours the men should work each day, and notified Carpenter of the amount required to pay their wagees. Hudson and each of the men employed on the job received 50 cents per hour. Hudson furnished his own tools with which to do the work, but did not furnish any of the material used therein. Carpenter was not present while the work was being done, and did not, in fact, direct Hudson, or the men employed with him, as to how the work should be done. He did. however, advise Hudson that they should commence the excavation at the tile drain, which they did. In addition to 50 cents per hour for his time, Carpenter paid Hudson for oil and gas used in his automobile for 12 days and also paid him for the use of his automobile in taking Franks to Conroy. The arbitration board found in favor of the claimant. This finding was sustained on review by the Industrial Commissioner and upon appeal thereto by the district court.

Three propositions are argued by appellants as follows: (a) That the undisputed evidence shows that deceased, at the time of his death, was an employee of Hudson, an independent contractor, and not of Carpenter; (b) that Carpenter was not served with notice of the death of Franks as required by the provisions of section 2477m8 of the 1913 Supplement to the Code; and (c) that the policy in suit does not provide indemnity for the loss sustained.

[1] I. Was Franks, at the time of his death, an employee of Carpenter or of an independent contractor? If he was an employee of the former, then he sustained such relation to Carpenter as to entitle the plaintiff to compensation on the basis allowed in the court below. There is no There is no absolute rule for determining whether, under a given state of facts, the one doing or having charge of the work is an independent contractor or an employee. We said in Pace v. Appanoose County, 184 Iowa, 498, 168 N. W. 916, that—

"The test oftenest resorted to, in determining whether one is an employee or an independent contractor, is to ascertain whether the employee represents the master as to the result of the work, or only as to the means. If only as to the result, and he himself selects the means. he must be regarded as an independent contractor."

In the same case the writer of the opinion quoted the following from Thompson on Negligence (2d Ed.) § 629:

"The test lies in the question whether the contract reserves to the proprietor the power of control over the employee."

The same general rule was approved in Norton v. Day Coal Co., 180 N. W. 905. Applying this test to the facts of the case before us, we conclude that the finding of the commissioner that at the time of his death both Franks and Hudson were employees merely of Carpenter is fully sustained by the evidence. Carpenter, at the time Hudson was employed by him, knew that Hudson understood the work of constructing sewers and would be a good man to place in charge of the work at Con-

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roy. Nothing was said between Carpenter and Hudson as to the manner of doing the work, nor is there anything in the contract or arrangement between them, or the manner in which it was carried out, to indicate that Carpenter in any respect waived his right to control or direct the time or manner of making the excavation and laying the drain. There was no occasion for any specific reservation of this right. It is true that that Carpenter was not present at any time during the progress of the work, but. manifestly, he had the right to discharge Hudson, Franks, or any other employee on the job and to absolutely direct Hudson in everything he did in the work of putting in the drain. The fact that he refrained from doing so is not of controlling importance. Hudson furnished none of the material and was paid 50 cents per hour for his time, the same as the other employees. He assumed the position of foreman, but this was clearly contemplated by Carpenter at the time of his employment. The tools furnished by Hudson were simple tools, and under his contract with Carpenter, he assumed no liability and incurred no financial responsibility. He stood no chance to make a profit or to suffer a loss. He kept the time of himself and the other men, delivered it to Carpenter, who gave or sent him a check for the amount shown thereby to be due the men. Hudson distributed the money sent him by Carpenter only. The commissioner gave considerable significance to the fact that Carpenter paid Hudson for taking Franks in his automobile to Conroy This is an important fact.

Significance is also given by counsel for appellants to the facts that Hudson and the men employed with him determined how the work should be done, the number of hours they would work each day, at what time they would begin. and at what time they should quit and what time they would take at noon for lunch. These were all matters within the control of Hudson as foreman. There was nothing in the contract between Hudson and Carpenter to prevent the latter from fixing the time for the men to commence work and the number of hours they should work each day. He simply refrained from doing so and left it all to the discretion of Hudson. This did not make him an independent contractor.

[2] II. The record does not show that Carpenter was served with notice of the death of Franks. Section 2477m8, so far as material, provides as follows:

"Unless the employer or representative of such employer shall have actual knowledge of the occurrence of an injury, or unless the employee or some one on his behalf, or some of the dependents or some one on their behalf, shall give notice thereof to the employer within fifteen days of the occurrence of the injury, then no compensation shall be paid until and from the date such notice is given or knowledge obtained; but if notice is given or the knowledge obtained within thirty days from the occurrence of the injury, no want, failure or inaccuracy of a notice shall be a bar to obtaining compensation, unless the employer shall show that he was prejudiced by such want. defect or inaccuracy, and then only to the extent of such prejudice. Provided. that if the employee or beneficiary shall show that his failure to give prior notice was due to mistake, inadvertence, ignorance of fact or law, or inability, or to the fraud. misrepresentation or deceit of another or to any other reasonable cause or excuse, then compensation may be allowed, unless and then to the extent only that the employer shall show that he was prejudiced by failure to receive such notice. Provided, further, unless knowledge is obtained or notice given within ninety days after the occurrence of the injury. no compensation shall be allowed. No form of notice shall be required but may substantially conform to the following form. * * *"

Manifestly, the purpose of the notice is to apprise the employer of such facts as will enable him to fully investigate the cause and extent of the injuries received by an employee. Actual knowledge of the em-

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ployer or the employer's representative supersedes and does away with the necessity of notice. Carpenter was not present when Franks was killed and it is not claimed that he could have had actual knowledge of what occurred. Hudson was present when the sides of the excavation fell in and buried Franks, and therefore had full knowledge of everything that occurred at the time. Is the actual knowledge of Hudson sufficient, under the statute, to excuse the failure of the proper party to cause notice of the occurrence to be served upon Carpenter?

Somewhat similar statutes are in force in other states. In Massachusetts it is provided (St. 1911, c. 751, pt. 2, § 18), that—

"Want of notice shall not be a bar to proceedings under this act, if it be shown that the association. subscriber, or agent had knowledge of the injury."

The statute of Minnesota (Gen. St. 1913, § 8213), with reference to notice, is quite like the section quoted supra. The statute of California (St. 1913, c. 176, § 20), provides that—

"Actual knowledge of such injury on the part of such employer, or his managing agent or superintendent in charge of the work, upon which the injured employee was engaged at the time of the injury. shall be equivalent to such service."

The statute of New Jersey (Laws 1911. c. 95, § 15), makes actual knowledge of the employer sufficient without notice, whereas the statute of Pennsylvania (Laws 1915, P. L. 736, § 311 [Pa. St. 1920, § 22008]) is in this respect the same as ours. The Illinois statute (Hurd's Rev. St. 1915, p. 1286, § 149). provides:

"That the failure on the part of any person entitled to such computation to give such notice shall not relieve the employer from his liability for such compensation, when the facts and circumstances of such accident are known to such employer, his agent or vice principal in the enterprise."

In several of the jurisdictions mentioned, the Supreme Court has held that knowledge of the employer, or of his agent, where the statute so provides, is sufficient and does away with the necessity of the service of formal notice. Allen v. City of Millville. 87 N. J. Law, 356, 95 Atl. 130; State ex rel. Duluth Diamond Drilling Co. v. Dist. Ct. of St. Louis Co., 129 Minn. 423, 152 N. W. 838; Frier's Case. 232 Mass. 181, 122 N. E. 195; In re Brown, 228 Mass. 31, 116 N. E. 897; In re Murphy, 226 Mass. 60, 115 N. E. 40; In re McLean. 223 Mass. 342. 111 N. E. 783; In re Bloom. 222 Mass. 434. 111 N. E. 45; Parker-Washington Co. v. Ind. Board, 274 Ill. 498. 113 N. E. 976; Bushnell v. Ind. Bd., 276 Ill. 262, 114 N. E. 496; Purdy v. Sault Ste. Marie, 188 Mich. 573, 155 N. W. 597. Ann. Cas. 1917D, 881.

No formal notice was necessary in this case if Hudson was the representative of Carpenter within the meaning of the statute. The term has not been given legislative definition. In the sense that a representative is one who represents another. stands in his place or stead. or acts for him in the capacity of a foreman, Hudson was the representative of Carpenter. As foreman he was such a representative as that it was his duty to at once report the fact that Franks met his death while employed upon the sewer in question, and of the circumstances surrounding the occurrence. Employees are often in charge of, and under the control of, a foreman. superintendent, or other agent of the employer. One occupying such a position would obviously be the representative of the employer within the meaning of section 2477m8. It is, of course, conceded by appellant that Hudson had charge of the work; that he directed the workmen and determined how and when, and in what manner it should be done, but that he did this as an independet contractor only. We are of the opinion that, notwithstanding he was in charge of the employment of the men working on the sewer and directed the manner in which the

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work should be done, he did not do this as an independent contractor, but as the foreman and representative of the appellant. Therefore the actual knowledge of Hudson superseded the necessity of notice. The question as to who has the burden of proving notice is ably discussed by counsel for appellants, but we prefer to defer the decision of this question until it is presented by brief and argument on both sides.

III. Some claim is made by counsel for appellants that the facts of this case do not bring it within the provisions of the policy. This contention of counsel is based upon a technical construction of the policy, and is. in our opinion, without substantial merit. We conclude that the finding and order of the Commissioner is fully sustained by the proof and proper inferences therefrom.

The judgment of the court below is therefore affirmed.

Evans, Arthur, and Faville, JJ., concur.

O'NEILL v. SIOUX CITY TERMINAL RY. CO. (No. 34592.)

(Supreme Court of Iowa. Feb. 14, 1922.)

186 Northwestern Reporter, 633.

1. MASTER AND SERVANT—FINDING OF INDUSTRIAL COMMISSIONER UNDER COMPENSATION ACT CONCLUSIVE.

The Industrial Commissioner's finding which is conclusive under Workmen's Compensation Act (Acts 37th Gen. Assem. c. 270, § 17) stand upon the same footing as the finding of a judge or a verdict of a jury. and is not to be set aside if there is evidence upon which it can rest, though a court, if trying the facts in the first instance, might reach a different conclusion.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

2. MASTER AND SERVANT—FINDING OF EMPLOYMENT INTERSTATE COMMERCE SUSTAINED BY EVIDENCE IN COMPENSATION CASE.

In a proceeding under the Workmen's Compensation Act to obtain compensation for the death of an employee of a terminal railway company, evidence *held* to sustain a finding that deceased was engaged in interstate commerce, notwithstanding admission of improper evidence.

(For other cases, see Master and Servant. Dec. Dig. § 405[1].)

Appeal from District Court, Woodbury County; George Jepson, Judge.

One Patrick O'Neill was killed while employed as a switchman by the Sioux City Terminal Railway Company. His surviving widow seeks to recover compensation under the Workmen's Compensation Law. From judgment denying her claim, this appeal is prosecuted. The facts appear in the opinion. Affirmed.

Humphrey Barton. of St. Paul, Minn., and J. P. Shoup and T. P. Cleary,, both of Sioux City, for appellant.

Chandler Woodbridge, of Des Moines, and Jepson, Struble & Anderson, of Sioux City, for appellee.

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FAVILLE, J. The appellee operates a terminal railway at Sioux City. which is connected with what is known as "the transfer." Several lines or railway entering Sioux City deliver cars at this transfer. Such cars are picked up by the appellee at the transfer and transported over its own tracks, by its own engine, to the points of final destination at certain packing plants.

At the time of the injury in controversy, it appears from the evidence that Patrick O'Neill was a member of a switching crew employed by the appellee. The switching crew had been to the transfer, and had taken charge of a string of cars, part of which were to be delivered at the point of the Cudahy Packing Company and part at the plant of the Armour Packing Company. The portion of the train to be switched to the Armour plant consisted of 9 cars. These were placed on a track of the appellee leading to said plaint. After said cars had been so placed, all of the switching crew, except O'Neill, took the cars that were intended for the Cudahy plant: and placed the same at said plant. Thereafter the crew, with the engine, returned to the switching track, where the 9 cars destined for the Armour plant had been placed. The evidence shows that when these cars were first placed upon this track O'Neill was last seen upon the rear car of said string. These cars were left standing about 25 car lengths north from the gate of the Armour yard at the time the remainder of the crew went to place the other cars at the Cudahy plant. It appears that it was O'Neill's duty to properly set the switch so that said cars could be moved to the Armour plant, and to open a gate, or entrance, leading to the Armour plant. It is shown that O'Neill had performed both acts.

The crew returned from the Cudahy plant and proceeded to move the 9 cars toward the Armour plant. There was no witness to the tragedy, but in some manner O'Neill was run over by the cars in this movement and killed as they were being backed toward the Armour plant.

I. The only question involved in this appeal is whether or not the decedent, Patrick O'Neill, was engaged in interstate commerce at the time he was killed. It appears from the record that a portion of the string of cars that were being moved to the plant of the Armour company. and which caused the death of O'Neill, were engaged in interastate commerce. The evidence shows, however, that one of the 9 cars that was being moved to the Armour plant at the time of the accident was "A. T. L. car No. 244," which had been delivered on the day in question by the Chicago, Milwaukee & St. Paul Railway Company to the appellee at the transfer and the evidence tends to show that the shipment of this car originated in Chicago, and that said car was consigned to the Armour Packing Company at Sioux City. Said car No. 244 was an empty car of the Armour Tank Lines. It was necessary for this car to pass over the tracks and be handled by the appellee company in order to reach its final destination at the plant of the Armour Packing Company.

It is urged by appellant that there is no sufficient competent evidence in the record to show that car No. 244 was being moved by appellee in interstate commerce at the time that O'Neill was killed. The car inspector employed at the Sioux City Terminal Company testified that car No. 244 came to the terminal over the Chicago, Milwaukee & St. Paul Railroad. The yard clerk of the Milwaukee road produced the train record of July 4, 1915, from which it appeared that train No. 63 arrived from the east on July 3, 1915. and that car No. 244 was in said train, and that the shipment of said car originated at station No. 4 in the Union Stockyards in Chicago, and that it was consigned to the Armour Packing Company at Sioux City. The witness testified that the train record book, in which said entry appeared, was not made by him, and that he did not know in whose handwriting it was made, but that it was one of the records kept of the movement of cars in the record room of the Milwaukee road. We gather from the evidence that it was a permanent record that

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was required to be kept in the usual course of the business of the said railroad, and showed the point of the origin and destination of all cars handled by the railroad at that point.

There was also evidence tending to show that the records of the waybills received by Armour & Co. showed that said car No. 244 was at said time engaged in interstate commerce. The competency of this evidence is challenged by the appellant. It may be true that some of this evidence offered by the appellee in regard to the interstate character of the shipment of car No. 244 was not in strict compliance with the rules of evidence as recognized in courts of record, but there was sufficient competent evidence, aside from that which is challenged. to warrant the finding of the Industrial Commissioner and of the district court that the decedent was engaged in interstate commerce.

A majority of the arbitration committee denied appellant's claim. On appeal, the Industrial Commissioner also denied the claim, and upon appeal from his finding the district court of Woodbury county likewise denied the appellant the relief sought.

Section 17, c. 270, of Acts 37th G. A., provides in part as follows:

"The findings of fact made by the Industrial Commissioner within his powers shall, in the absence of fraud, be conclusive, but upon such hearing the court may confirm or set aside such order. or decree of the Industrial Commissioner. if he finds:

"(4) That there is not sufficient competent, evidence in the record to warrant the Industrial Commissioner in making the order or decree complained of."

[1, 2] We have had occasion to construe this statute, and have held that the finding of the Commissioner stands upon the same footing as the finding of a judge or a verdict of a jury, and that it is not to be set aside if there is evidence upon which the finding can rest. We have also approved of the rule that, if the evidence in the case supports the finding of fact as made by the Commissioner, the court will not say that the Commissioner acted without or in excess of his powers, even though a court, if trying the facts in the first instance, might reach a different conclusion. Rish v. Iowa Portland Cement Co., 186 Iowa. 443, 170 N. W. 532; Bidwell Coal Co. v. Davidson, 187 Iowa, 809, 174 N. W. 592, 8 A. L. R. 1058; Pierce v. Bekins Van & Storage Co., 185 Iowa, 1346, 172 N. W. 191; Pace v. Appanoose County, 184 Iowa. 498, 168 N. W. 916. See, also, Kraft v. West Hotel Co., 185 N. W. 895.

In Flint v. City of Eldon, 183 N. W. 344, we said:

"It is not within the legislative scheme to make a court the reviewer of the facts. and it has been repeatedly held that the court is forbidden to trespass upon the defined jurisdiction of the Commissioner, the latter being the sole judge and the final judge of the facts."

Applying this rule to the instant case, we find from the record substantial competent evidence to sustain the findings of fact of the Commissioner that the car No. 244 which the decedent was engaged in switching at the time of the accident. was at said time being moved in interstate commerce.

In N. Y. C. & H. R. R. R. v. Carr, 238 U. S. 260, 35 Sup. Ct. 780, 59 L. Ed. 1298, the Supreme Court of the United States very properly said:

"But owing to the fact that, during the same day, railroad employees often and rapidly pass from one class of employment to another, the courts are constantly called upon to decide those close questions where it is difficult to define the line which divides the state from interstate business. * * * But the matter is not to be decided by considering the physical position of the employee at the moment of injury. If he is hurt in the course of his employment while going from a car to perform an interstate duty; or if he is injured while preparing an engine for an

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interstate trip he is entitled to the benefits of the federal act, although the accident occurred prior to the actual coupling of the engine to the interstate cars."

[3] The car in question had its origin in Chicago, and its point of destination was the Armour packing plant. It was still in transit. and had not been yet reached its final point of destination at the time of the accident. The act of the decedent, as a switchman, was one of the instrumentalities necessary to complete this act of transportation. It was therefore an act in interstate commerce. Rhodes v. Iowa, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. Ed. 1088; McNeill v. So. Ry. Co., 202 U. S. 543–559, 26 Sup. Ct. 722, 50 L. Ed. 1142; N. Y. C. & H. R. R. R. Co. v. Carr, supra; Pennsylvania Co. v. Donat, 239 U. S. 50, 36 Sup. Ct. 4, 60 L. Ed. 139; St. Louis, etc., Ry. Co. v. Seale, 229 U. S. 156, 33 Sup. Ct. 651. 57 L. Ed. 1129, Ann. Cas. 1914C, 156; N. C. R. R. v. Zachary, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159.

It is argued that car No. 244 was empty at the time, and hence not in interstate commerce. If the car was being transported in interstate commerce from its point of shipment in the stockyards in Chicago to the Armour packing plant at Sioux City, Iowa, it makes no difference whether it was empty or loaded at the time the decedent received his injury. N. C. R. R. Co. v. Zachary, supra; C., R. I. & P. Ry. Co. v. Wright, 239 U. S. 548, 36 Sup. Ct. 185, 60 L. Ed. 431.

[4] The decedent was doubtless engaged in both interstate and intrastate commerce. The rule is that, where an employee is at the same time engaged in both intra and inter state commerce, and received an injury, recovery for such injury can only be had under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665), as the state statute on the same subject is excluded by reason of the supremacy of such act. St. Louis. etc., Ry. Co. v. Seale, supra; C., R. I. & P. Ry. Co. v. Devine, adm'r, 239 U. S. 52, 36 Sup. Ct. 27, 60 L. Ed. 140; Second Employers' Liability Cases, 223 U. S. 1–53, 32 Sup. Ct. 169. 56 L. Ed. 327, 38 L. R. A. (N. S.) 44; M. C. R. R. Co. v. Vreeland, 227 U. S. 59–66, 33 Sup. Ct. 192, 57 L. Ed. 417. Ann. Cas. 1914C, 176; St. Louis, Iron Mt. & So. Ry. Co. v. Craft, 237 U. S. 648–655, 35 Sup. Ct. 704, 59 L. Ed. 1160; N. Y. C. & H. R. R. R. Co. v. Carr, supra; Taylor v. Taylor, 232 U. S. 363, 34 Sup. Ct. 350, 58 L. Ed. 638.

The cases cited by counsel for the appellant do not controvert the propositions above stated, nor their applicability to the facts in the instant case. In I. C. R. R. Co. v. Behrens, 233 U. S. 473, 34 Sup. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163, the particular service in which the employee was engaged at the time was wholly with regard to intrastate freight from one part of the city to another, and the court held that this was not a service in interstate commerce, and so the inquiry was not within the federal statute.

In C., B. & Q. R. R. Co. v. Harrington, 241 U. S. 177, 36 Sup. Ct. 517, 60 L. Ed. 941. the employee was engaged in moving coal from storage trucks to coal chutes, and was not at the time engaged in interstate commerce, even though the coal had been previously brought from another state.

In Lehigh v. Valley R. R. Co. v. Barlow, 244 U. S. 183, 37 Sup. Ct. 515, 61 L. Ed. 1070, the employee was a member of a switching crew, and assisting in placing cars containing a supply of coal for the railroad company on an unloading trestle within its yards. The cars had previously reached their destination, and had been left on the siding of the company for 17 days. The court held that the employee was not engaged in interstate commerce when these cars were being moved upon the trestle for unloading purposes.

Other cases are of like character.

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It being established that the decedent. at the time of the accident, was engaged in interstate commerce, it follows that the federal Employers' Liabiliy Act controls the right to compensation to the exclusion of the provisions of the Workmen's Compensation Act of this state. N. Y. C. Ry. Co. v. Winfield, 244 U. S. 147, 37 Sup. Ct. 546, 61 L. Ed. 1045, L. R. A. 1918C, 439, Ann. Cas. 1917D, 1139.

It therefore follows that the judgment of the district court must be, and the same is. affirmed.

Stevens, C. J., and Evans and Arthur, JJ., concur.

McILVAIN v. BLUE ET AL. (No. 23429.)

(Supreme Court of Kansas. Jan. 7, 1922.)

203 Pacific Reporter, 701.

(Syllabus by the Court.)

1. MASTER AND SERVANT—OWNER OF BUSINESS NOT LIABLE FOR COMPENSATION FOR INJURIES TO EMPLOYEE OF INDEPENDENT CONTRACTOR.

One within the Workmen's Compensation Act who contracts with another to perform labor incidental to the business which brings the operations of the first within that act is not liable for compensation to an employee of the one who contracts to perform the incident labor.

(For other cases, see Master and Servant, Dec. Dig. § 367.)

Appeal from District Court, Butler County.

Action by A. H. McIlvain against Earl Blue and the Prairie Oil & Gas Company, to recover under the Workmen's Compensation Law. Judgment for the defendants. and plaintiff appeals. Affirmed.

H. W. Schumacher and Hamilton & McKay, all of El Dorado. for appellant.

Kramer & Benson. of El Dorado, T. J. Flannelly and Paul B. Mason. both of Independence. and Aikman & Aikman. of El Dorado. for appellees.

MARSHALL. J. This is an appeal from an order sustaining separate demurrers of the defendants to the amended petition of the plaintiff.

The action was to recover compensation under Workmen's Compensation Law. Gen. St. 1915, §§ 5896–5942. The petition alleged:

That the Prairie Oil & Gas Company "was engaged in the various branches of the oil business in Butler county. Kan., and in doing all things incident to the production and marketing of oil and gas. That in pursuance and furtherance of its said business the said the Prairie Oil & Gas Company did. some time prior to May 25. 1920. undertake to execute a part of its said business by letting a contract with its codefendant, Earl Blue. for the execution by the said Earl Blue of part of the work and business of the said the Prairie Oil & Gas Company , to wit:

"The loading. hauling. and unloading by the said Blue for the said company of certain pipe or casing from what is known as the Redford lease in Rock Creek township, Butler county. Kan.. about 20 miles from El Dorado. Kan., to a machine shop in El Dorado, Kan.. which said

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machine shop had been employed by said the Prairie Oil & Gas Company to repair said casing. That the said casing had been used by said Prairie Oil & Gas Company in its production of oil on said premises. and was intended to again be used by it in the producing of oil on said premises as soon as the same could be repaired. That pursuant to said contract the said Earl Blue undertook to and did load and haul said casing from said lease to the city of El Dorado. Butler county. Kan., to said machine shop; that the said Earl Blue hired and employed this plaintiff to assist him in loading, hauling. and unloading said casing. That the said the Prairie Oil & Gas Company at all times retained and exercised direct supervision over the loading, hauling, and unloading of said casing, and directed the said Blue and this plaintiff how to load. haul, and unload the same. and what casing to haul. and in general directed how said casing should be hauled. That said casing was hauled as a part of the regular trade and business of the said the Prairie Oil & Gas Company, and was used. and was intended to be used, by it in the conduct of its said business, and that in letting the said contract to the said defendant Blue the said the Prairie Oil & Gas Company undertook to and did execute a part of its trade and business of producing oil through the said contract. That the said the Prairie Oil & Gas Company owns and operates a large number of oil and gas leases in Butler county, Kan., all of which are operated under one management and by one set of workmen, who are shifted from lease to lease, and from one duty to anothr as occassion demands."

The petition further alleged that the Prairie Oil & Gas Company employed more than five workmen in conducting its business; that the plaintiff had offered to arbitrate; and that arbitration had been refused.

[1] 1. So far as the Prairie Oil & Gas Company is concerned, this case is controlled by the decision of this court in Farmer v. Purcell, 109 Kan. 612. 201 Pac. 66, where this court said:

"The owner of a sawmill had occasion to remove a quantity of sawdust that had accumulated. He arranged for his employees to feed it into a chute through which by an endless chain it was conveyed to an elevated bin from which it could be loaded into wagons by gravity. He contracted with a person to take it from the bin as fast as should be necessary to prevent such accumulation there as to delay the work, and remove it to a designated place, in consideration of the payment of a fixed price per hour. A driver employed by such person was injured while attempting to load a wagon from the bin. and sued the mill owner under the Compensation Act. It is held that such person was an independent contractor, and the plaintiff was not an employee of the defendant."

Earl Blue was an independent contractor, and the plaintiff was not an employee of the Prairie Oil & Gas Company.

[2] 2. The order sustaining the demurrer of Earl Blue rests on a different foundation. Section 1 of chapter 226 of the Laws of 1917, the Workmen's Compensation Act as amended, must be examined. That section, in part, reads:

"This act shall apply only to employment in the course of the employer's trade or business on, in or about a railway, factory, mine or quarry, electric. building or engineering work, laundry, natural gas plant, county and municipal work. and all employments wherein a process requiring the use of any dangerous explosive or inflammable materials is carried on, which is conducted for the purpose of business, trade,. or gain."

The work being done by Earl Blue was not covered by any part of the Workmen's Compensation Act, unless his work was building or engineering as defined in section 2 of chapter 226 of the Laws of 1917. The parts of section 2 material for consideration read:

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"'Building work' means any work in the erection, construction. extension, decoration, alteration, repair or demolition of any building or structural appurtenances. * * * 'Engineering work' means any work in the construction, alteration, extension, repair or demolition of a * * * oil or gas well."

Earl Blue was hauling pipe between the place where it was being used and the place where it was being repaired, a distance of 20 miles. He was not building anything, nor was he doing any part of engineering work. Others may have been engaged in building or engineering work. but he was not.

Another statute that should be considered, so far as Earl Blue is concerned, is section 5902 of the General Statutes of 1915. That section, in part, reads:

"It is hereby determined that the necessity for this law and the reason for its enactment, exist only with regard to employers who employ a considerable number of persons. This act, therefore, shall only apply to employers by whom five or more workmen have been (employed) continuously for more than one month at the time of the accident: Provided, however, that employers having less than five workmen may elect to come within the provisions of this act in which case his employees shall be included herein."

The petition did not allege that Earl Blue employed five or more workmen. nor that he had elected to come within the provisions of the Workmen's Compensation Act. He employed only one man. Under these statutes, the plaintiff had no cause of action against Earl Blue under the Workmen's Compensation Act.

The judgment is affirmed.

All the Justices concurring.

HADDAD v. COMMERCIAL MOTOR TRUCK CO. (No. 24148.)

(Supreme Court of Louisiana. Nov. 3, 1920. On the Merits, May 30, 1921. On Rehearing Jan. 2, 1922. Second Rehearing Denied Jan. 30, 1922.)

90 Southern Reporter, 666.

On Rehearing.

(Syllabus by Editorial Staff.)

2. MASTER AND SERVANT — COMPENSABLE INJURY TO DRIVER FOUND DEAD HELD NOT SHOWN.

In a proceeding under the Workmen's Compensation Act for the death of a truck driver who was found dead in the road with bruises on his body and the truck in gear against the stump of a tree by the roadside, evidence *held* not to warrant a finding that the servant's death was the result of accident.

(For other cases, see Master and Servant. Dec. Dig. § 405[4].)

3. MASTER AND SERVANT — COMPENSABLE INJURY MUST BE SHOWN TO LEGAL CERTAINTY.

In a proceeding under the Workmen's Compensation Act to obtain compensation for death of servant, it is not enough to show that death was probably the result of an accident, but that such was the case must be made out to a legal certainty.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

O'Niell and Dawkins, JJ., dissenting.

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Appeal from First Judicial District Court, Parish of Caddo; J. R. Land, Judge.

Proceeding by Ossie Haddad under the Workmen's Compensation Act to obtain compensation for the death of her husband. opposed by the Commercial Motor Truck Company. the employer. There was a judgment allowing compensation, and the employer appeals. Judgment set aside, and suit dismissed.

Wise, Randolph, Rendall & Freyer, of Shreveport, for appellant.

Murff & Mabry, of Shreveport, for appellee.

On Motion to Dismiss.

PROVOSTY, J. [1] The appeal in this case is asked to be dismissed because the appeal bond, instead of reading that the appeal is returnable to this court; reads that it is returnable to the First district court of Caddo parish—the very court which rendered the judgment appealed from. Assuming this to have been an irregularity, and even a serious one, the motion to dismiss was filed more than three days after the transcript had been lodged in this court, and therefore too late to be entitled to consideraion. In re Lindner, 113 La. 772, 37 South. 720. The transcript was lodged in this court on June 21, 1920; and the motion to dismiss was filed on July 17, 1920.

The motion to dismiss is overruled.

O'NIELL, J., concurs in the result, on the ground that section 9 of Act No. 112 of 1916 declares that no appeal shall be dismissed on account of any error in the appeal bond; hence it is not important that the motion to dismiss the appeal in this case was filed more than three days after the transcript was filed.

On the Merits.

O'NIELL, J. Defendant appeals from a judgment allowing plaintiff compensation, under the Employers' Liability Act, for the death of her husband.

Her suit was dismissed on an exception of no cause of action after it had been heard on its merits. On appeal, the judgment was reversed, the exception overruled, and the case remanded for a decision on its merits. Haddad v. Commercial Motor Truck Co., 146 La. 897, 84 South. 197, 9 A. L. R. 1380.

The only proposition that was decided on the former appeal was that the business in which the defendant was engaged. and in the course of which plaintiff's husband was performing services arising out of and incidental to his employment at the time of the alleged accident, was a hazardous business or occupation, defined in subdivision (a) of paragraph 2 of section 1 of the Employers' Liability Act, Act 20 of 1914, as "the installation, repair, erection, removal or operation of * * * engines and other forms of machinery." The ruling was that the business or occupation of handling, selling, operating and delivering motor trucks was such hazardous occupation or business.

Plaintiff avers that her husband's death was caused by his falling from a motor truck and being run over or struck by a wheel of the truck. Defendant contends that the man's death was not caused by an accident but was the result of a physical ailment with which he was afflicted before the alleged accident.

The only question presented on this appeal is whether the evidence warrants the conclusion that plaintiff's husband's death was the result of an accident. The word "accident" is defined in section 38 of the Act

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20 of 1914 as "an unexpected or unforeseen event happening suddenly or violently, with or without human fault, and producing at the time objective symptoms of an injury."

It is not disputed that plaintiff's husband was, immediately before his death, driving a motor truck belonging to defendant, and that the service which he was then performing arose out of and was incidental to his employment in the course of defendant's trade, business or occupation. No one witnessed the man's death or the occurrences immediately preceding it. He was found dead in the road, about 80 feet in front of the motor truck, which had stopped against the stump of a tree by the roadside. The man who found the dead body in the road notified the coroner, who, with the sheriff and clerk of court, went immediately to the scene. On examination of the body, they found marks indicating that the man had been run over or struck by a wheel of the motor truck. They found that the truck was yet in gear, showing that it had been stopped by coming in contact with the stump. They found marks on the dirt embankment beside the road, showing where the wheels of the truck had struck and skidded. They also found an impression in the embankment, which they concluded was caused by the body of the man being jammed against the embankment. They concluded, therefore, that the man had lost control of the motor truck, had fallen from the seat, and had been run over or jammed against the embankment. They concluded that he had not been killed instantly but had walked from the place where he had fallen to the place where his body was found. They then looked for the cause of his having, as they supposed, lost control of his steering wheel; and they found a small sack of tobacco, cigarette paper and a match on the floor in front of the driver's seat in the motor truck. From these circumstances, the coroner, sheriff and clerk of court came to the conclusion that the man had undertaken to roll a cigarette while he was driving the motor truck and had thereby lost control of his steering wheel. The coroner was so convinced of the correctness of his theory as to the cause of the man's death that he made his report accordingly, deeming an autopsy unnecessary. The body was taken to an undertaker's establishment, where it was embalmed and prepared for burial. The widow, father and two other relations of the deceased viewed the body at the undertaker's establishment, and testified that they saw marks indicating that the man had been run over or struck by the wheel of the motor truck.

The death occurred on Saturday. The corpse was sent from the undertaker's establishment to the residence of the father of the deceased the next day, Sunday morning, and remained there until Monday morning, when it was returned to the undertaker's establishment, at the request of three surgeons or physicians who were then employed to make an autopsy by the indemnity company that will bear the loss if defendant be condemned to pay compensation in this case. The three physicians or surgeons testified that they found only three external marks of injury on the body, a slight bruise on the chin, another on the chest, and a larger bruise on the hip, none of which bruises, they testified could have caused death or even serious injury. They testified that, when they cut open the body, they were surprised to find what they described as a tumor mass, about 4 inches in diameter and 5 or 6 inches in length, showing that a cancer had been growing from the right lobe of the liver, and that the growth had ruptured at its upper end. They expressed the opinion that the tumor had reached such an advanced stage of development that it might have ruptured without any act of violence, extraordinary exertion or other external cause—in fact, that such a tumor could have ruptured while the victim was lying quietly in bed. They testified that the rupture of such a tumor would cause the victim to faint and that the hemorrhage would cause death, which might result very quickly.

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From this expert testimony, defendant has advanced the theory that the tumor burst merely because it had reached that stage of development at which nature demanded that it should burst, without external cause, and that the man fainted and fell from the motor truck, and that his death was the result of internal hemorrhage.

Against that theory is the uncontradicted evidence that the man appeared to be in good health when he was last seen alive. He was 27 years of age, was doing manual labor, working as a mechanic's assistant, and had not consulted a doctor during the last 17 years. No one had suspected his having a malignant growth until the doctors found the tumor mass in the dead body, on the second day after it had been embalmed.

However, plausible may be the theory which defendant has evolved from the expert testimony in this case, it is far more probable that the man's death resulted from the automobile accident than that the accident resulted from a natural death. It is quite probable that the accident would not have caused death if the man had not been afflicted with a tumor. The fact, however, that he was afflicted with a fatal disease would not interfere with the widow's right to compensation for an accident which, because of the disease, superinduced immediate death. Behan v. John B. Honor Co., 143 La. 348, 78 South. 589, L. R. A. 1918F, 862.

The judgment appealed from is affirmed, at appellant's cost.

Provosty, J., dissents.

On Rehearing.

PROVOSTY, J. Plaintiff's husband was found dead on a public road leading to Shreveport. Some 20 or 30 yards further on was a truck he had been driving. Its front wheels were in the ditch on the side of the road. It had turned out of the road, almost at right angles, and stopped against the outer embankment of the ditch on the left-hand side of the road, and, presumably, had followed this erratic course after its driver had ceased to control it, for it was still in gear. Several men, who discovered the body, moved it from where it lay near the middle of the road to the other side of the ditch; and one of them notified the coroner. The latter repaired to the scene with the sheriff and the clerk of court. They found a number of persons there. After viewing the situation, they concluded that the man had fallen out of the truck, and been fatally injured by being pressed against the outer embankment of the ditch by the hind wheel of the truck. This conclusion they reached from the following indicia: (1) The presence in the truck of the stumps of "a cigarette and match that had been just burned" (we presume these things were on the floor of the truck in front of the driver's seat); (2) an impression in the outer embankment of the ditch, as if made, not by "wood or iron or anything of that kind," but by "something with clothes or clothing on"; (3) there was fresh dirt on the hands and on the clothes in front on the lower part of the chest, down as low as the hips, just some dirt, nothing special about it; (4) bruises on the body; (5) some footprints on the road, which they thought might have been, and probably were, made by the man. Anything more vague and unsatisfactory than the testimony on the subject of the reasons why the said footprints and the said impression on the outer embankment of the road ditch should be held to have been made by the dead man it would be not easy to conceive of. Thus:

Testimony of Mr. Bell, the clerk of court:

"Q. About how far from the body was this truck, Mr. Bell?

"A. Well, from the body where it was lying when I saw it, it was approximately 60 feet.

"Q. Mr. Bell, please state in your own way what you observed, what you saw there near the truck and body.

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"A. * * * I stayed there for a while, and I walked down the road just a little piece to see if I could see just what had happened. I found the truck track where it left the road, I would say, about 70 or 80 feet east of the point where the body was lying. The truck had been coming up the road on the left-hand side of the road, the right wheel of the truck being just about where the left wheel of the vehicles that usually traveled the road would be. I saw that the wheel, the front wheels of the truck, had turned abruptly across the road almost at right angles. There is a little embankment I would say about 18 inches high, what is generally known as a ditch, on the side of the road. and it was plain that the left wheel, left front wheel of the truck. had struck the bank before the right-hand wheel had, had not turned together at right angles across the road. About 4 or 6 feet east of where the wheels struck the bank there was an imprint in the bank where something had struck the little bank of the ditch there—the left wheel of the truck turned right up the little ditch. The hind wheel of the truck had begun to slide, and when it got nearly to the edge of the ditch it showed it just slipped right around and struck the side of the ditch, and right where this imprint was in the side of the bank where something had struck it, the left wheel began to cut into the bank and abruptly had run up that ditch for a distance of about 80 feet, and the bank of the ditch there was a little lower, and the left wheels of the truck climbed up on the bank with the left wheels on the bank and the right wheels in the ditch, run about a distance of 50 or 60 feet. The bank there raises up and was elevated, and the axle of the truck had run into the bank and cut into it and evidently choked the engine down and it stopped. The impression made in the side of the bank was very plain and showed that there was considerable impact. Dr. Hewitt at that time was viewing the body, and they had finished. I called Dr. Hewitt and Mr. Smith down, and we retraced it from the place where the automobile truck struck the little ditch bank. There were some tracks that lead off for approximately 10 or 12 steps. We were unable to track that any further, because other people there, and they had walked all around so many could not carry it further.

"Q. Well, Mr. Bell, referring to the tracks that you mentioned in your testimony, I will ask you if you noticed the size of those tracks?

"A. Well, I cannot say that I did particularly, except will say this, the tracks were the apparent size of the shoes the man wore.

"Q. In reference to the imprint you saw in the side of the bank, I will ask you to state what it looked like?

"A. Well, I would have done that in the beginning, except I thought possibly be calling for an opinion. It was clear, though, that it was not made by a piece of wood, iron, or anything of that kind; it had the appearance of where something with clothes or clothing had struck the bank, very plain.

"Q. I will ask you if in a case of that kind if a man's body was thrown against the bank, if it would make that kind of imprint?

"A. It would have, sir; unquestionably so.

"Q. Those tracks that you spoke of, Mr. Bell, did they lead in the direction where Haddad's body was?

"A. From the place—well, I will state it this way: That the tracks lead off in the direction that the motor car. This motor truck had gone the general direction and lead out towards the center of the road, the tracks. We only tracked the man about halfway between the place where I saw this imprint in the bank and where the spot that was pointed out to us as the spot where Haddad's body was picked up.

"By Court:

"Q Had the wheels of this truck passed over that imprint in the bank?

"A. No, sir; the front wheels were west of that—

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"Q. Of the imprint?

"A. Yes, sir.

"Q. Any evidence that the hind wheel had passed over the body?

"A. Right at it could not say that didn't pass over but within, just as if the impression had been made against this bank this way, the hind wheel began to shave off the bank right at that place.

"Q. I believe you stated, Mr. Bell. that the truck was very near or within a few inches of this imprint you saw in the side of the bank?

"A. The hind wheel; yes, sir. We could track the tracks of the truck very plainly.

"Q. Was that imprint—how was it located as to length?

"A. Well, it was shown in the bottom of the ditch and in side of this bank about, approximately, 18 inches.

"Q. The impression was about 18 inches long?

"A. Well, it showed in the bottom of the ditch, of course. just the length could not say, and it showed plainly on the bank from the top of the bottom of the ditch and some evidence of it in the ditch.

"Q. Was the length of that impression up and down or horizontal?

"A. It was right against the bank up and down and showed in the ditch just below it.

"Q. That bank about 18 inches tall?

"A. Yes, sir; just as if would lean against it this way.

"Q. You don't know whether the impression had been made, if made by a man, was made with his face to the bank or back to the bank—of course, nothing to indicate that?

"A. No, sir; could not say as to that.

"Q. If a large sack of flour had been pressed, thrown against the bank. would it have made something similar to the same sort of imprint?

"A. Well, in a way it would have; yes, sir.

"Q. Anything with cloth on it would leave impression similar, a similar sort of imprint?

"A. You might say so, Mr. Freyer, would have been similar, but no sack of flour thrown across there could not have made that imprint.

"Q. If any object that had cloth on it of size large enough and of the size of this imprint of about 2½ feet if pressed against there, thrown against there, would make something of a similar imprint?

"A. Yes, sir; it would have been similar; you could have thrown a hog against it and would have made a similar imprint too.

"Q. Now these. the imprint of the wheels striking this side of the ditch or bank, the first imprint of the front wheels was about how far from this imprint?

"A. Approximately four to six feet; that is, the left wheel of the truck.

"Q. And the hind wheel within a few inches, I believe, you say?

"A. It started, you may say, at the edge of the imprint almost.

"Q. That is, on the side?

"A. Yes, sir; it was very plain that the wheel had slided sideways just before it got to this little ditch, possibly two or three feet. There was no evidence of the wheel in the bottom of the ditch. and after it left the side, the right side of the ditch, we saw nothing of it until the wheel began to cut right into the bank, right at this impression that was in the bank. The left wheels ran into the ditch and cut the side of the ditch all along, the left wheels climbed up the edge of the ditch, and the truck run a little to the left all the time, and the right wheels finally got in the ditch.

"Q. Now, Mr. Bell, from the point of this imprint on the side of the ditch back to where the truck appears to have left the forward movements and gone almost at right angles, about how far back was that along that road?

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"A. Let me understand you—

"Q. You got the tracks traced along the left-hand side of this road coming to Shreveport; then at a point along there they leave almost at right angles and went to the left?

"A. Yes. sir.

"Q. Now, how far was it back down the road there where the tracks leave this straight line and turn to the left before you come to the imprint in the bank?

"A. The automobile tracks for some distance down the road running up the left-hand side of the road and from the point that it turned abruptly to the left to where the imprint in the bank was approximately 12, maybe 15 feet.

"Q. And then from there on the automobile ran some 75 or 80 feet, some little distance?

"A. Ran about 150 feet before the automobile stopped.

"Q. Now, with reference to this point where the tracks abruptly left the straight line and went to the left, how far was it to the body when you first saw it?

"A. About 70 or 80 feet.

"Q. Then it was something like about 55 or 60 feet further down the road from the point of this imprint.

"A. The imprint, Mr. Freyer, in the ditch, was almost opposite the point where the automobile turned out of the road abruptly to the left from that point up to where the body was lying when I got there, was approximately 70 or 80 feet.

"Q. You know whether or not the body had been moved before you got there?

"A. I was informed so when we got there. and the point pointed out where the body was moved from.

"Q. Who was there before you got there?

"A. Well, I could not say; a number of people; don't know; some negroes, Mr. Fiske, the deputy sheriff, who resides at Grand Cane, I remember distinctly was there. I think one or two of the Ricks who reside at Grand Cane was there; quite a number of people.

"Q. At the place where the body was first discovered was there evidence of his body having been turned over, moved, etc.?

"A. No, sir; there were so many tracks there near the little spot in the road they pointed out to me—I remember there was a little wet spot in the road where the man was picked up.

"Q. No distinguishing mark about this particular footprint leading from this imprint on the side of the ditch except in size, it had certain size. no distinguishing marks about it?

"A. No, sir; there was not. That was the only track, however, that led from that place in the direction of the point where the body was found.

"Q. You only traced about half that distance?

"A. Approximately, right in direct line of where the point was shown to us as the place where the body was picked up.

"Q. In the middle of the road or what part of the road?

"A. Near the middle of the road; yes, sir.

"Q. Mr. Bell, the wet spot in the road that was pointed out to you as where the body was found, how far was that spot from the imprint that you saw in the bank?

"A. I would say approximately 80 feet—the wet spot in the road was just north, little northwest, I would say. of where the body was lying when we got there, would say about 15 feet north of the west bank of the ditch.

"Q. Did you notice whether the tracks of this truck passed over that wet spot in the road?

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"A. It did not. It was not closer than, the right-hand wheel not closer than 15 feet to where this wet spot in the road was and the point where the parties showed us the body was. * * *

"Q. The point where the wheels skidded, as stated in your testimony this morning?

"A. The front wheel didn't skid at all; it turned almost abruptly to the left. The left wheel struck the ditch bank and followed the course of the ditch bank. The hind wheel skidded in a forward movement until it got opposite the place where the imprint was in the bank, and right at that time it was just on the edge of the ditch next to the road on the inside, inside ditch. There was no mark in the bottom of the ditch. The wheel went right up the little ditch, and next place was found right opposite where the wheel right at the imprint that was made in the bank, the wheel begun to cut in the side of the bank and followed the course of the front wheels."

Testimony of Dr. Hewitt, coroner:

"Mr. Bell came back; had been down the road. He took me down to show those evidences. There was the place where the automobile had left the road and run into the bank, and anybody who runs a car, Judge —the wheels, the front wheels, hit the bank the back wheel skidded right where the wheels hit the bank imprint there where something had been mashed into the bank, and it rolled off at out that far where it begun to cut dirt and go on up the road.

"Q. You didn't see a sack of flour anywhere around?

"A. Judge, a sack of flour didn't make that sort of a print. A man's back and hips make that kind of print by being mashed into the bank with clothes on.

"Q. Was this impression, the soil in this bank where the impression was made that as hard as the soil in the road?

"A. No, sir.

"Q. Much softer?

"A. Just like any embankment would be, Judge.

"Q. So there would be considerable difference between the injuries to a man run over by truck on hard road and where simply shoved against the bank and run over?

"A. Great deal of difference, yes, sir, on hard road and a soft place like that it would be."

Testimony of Mr. Smith, sheriff:

"We got to looking around as a matter of course, and we found where this truck had turned abruptly to the left and the front wheel struck the embankment and the hind wheel had slided against the embankment, and we found the impression there; we knew in reason that this party had fallen and the hind wheel of the truck rolled over him; but where the hind wheel struck the embankment was just about where the party or whatever this impression was made by the hind wheel struck looked like the object or whatever it was that made the impression, and we could see where the wheel rolled off. The truck then rolled up. the left hind wheel was in the ditch and rolled up, I reckon, 30 or 40, possibly 50 feet, little low place in the road; climbed out of the ditch on the bank and straddled it and then run into a little mound and stopped."

The impression or imprint which these witnesses saw in the ditch embankment was still there several days thereafter. How long it remained, and how long it may have been there before, no one, of course, can know. Nothing shows that the footprints were those of the dead man.

A more satisfactory theory of the cause of the man's death is given by the witnesses for defendant.

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The death was on a Saturday. On the following Monday three physicians of Shreveport, of whose competency and reliability in every way there can be no question. made an autopsy, and found that the man most probably had died from the rupturing of a tumor. With respect to the outer appearance of the body and this tumor, these witnesses testified as follows:

Dr. Butler:

"Q. Did you examine the body from head to foot for marks?

"A. Yes, sir; very carefully, both Dr. Ellis and myself, and with the parties present, at least five or six looking over the body with us.

"Q. What marks did you find?

"A. We then started at the top of the head, looking all through, from the scalp down; found nothing; went down and found small scar under the chin, and then come on down and found small, another over the fifth right rib. another scar, scraped place. Something had disturbed the skin. The only other place was rather large place two or three inches in size right on the side of the hip, right here, extending across the side. It looked like something had been scraped.

"Q. Any of these marks, were they superficial only?

"A. All involved the skin surface only; didn't go deeper than the skin so far as could tell.

"Q. Were there any bones broken at all?

"A. No, sir; we examined as carefully as could be examined; didn't find any broken bones.

"Q. Did you find any flesh mashed, torn, or bruised across the body?

"A. One, yes, sir, is my recollection.

"Q. No other marks at all on the body?

"A. No. sir; none that would be of any consequence, nothing to notice at all.

"Q. And you examined very carefully for the purpose of finding—

"A. We did; had extra good light; turned the body over two or three times.

"Q. When opening the body up, what did you find inside?

"A. First made an incision from the ——— right straight down to the public bone, and we opened up the chest first, as first procedure in post mortem, went in the left side of the chest, and we didn't find any trouble, except the heart pushed over about 1½ inches further to the left than it should be. Now in the right chest cavity the right lung was pushed considerably out of place; there was about nearly three quarts of serum-like fluid in the chest cavity. We removed all that fluid out of the chest cavity and found that the lung had been pushed up to make space for that amount of fluid, close to three quarts, right in the top of the chest, which was separated by the diaphragm all the way across; just looked like the head of a drum. Protruding through this diaphragm was a tumor mass about between five and six inches long about four inches in diameter which had pushed through the hole in the diaphragm with smooth edges about like that and practically filled that hole up. The top part of this tumor had a rupture about as long as the finger from which it had been bleeding. Then we went down into the abdominal cavity to see where the tumor came from, and we found it attached and growing from the right lobe of the liver. Then we cut the diaphragm out about a foot in diameter and found the tumor came through the hole in the diaphragm and found this intact. Then we found in the abdominal cavity all around the intestines clotted blood from hemorrhage that had been bleeding enough to produce some swelling. Then this fluid was taken and examined to see what it was, and it was blood serum with some formalin. Then the piece of tumor was taken and sections frozen and examined under the microscope, and it showed to be cancer.

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"Q. With a tumor of this sort, this character, ruptured as you found it, do you find such condition without any violence or accident or external force that man might be lying in bed and that would rupture?

"A. Yes, sir; it could happen under any circumstances, and tumor on the liver of that kind generally does rupture sometimes itself; really to be expected.

"Q. With a tumor of that size and conditions as you found in this man, what would you say as to his condition, whether his death was imminent, whether from accident or what not?

"A. It really, from a pathological standpoint, it is hard to believe the man lived as long as he did, don't generally see anybody in the condition that man was live long. Of course, you can live several years with cancer, but any one who does anything very much in a manual way is liable to rupture it; hard to see how could keep from being ruptured.

"Q. That man then, independent of any fall or blow, pressure, or whatnot, was likely to have died any day in that condition?

"A. Yes, sir.

"Q. From the appearances on this body as you have described, would you say that he had been run over by an eight-inch hard rubber wheel on truck weighing over 4,000 pounds?

"A. Could not see anything on the body that would indicate that he had.

"Q. Did you find any organs in there that were displaced?

"A. No. sir; except those pushed by this fluid and had been pushed sufficient length of time that they were stationary, might say grown there, and we could not move that lung back; had been sufficient length of time could not be pulled back in place. The fluid had necessarily been there for days, probably weeks, the heart pushed over sufficient length of time for the heart and lung to remain over there, would not come back at all.

"Q. If there had been any pressure on that body, would it not leave any outward evidences. If had been any injury some organ inside?"

Dr. Ellis:

"Q. What did you find inside the body?

"A. We found a tumor mass which was attached to the right lobe of the liver protruding, projecting through a hole in the diaphragm in the chest cavity. We found the right chest cavity filled with fluid, the heart pushed to the left, and the right lung pushed upward.

"Q. What effect did that fluid have on the position of the lung and heart?

"A. Pushed the heart to the left and the right lung pushed upward.

"Q. Had that condition existed for some little time?

"A. Yes, sir.

"Q. Had it been there long enough to have allowed this lung to grow in that position?

"A. Yes, sir.

"Q. Permanent displacement of the heart and lung?

"A. Yes, sir.

"Q. With a man in that condition, would you expect him to live very long?

"A. No, would have expected him to die at any time, his days numbered.

"Q. He could not have lived very long at all?

"A. Would not think so.

"Q. Be a matter of days or weeks, or how long?

"A. Anywhere from hours to days.

"Q. As a matter of fact, what was the proximate cause of his death?

"A. He bled to death.

"Q. Where did he bleed from?

"A. From the rupture in his tumor.

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"Q. What was the nature of the structure of this tumor as to whether it was firm or friable?

"A. Very friable, easily broken.

"Q. If this body had been mashed about the abdomen with force of a truck weighing over 4.000 pounds pressing against it, what would have been the effect as to the crushing of the entire tumor inside of this man's chest?

"A. I think it would have crushed it out of shape.

"Q. Did you find any evidence of bruises on the body in the neighborhood of the abdomen or hips?

"A. No, sir.

"Q. Did you find anything to evidence that this body had been run over by a wheel with solid rubber tire about 8 inches wide on a truck weighing about 4,000 pounds?

"A. No. sir.

"Q. If this body had been mashed by such a force or run over by such a wheel, would it not necessarily have left evidence that you could have determined it?

"A. It would have.'

Dr. Williams::

"Q. Did you have a careful—make a careful examination or observe the body externally?

"A. I did.

"Q. What marks did you find?

"A. Slight mark abrasion on the outside right thigh, and my reflection is little mark on his chin and slight abrasion on the right chest.

"Q. Were these superficial?

"A. Very superficial.

"Q. Independent of any tumor and its connections. were they sufficient to have disabled the man at all?

"A. Absolutely no.

"Q. If they had been the result of accident or from external violence, would they have occasioned the man to lose any time from work at all?

"A. No, sir.

"Q. They would not?

"A. They would not.

"Q. Was there any indication on the outside of this body to show that any part of it had been run over by the wheel of a solid rubber tire about 8 inches wide, truck weighing something like 4,000 pounds?

"A. No, sir.

"Q. If any part of the body had been run over by such a weight, do you think it would have left marks on the body?

"A. Marks of some kind.

"Q. If there had been pressure by mashing this man by truck weighing something like 4,000 pounds in the vicinity of his abdomen, would have left evidence on his body?

"A. Yes, sir.

"Q. Did you find evidence of any such injury?

"A. No. sir.

"Q. What did you find inside this man?

"A. Tumor mass connected with the lung projecting through hole in the diaphragm.

"Q. What effect did this mass in the chest have on the lungs and heart?

"A. The heart was pushed to the left and the lung pushed upward.

"Q. Had that condition become permanent?

"A. Yes. sir.

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"Q. Would you say from that this fluid had been there some time or a short time?

"A. Yes, sir.

"Q. Could you estimate approximately about how long it would take for this condition to come about?

"A. Good many days.

"Q. Good many days?

"A. Yes, sir.

"Q. Would not form in five or six days, something like that?

"A. No.

"Q. If there had been sufficient force to have caused any serious injury independent of this tumor from external sources, would there have been evidnce that you could have discovered on this body?

"A. I think so.

"Q. You found no such evidence?

"A. No, sir.

"Q. If the stationery object behind or under the body had been so soft that the pressure against it did not leave any evidence on the body itself, would it or not, and yet such pressure had caused death, would it or not have injured some vital organ inside the body?

"A. I think so.

"Q. Did the examination disclose injury to any organ inside the body except the lung and heart and this tumor?

"A. The diaphragm. the hole in the diaphragm.

"Q. Injury to any other—any other injury to any vital organ inside the body?

"A. No, sir.

"Q. From your complete examination of this man and his entire condition, what you have stated, what was your prognosis as to the cause of death?

"A. Hemorrhage from rupture of the tumor."

Dr. Hewitt, the Coroner, a witness for plaintiff, testified as follows:

"Q. Just state what condition you found the body in when you made the examination?

"A. Well, at first—his hands, clothes were muddy and his clothes were wet; I think the mud was from the evacuation of the bladder and the clothes were wet; also a wet spot in the road where the man was picked up. The man's privates were swollen and bruises on the lower part of the abdomen. bruises between the navel and pelvic bone. * * *

"Q. This place you found on his stomach, about where was it located?

"A. Located between the navel and pelvic bone.

"Q. The bone in front?

"A. Yes, sir; the bone in front.

"Q. About what size was that bruise?

"A. About like three fingers lying in that direction.

"Q. About three inches long and probably two wide?

"A. About three inches wide and three or four long.

"Q. It didn't extend across his abdomen?

"A. Yes, sir; right across.

"Q. Not the entire length?

"A. No.

"Q. It was about, I believe you say about three inches wide and three or four long, something like that?

"A. Yes, sir; I didn't measure."

The man had theretofore been in poor health and weak. His employer testified as follows:

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"He would work as helper in the shop, clean trucks, clean up the office, take care of cars, clean up tools, general help work about the shop, and occasionally we would use as driver to deliver trucks something of that nature unloading cars.

"Q. Well, when did he stop working in that capacity?

"A. Could not tell exactly; some time prior to the last employment he secured other employment, he was always around, and whenever we found anything he could do we gave it to him. He was always around willing and anxious to work because he needed the money, and we gave anything that we could from time to time to keep him employed."

Another witness testified that owing to his physical condition he was able to do "only little things"; only things that required "no heavy exertions."

As the road was smooth and straight, and he was an experienced chauffeur, the probability of his having been thrown out or fallen out, or, indeed, of his having lost control of his wheel, because of trying to light a cigarette, is very slight. Besides, the evidence shows that between the steering wheel and the side of the driver's seat the space was only six to eight inches—a space through which a man could pass only with difficulty.

[2] Upon the whole, and after a careful reconsideration of the case, we have concluded that plaintiff has not shown that the death of her husband was from an accident arising out of his employment. And that, on the contrary, the defendant has shown that the death was in all probability from the tumor having ruptured in due course of its development.

[3] Even if the thoery of plaintiff's case—that the man had fallen out of the truck as the result of some accident and had come to his death by being pressed against the ditch embankment—were probable, this would not suffice; for the matter would still be involved in grave doubt, so much so that the court could not know with any sort of certainty that the defendant was liable. A case must be made out to a legal certainty; this is elementary, and is as true in the case of a suit under the Workmen's Compensation Act, like the present, as in any other. Piske v. Brooklyn Cooperage Co., 143 La. 455, 78 South. 734.

In the note contained in annotation L. R. A. 1916A, 294, we find the following:

"An accident will not be inferred where there is no evidence of any strain, and the evidence adduced is equally as consistent with the fact of no accident, as with the fact of an accident. Barnabus v. Barsham Colliery Co. (1910; H. L.) 103 L. T. N. S. (Eng.) 513, 55 Sol. Jo. 63 (Apoplexy); Kerr v. Ritchie (1913) 50 Scot. L. R. 434, (1913) S. C. 613, (1913) W. C. & Ins. Rep. 297, 6 B. W. C. C. 419 (heart failure); Beaumont v. Underground Electric R. Co. (1912) W. C. Rep. (Eng.) 123, 5 B. W. C. C. 247 (heart disease)."

The judgment appealed from, which was in favor of plaintiff, is set aside, and the suit is dismissed at the cost of plaintiff.

O'Niell and Dawkins, JJ., dissent, adhering to the original opinion.

Land, J., is excused.

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LOWE v. MORGAN'S LOUISIANA & T. R. & S. S. CO. (No. 23461.)

(Supreme Court of Louisiana. April 4, 1921. On Rehearing Jan. 2, 1922.)

90 Southern Reporter, 429.

(Syllabus by Editorial Staff.)

2. MASTER AND SERVANT—INJURED EMPLOYEE CLAIMING COMPENSATION LOSES NO RIGHT OF ACTION AGAINST THIRD PERSON.

All that section 7 of the Workmen's Compensation Act intended to do was to give the employer a statutory subrogation pro tanto to the rights of an employee injured through the negligence of a third party, and employee claiming compensation from the employer did not forfeit his right of action against the third person, such section only giving the employer an interest in the subject-matter of the litigation, which is essential to the maintenance of an action under Code Prac. art. 15, although such third party had the right by appropriate exception to require that the employer be made a party, but the total liability of the third person was to be determined by Civ. Code, art. 2315.

(For other cases, see Master and Servant, Dec. Dig. § 354.)

O'Niell and Dawkins, JJ., dissenting as to disposition on rehearing.

Appeal from Civil District Court, Parish of Orleans; E. K. Skinner, Judge.

Action by George H. Lowe against Morgan's Louisiana & Texas Railroad & Steamship Company for personal injuries. Judgment for plaintiff, and defendant appeals, and plaintiff asks for increase of verdict. Judgment set aside, and action dismissed.

Denegre, Leovy & Chaffe and Harry McCall, all of New Orleans. for appellant.

H. W. Robinson, of New Orleans, for appellee.

DAWKINS, J. Plaintiff's suit is for personal injuries alleged to have been received through the fault and carelessness of defendant and its employees. He alleges that he was employed as a carpenter by the Southern Cotton Oil Company, and at the time of the injury was engaged in helping to construct the frame-work around and in a scale pit of said Cotton Oil Company, on its premises in the town of Gretna, La.; that the tracks of the defendant company extend into the yard and plant of his said employer; and that defendant's locomotive, in passing on a track near where petitioner was at work, carelessly struck a large metal pan or box which was lying on or near said track, hurled it against and upon petitioner, crushing and injuring his right leg to such extent as to render it of no further use, and which will ultimately necessitate its amputation; that the said injury has wholly incapacitated petitioner for pursuing his chosen trade; and prays damages in the sum of $25,000.

Defendant admits the injury, but denies the charges of negligence imputed to it, or that the injuries were of the character alleged, avers contributory negligence on the part of plaintiff, and prays that his demands be rejected.

Subsequently defendant filed an amended answer, in which it was averred that plaintiff was an employee of the Southern Cotton Oil Company, governed by the provisions of the Workmen's Compensation Act (Act No. 20 of 1914), and under said statute had the choice of claiming compensation thereunder and waiving his claim for damages ex delicto

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against respondent, or of refusing such compensation and pursuing his action against respondent; that he had chosen the former course, had demanded and accepted compensation under said act, and was thereby precluded from asserting the demand made in this case.

Plaintiff resisted the allowance of the supplemental answer on the ground that it was inconsistent with and changed the issues raised by the prior pleadings. This objection was overruled by the lower court, the issue raised by the amendment was submitted first and preliminarily to the jury, which decided in plaintiff's favor, holding that there had been no voluntary election of remedies, and the case then went to trial on the main issues.

There was a verdict in favor of plaintiff for $11,000, and from a judgment pursuant thereto, defendant prosecutes this appeal. Plaintiff has answered, praying that the sum awarded be increased to the amount originally demanded.

The Amended Answer.

[1] We think the ruling of the lower court on the amendment was correct, for the issue therein raised, if well-founded in fact and law, afforded a complete defense to the case, no matter how meritorious or well-founded the demand might have been otherwise. Nor was it contradictory of the other defenses of denial of negligence, and contributory negligence for any or all of them might exist at the same time. The plea was in the nature of a peremptory exception, or plea in bar, tending to defeat the demand, and we think properly allowed.

The Plea in Bar.

[2] Section 7 of Act No. 20 of 1914 (which was the law existing at the time this case arose) is as follows:

"That when an injury for which compensation is payable under this act shall have been sustained under circumstances creating in some other person than the employer a legal liability to pay damages in respect thereto, the injured employee may, at his option, either claim compensation under this act or obtain damages from or proceed at law against such other person to recover damages; and if compensation is claimed and awarded under this act any employer having paid the compensation or having become liable therefor shall be subrogated to the rights of the injured employee to recover against that person, and may compromise the claim therefor in his discretion; provided, if the employer shall recover from such other person damages in excess of the compensation already paid or awarded to be paid under this act then any such excess shall be paid to the injured employee less the employer's legitimate and reasonable expenses and costs of the action. which payment shall be credited upon the balance of compensation, if any, that may become due thereafter."

While counsel for plaintiff. in brief and argument, appears to concede that his client would be precluded from pursuing the present action against defendant, as for a tort, by the terms of that statute, if he had demanded or voluntarily accepted compensation, we do not so construe it All that we think this section intended to do was to give the employer a statutory subrogation pro tanto, to the rights of plaintiff, where otherwise it would have been necessary to obtain from the employer a conventional transfer. The provision does not say that an employee claiming compensation shall forfeit his right of action against a third person by claiming compensation, but that he shall have the option to seek either, but in any event he shall not be entitled to be paid twice that portion of his demand which is represented by the compensation. Such a meaning can only be read into the law by implication, and we think its language would have to be much plainer than it is to have the effect of

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saying that a tort-feasor can avail himself of a provision in no wise intended for his benefit, and with respect to which he is in no sense a party privy or governed in his responsibility by the law; especially where the effect would be to deprive the employee of substantial rights which he would otherwise have, since, notoriously, the employer's liability law affords but scanty recompense for the injuries which those affected by its operation may receive from the employer.

It is true that the employee is given the right to bring the action against the tort-feasor in his own name and to "compromise the claim therefor in his discretion"; but, in our opinion, this was for the purpose of giving him such an interest in the subject-matter of any such action, as to permit him to protect himself against a liability for which the law makes him responsible, regardless of the fault of others. For even if the suit be brought by the employer, the extent of the liability of the third person is in no way diminished, and the former can receive only a sufficiency to reimburse him his outlay on account of the injury, any excess above that sum still remaining the property of the employee, and by the terms of the law having to be paid over to him, thus clearly disclosing that, notwithstanding the statutory subrogation, he still has a real interest in the subject-matter of such litigation, which is one of the essentials prescribed by the Code of Practice to the maintenance of an action. Code Prac. art. 15.

We also think that, in view of the quoted provision, the defendant would have the right, by timely and appropriate exception (non-joinder) to require that the employer, who had paid, agreed to pay, or been adjudged to pay, compensation, be made a party to the suit, either as plaintiff or defendant, but no such motion has been made in this case, and the most that the court can be asked to do is to deduct from whatever sum, if any, which the plaintiff may recover, the amount of compensation, at its present discount value, which the employer will or should have to pay to the employee under the statute. The object and effect of the law was to allow plaintiff only a fair and just compensation for his injury. In so far as the employer is concerned, the sum or portion to be paid is fixed by the act of 1914, but as to third persons, the liability is to be determined by article 2315 of the Civil Code and the jurisprudence interpretative thereof.

It is true that the section quoted gives the employer who pays compensation a discretion to compromise the claim against third persons in the circumstances of this case, but it is not one which he is compelled to exercise, and the law of prescription with reference to such actions is just as applicable to any demand by him as any one else. If he does not appear or exercise that right, no one else can complain or assert it for him; and if defendant is credited with the portion which it might have to pay to him, then he (defendant) has no risk of having to pay twice, nor is the employee permitted to recover more than a sum which will reasonably compensate him for his injury. On the other hand, if the employee chooses to exercise his action against the tort-feasor, he is not deprived of his rights against the employer under the statute, but any amount recovered, we think, would have to be credited on the sum due by the employer, or, if more, the claim would be extinguished entirely.

This view gives effect to all the law, without reading into the statute a provision which the Legislature did not see fit to prescribe, we think, either expressly or impliedly. It is true that the act has been amended subsequently (Act No. 247 of 1920) so as to plainly exclude the idea of the employee's being deprived of his action against tort-feasors, but we do not interpret this as meaning that the act of 1914 was intended otherwise, but rather to remove whatever doubt there might have been.

Defendant cites three cases in support of its contention, to wit: Carlson v. Minneapolis St. Ry. Co., 143 Minn. 129, 173 N. W. 405; Mc-

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Garvey v. Independent Oil & Grease Co., 156 Wis. 580, 146 N. W. 895; and Barry v. Bay State R. Co., 222 Mass. 366, 110 N. E. 1031, 1032.

In the first case, the Minnesota statute expressly provided that the employee or his dependents might, "at his or their option, proceed either at law against such third party to recover damages, or against the employer for compensation, under part 2 of this act, but not against both." As above pointed out, our law contains no such provision, and but for the positive language of the Minnesota statute the court might have taken a different view. In any event, the real point decided in that case was that an employer, who had paid compensation to an employee injured by another could not receover without showing negligence on the latter's part, just as would have been necessary on the part of the injured employee.

In McGarvey v. Oil & Grease Co., the only question decided was that, under the peculiar provisions of the statute, which declared that the mere making of a claim by an employee against the employer should work an assignment of the former's rights against a third person for tort, the employer had the power to assign (by convention) the said claim to any one whom he might see fit to its full extent, without the tort-feasor having a right to complain.

And in Barry v. Bay State Ry. Co., while the statute is not quoted, the court says:

"The plaintiff under part 3, section 15, either could sue the defendant for damages or ask for compensation, but could not recover both."

We assume, therefore that its terms were free from doubt, and the case otherwise turned upon a question of fact as to whether the employee had voluntarily made the election to claim compensation.

We are of the opinion, therefore, that it makes no difference, for the purposes of this case, whether the plaintiff knowingly accepted compensation or not, for we do not think it would have had the result, even if true. contended for by defendant.

Defendant's Negligence.

The question of whether defendant was guilty of negligence turns upon the following circumstances:

Plaintiff and another carpenter were engaged in building wooden forms into which other workmen of the Cotton Oil Company operating under another department were to pour concrete to form the walls of a scale pit some 50 feet in length by about 10 feet wide, except that near the center on one side there was a jut in the wall about 4 feet deep and 12 feet long, making the pit at that point about 14 feet in width. They had nearly completed the forms, and the other employees were getting ready to mix the concrete to pour in place. For this purpose a large metal pan 9 feet 9½ inches long by 4 feet 4 inches wide and 5½ inches deep, weighing 370 pounds, was placed on the ground near the pit, and in close proximity to the track of defendant company, which ran parallel to the pit and about 8 feet distant therefrom on the east side. One of the defendants' switch engines backed in on this track in a northerly direction, passed without striking the pan. went to the upper end of the yard of the oil company, somee 300 feet or more, remained for a period of time estimated from 10 to 30 minutes, and started back with the locomotive in front drawing two freight cars, at a speed estimated from 4 to 10 miles an hour. In passing the pan, some part of the locomotive struck its end or corner and knocked the pan against the right leg of plaintiff, who was working upon the concrete forms, as stated. and inflicting most serious injuries.

At this point, the important questions of fact and law arise: First, was the pan so close to the rail and in a position reasonably indicating that it might come in contact with the engine; and, second, if so, were

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the employees of defendant guilty of negligence in not seeing, stopping, and removing it such as to render the defendant liable for the result which followed the failure to do so.

There is a dispute as to what part of the locomotive struck the pan. Plaintiff's witnesses say it was the rear right side of the engine or front of the tender; while those of defendant say it was the right end of the running board on the front of the locomotive.

At all events, defendant says that the backing locomotive had passed the pan when going into the yard without striking it, and the crew had a reasonable right to assume that they would be able to do so again in pulling out; hence there was no negligence in not stopping and removing the pan before attempting to pass. The pan was not put there by any one for whose acts defendant was responsible, but by the employees of the Cotton Oil Company. It is also reasonably established that no one moved it between the time the engine went in and came out. The only two possible explanations of how its position was changed are that, being on a slight incline toward the track, the vibrations of the engine and car caused it to slide toward the track; or that the pan was resting on a drainpipe 2 inches long which protruded through the bottom, at the center, and, when the locomotive backed in, the end of the pan toward the track was resting on the ground. being only 5½ inches deep, all parts passing over it, and when the train came out that end had tilted up, which raised its bottom 4 inches (or twice the length of the drainpipe) off the ground, and this, plus the depth of the pan, placed its top 9½ inches above the ground, a height at which it could be struck by parts of the passing locomotive.

Whatever may have been the cause for the pan's getting into a position to be struck, we think the danger should have been seen in time to have avoided the accident. If defendant's contention as to its striking the running board was correct, then there was riding on this running board at the time a switchman who says he saw it, and. since all of defendant's said employees say the train could have been and was actually stopped within 4 or 5 feet, he should have appreciated the danger and signaled the engineer to stop. Then, again, the position which the engineer occupied on the same side of the locomotive that the pan was on should have enabled him to also see and appreciate the danger, for his line of vision was clear and straight, past the front of his locomotive on that side, and it must have been apparent, if he had been keeping a close watch, that the engine would not clear the pan. and being able to stop in such a short distance, he should have done so, and the accident would not have happened

We think a case of negligence is reasonably established. Kird v. N. O. & N. W. R. Co., 105 La. 226, 29 South. 729.

We deem it unnecessary to discuss the conflicting testimony as to just where plaintiff was struck, or how far the train moved thereafter; for defendant had his back to the train, did not know there was any danger until he heard the clash of the locomotive with the pan, and then made every effort to escape, but was caught and severely injured. There is no proof to sustain the defense of contributory negligence.

Quantum of Damages.

[3] Plaintiff's foot was crushed in the ankle joint, the large bone of the lower leg was broken and protruded through the flesh; he was operated on, and portions of the bones taken out, and a plaster cast was applied, with drain in the side, and so remained for six weeks. Later another operation was performed in which the tendon Achilles was severed, other portions of the bones removed, and an ffort made to give him a stiff joint (ankylosis), but this failed ,and it is admitted that his foot in the present condition is worse than useless. However, the physicians

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disagree as to whether or not this condition may yet be accomplished by a proper operation and keeping the plaster cast on sufficiently long. An eminent surgeon testified that in his opinion this result could be had; while the physicians of plaintiff who had attended, treated, and operated upon him were of the view that the foot would have to be amputated. In any event, plaintiff has not been totally disabled, and whichever alternative is pursued, either with a stiff joint, or artificial foot, he should still be able to pursue his calling, and we think the allowance was excessive. True, he suffered a great deal, still he should only be allowed such a sum as will reasonably compensate therefor, together with the loss in earning capacity, disfigurement, etc. He was 36 years old, and earning $19.40 a week, or about $85 per month. We, therefore, think that a judgment of $10,000, less the compensation which he is receiving and will receive from his employer, amounting to 50 per cent of his weekly wagees for 300 weeks, or $2,710, would be just and reasonable.

For the reasons assigned, the judgment appealed from is amended by reducing it to $7,390, and, as thus amendeed, it is affirmed, plaintiff to pay costs of appeal, and defendant those of the lower court.

Monroe, C. J., takes no part.

O'Niell, J., considers the amount of the judgment excessive, but would otherwise concur in the decree.

On Rehearing.

Provosty, J. In the railroad yard of the defendant company a number of tracks run close to each other. A scale for weighing railroad cars was being installed in one of these tracks, which, when completed, would constitute a section of the track. To lodge this scale a long narrow and shallow pit had been dug, and, as the sides of this pit were to be concreted, a pan for mixing concrete had been brought and laid by it, between it and one of the tracks next to the the one in which the scale was being installed. This pan was 10 feet long, 4½ feet wide, and 5½ inches high. It was of iron, and weighed 370 pounds. Its corners were rounded. It occupied nearly the entire space between the pit and the track next to which it was—coming within 4 inches of the rail. A locomotive passing on this next track came in contact with it, and shoved it along so that it struck and injured the plaintiff and another carpenter who were in the pit constructing the boxing into which the concrete was to be poured.

The contention is that the engineer should have noticed this pan, and stopped. He had a short while before (the time variously estimated at 10 to 30 minutes) backed a train into the yard on this same track, passing this pan, and, after having disposed of this train, was returning without any cars attached to the locomotive. When backing the train into the yard as just stated, he had had to stop short of the place where these carpenters were working and allow the switchman to go ahead and clear the track of lumber and debris these carpenters had left upon it. The switchman had then seen this pan, but had not considered it to be in the way. In thus returning the engineer noticed the pan, but felt sure it was not in the way, especially that he had passed it a moment before. As he approached the place where the carpenters were working a brakeman standing on the footboard at the head of the engine signaled him to go clow, and, accordingly, he slowed down to 4 or 5 miles an hour. The pan had been placed in this dangerous position by the foreman of the concrete gang, who stood near it, waiting for his men to arrive to begin the concrete work. The pan, on being struck, would have caught him had he not nimbly jumped into it and as nimbly out. As it was, he fell into the pit, bruising his leg severely. He says that the part of the locomotive which came in contact with the pan was the driver, i. e., the bar connecting the two driving wheels. This may be, but, if so, it could only have been after the foot board had struck the pan and caused it to move towards the

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driver; for this footboard passed by the pan first, and it reached lower down and further out than the driver. There was a dent in this footboard, showing that it had come in contact with the pan.

Considering that between this footboard and the rail the clearance was of 8½ inches, and that the height of the rail must be added to this, and that the pan rose only 5½ inches above the ground, and that the testimony seems to show no one moved it from the position in which it was when the locomotive passed by it the first time, the collision becomes rather inexplicable. If no one moved it, the most plausible theory must be that the vibration imparted to the ground by the locomotive brought about a change. And this is not entirely improbable, considering that the ground slanted toward the rail, and, again, that extending out from the bottom of the pan, at its center, was a drainpipe 2 inches long, upon which the pan may have been resting more or less as upon a pivot, and thus been rendered mobile. So much so, indeed, as perhaps to have been susceptible of being tilted or otherwise moved by being merely stepped upon or brushed against.

There is no pretense that the engineer was not a careful engineer of long experience.

An effort was made to show that he was not at the throttle, but that the fireman was; but he and the fireman and one of the brakemen testify that he was, and admittedly he was in the cab.

[4] Our conclusion is that the evidence upon the whole falls short of making out a case of negligence on the part of the engineer.

The judgment appealed from is therefore set aside, and the suit of plaintiff is dismissed at his cost.

Monroe, C. J., takes no part.

O'Niell and Dawkins, JJ., dissent.

McGONIGLE v. O'NEILL ET AL.

(Supreme Judicial Court of Massachusetts. Suffolk. Feb. 23, 1922.)

133 Northeastern Reporter 918.

1. MASTER AND SERVANT—COMPENSATION ACT ABOLISHES COMMON-LAW DEFENSES.

In a common-law action for personal injuries against an employer not insured under the Workmen's Compensation Act, contributory negligence and assumption of risk are not defenses under G. L. c. 152, § 66.

(For other cases, see Master and Servant, Deec. Dig. § 356.)

Exceptions from Superior Court, Suffolk County; Patrick M. Keating, Judge.

Action by Edward A. McGonigle against Arthur H. O'Neill and others. Judgment for plaintiff, and defendants bring exceptions. Exceptions overruled.

Plaintiff was in defendant's employ, and was instructed by one of the defendants to fix awnings in front of their place of business, and for that purpose selected a stepladder from several others. He was injured by the braking of the ladder, throwing him to the ground. Defendant moved for a directed verdict, and also requested the following instructions and rulings, which indicate the nature of their contentions and which were refused:

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"(6) If the jury find that the paintiff, standing upon the next to the top round of a 10-foot ladder, tied to a brass rail about 4 feet from the ground, with a rope to one of its legs, said ladder standing upon a sidewalk which sloped from the building to the curbstone, so that the top of the ladder was further away from the building than the bottom, working upon an awning which was above his head and attached to the building, without having requested his employer to furnish a man to hold the ladder, and the leg of the ladder broke by reason of the great strain placed upon it, they must find that the danger was open and obvious, and that the plaintiff assumed said risk, consequently their verdict must be for the defendants.

"(8) If the jury find that the plaintiff knew, or in the exercise of due care ought to have known, that the position of the ladder placed on a sloping sidewalk so that the top was further away from the window than the bottom was, without asking his employer to furnish a man to hold it and used it without objection, he assumed the risk and cannot recover."

John J. Walsh, of Boston, for plaintiff.

Robert T. Healy and Arthur D. Healey, both of Boston, for defendants.

PER CURIAM. [1-3] This is an action of tort at common law to recover compensation for personal injuries received in 1918 by the plaintiff while employed in the usual course of their business by the defendants, who were not insured under the Workmen's Compensation Act. It is no defense that the plaintiff was negligent or had assumed the risk of injury. St 1911, c. 751, part 1, § 1; G. L. c. 152, § 66. The only question is wheher there was any evidence of negligence of the defendants having a causal connection with the injury to the plaintiff. The plaintiff was hurt by the breaking of a steplader furnished him for use by the defendants. There was evidence tending to show that the stpladder was more than 20 years old and had dry blue or black rot at or near the break, and that this defective condition might have been discovered by adequate inspection by the employers It was their duty to exercise easonable care to provide for the plaintiff appliances suitable for his work, and the continuing duty of inspection and repair was personal to the defendants and could not be relegated. Without reciting the testimony in detail, it is enough to say that the case was rightly submitted to the jury. Carroll v. Metropolitan Coal Co., 189 Mass. 159, 75 N. E. 84; Ryan v. Fall River Iron Works, 200 Mass. 188, 192, 86 N. E. 310; Hix v. New York Central & Hudson River Railroad, 230 Mass. 309, 311, 119 N. E. 827. There is nothing in Ashton v. Boston & Maine Railroad. 222 Mass. 65, 109 N. E. 820, L. R. A. 1916B, 1281, which aids the defendants. The case is quite distinguishable from Allen v. Smith Iron Co., 160 Mass. 557, 36 N. E. 581.

Exceptions overruled.

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O'DONNELL'S CASE.*

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 7, 1921.)

133 Northeastern Reporter, 621.

1. MASTER AND SERVANT — FINDING OF COMPENSATION BOARD CONCLUSIVE, IF SUBSTANTIALLY SUPPORTED.

A finding of the single member of the Industrial Accident Board, affirmed and adopted by the board, as to the cause of death, is conclusive, if it has a substantial support in the evidence.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

2. MASTER AND SERVANT — EVIDENCE HELD TO ESTABLISH DEATH BY LEAD POISONING IN EMPLOYMENT. WITHIN COMPENSATION ACT.

Evidence *held* sufficient to warrant the finding of the Industrial Accident Board that the employee's death was caused by lead poisoning suffered in his employment.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Appeal from Superior Court, Suffolk County.

Proceeding for compensation under the Workmen's Compensation Act (St. 1911, c. 751, as amended by St. 1912, c. 571), by the dependents of John J. O'Donnell, employee, against an employer and insurer. Compensation was awarded by the Industrial Accident Board, the award affirmed by the superior court, and from its decree the insurer appeals. Decree affirmed.

Paul L. Keenan, of Boston, for claimant.

Roger Clapp and James T. Connolly, both of Boston, for insurer.

De Courcy, J. The issue as framed before the single member of the Industrial Accident Board, and before the board on review, is:

"Whether the employee's death was caused by lead poisoning suffered in his employment by the subscriber."

The decision of the single member, affirmed and adopted by the board, is as follows:

"Upon the evidence in this case I find that the cause of the employee's death on June 26, 1918. was sclerosis of the coronary arteries and this sclerosis was caused by the accumulative effects of the lead which was being constantly assimilated into his system up to the time that the final assimilation caused his death. I find that this assimilation of lead occurred during his employment as a painter [plumber] resulting from the use of lead in his employment, and that the final assimilation which caused his death occurred during his employment with the subscriber in this case."

[1. 2] As in the analogous case of the verdict of a jury or the finding of a judge in an action at law, this finding is conclusive if it has a substantial support in the evidence. Uzzio's case, 228 Mass. 331, 117 N. E. 349. We are of opinion that there was evidence to warrant it.

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* Editor's Note.—This case as originally filed was published in W. C. L. J., Vol. VII, p. 453. Since this filing and publication, changes in the language of the opinion have been made by the judge, which, while not affecting the merits of the decision, make it necessary. in the interests of our subscribers. to reprint the case here.

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The claimant testified that the employee had worked as a plumber since he was twelve years of age and that he was thirty-nine years of age when he died.

The family physician testified that for the last few years he had treated O'Donnell "for what he supposed was lead poisoning." The expert, after reviewing the history and symptoms, gave as his opinion that "the cause of death was sclerosis of the coronary arteries, and it was undoubtedly caused by lead poisoning." There was evidence that during the five months of his employment with Cronin, the assured, he was handling lead pipe, and his handkerchiefs and napkins would be colored red from red lead. On the testimony of the specialist it could be found that the lead poisoning, which was a contributing cause of the employee's death, was progressive, and probably due to the constant assimilation of the lead during the years he had been exposed to it. Without further reference to the evidence in detail, it is apparent that we cannot say that the finding of the board was unwarranted. Johnson's Case, 217 Mass. 388, 104 N. E. 735; Doherty's Case, 222 Mass. 98, 100, 109 N. E. 887; Walker v. Gage, 223 Mass. 179, 182, 111 N. E. 766.

Decree affirmed.

KIRKLEY v. GENERAL BAKING CO. ET AL. (No. 15.)

(Supreme Court of Michigan. Feb. 8, 1922.)

186 Northwestern Reporter, 482.

MASTER AND SERVANT—FINDING OF WAIVER OF DELAY IN MAKING COMPENSATION CLAIM HELD UNWARRANTED.

Proof that before the expiration of the six months within which claim must be made under Workmen's Compensation Act, pt. 2, § 15, the board received a letter from employer denying liability on the ground that the persons claiming compensation as dependents were not entitled thereto, does not sustain a finding that the employer waived the objection that the claim was not filed in time, since the employer could not then have predicated a denial of liability on failure to make timely claim.

(For other cases, see Master and Seervant, Decc. Dig. § 398.)

2. MASTER AND SERVANT—FINDING OF TIMELY COMPENSATION CLAIM JUSTIFIED.

Testimony by a son of claimant that he mailed a copy of the claim properly addressed to the employer less than six months after the injury, without denial by any officer of the employer that such claim had been received, establishes the fact that the claim was made in time as required by Workmen's Compensation Act, pt. 2, § 15.

(For other cases, see Master and Servant, Dec. Dig. § 405[1].)

3. MASTER AND SERVANT — COURT CAN DETERMINE WHETHER COMPENSATION BOARD'S FINDINGS ARE SUPPORTED BY EVIDENCE.

Though Workmen's Compensation Act, pt. 3, § 12, makes the findings of fact by the board conclusive in the absence of fraud, the court can review such findings to determine whether they are supported by competent evidence or inferences fairly deducible therefrom.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

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4. MASTER AND SERVANT—COMPENSATION AWARD MAY BE AFFIRMED ON EVIDENCE, THOUGH BASED ON UNSUPPORTED FINDING.

Where the industrial accident board erroneously found that the requirement that claim for compensation be made within six months has been waived by the employer, but there was uncontradicted evidence in the record that the claim had been presented and mailed to the employer, the court can find as a fact that the clam was made and sustain the award on that ground.

(For other cases, see Master and Servant, Dec. Dig. § 417[5].)

5. MASTER AND SERVANT—INTENT TO ADOPT ESTABLISHED CONSTRUCTION OF WORDS USED IN COMPENSATION ACT PRESUMED.

The amendment to the Workmen's Compensation Act by Pub Acts 1919, Act No. 64, making a conclusive presumption that wife of an employee who was living apart from her husband for justifiable cause was dependent on him, by using the expression living apart for justifiable cause, which had previously been given a well-defined meaning, is presumed to have intended that the words in that act should be given the same meaning.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

6. MASTER AND SERVANT—EVIDENCE HELD TO JUSTIFY FINDING IN FAVOR OF WIFE CLAIMING COMPENSATION AS DEPENDENT.

Evidence that the employee had left the home maintained by his wife over her protest and had gone to another city, where he remained for several years without requesting her to join him or making provision for her to do so, though she was willing either to have him return home or to join him, is sufficient to sustain a finding that her living apart from him was for justifiable cause within Workmen's Compensation Act as amended by Pub. Acts 1919, No. 64.

(For other cases, see Master and Servant, Dec. Dig. § 405[5].)

Certiorari to Industrial Accident Board.

Proceedings under the Workmen's Compensation Act by Millie Kirkley to recover compensation for the death of her husband, Andrew Kirkley, opposed by the General Baking Company, employer, and Casualty Reciprocal Exchange, insurer. The board allowed compensation, and the employer and insurer bring certiorari. Affirmed.

Argued before Steere, C. J., and Moore, Wiest, Fellows, Stone, Clark, Bird, and Sharpe, JJ.

Kerr & Lacey, of Detroit, for appellants.
Hatch & Gillett, of Ypsilanti, for applicant.

SHARPE, J. Plaintiff claims compensation for the death of her husband, which occurred on January 15, 1920, due to an accidental personal injury sustained by him on December 15, 1919, while in the employe of the defendant baking company. Compensation was denied by the arbitration board. On appeal to the full board, an allowance of $14 per week for 300 weeks was made. The errors in the findings complained of are:

(1) There is no sufficint proof that plaintiff's claim for compensation was made within six months.

(2) The board had no authority to find, nor did the proofs jusify a finding, that plaintiff was living apart from her husband for justifiable cause.

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1. Under section 15 of part II of the Workmen's Compensation Act (2 Comp. Laws 1915, § 5445), notice of the injury must be given to the employer within three months and claim for compensation therefor made within six months after the happening thereof. The defendants concede they had notice of the injury within the three months and gave notice thereof to the board as required by the statute. The board in its findings says:

"We are unable to find from this record that claim for compensation was made within six months from death of decedent."

The board then calls attention to the fifth of its rules of practice and procedure, which provides in effect that when a claim for compensation is filed, if the employer denies liability, he shall file a denial with the board, setting forth with reasonable detail and accuracy the facts and circumstances upon which he relies as a defense to such claim. It then quotes a letter received by it from the attorneys for the defendants, dated May 29, 1920, reading as follows:

"In re Andrew Kirkley v. General Baking Co.

"December 15, 1919.

"Gentlemen: Careful investigation in the above-captioned case discloses to the satisfaction of ourselves, as well as our clients, that persons claiming compensation as depenents are not entitled to receive under the terms and provisions of the Michigan act.

"The matter was not only investigated carefully prior to the death of Mr. Kirkley but subsequent thereto and all the alleged members of deceased's family were interviewed. Any claims for compensation will be defended upon the ground that parties claiming are not entitled to any benefit under the law and, furthermore, such claimants will be compelled to prove their claim in the premise in every particular."

—and concludes that "under the denial of liability," as contained in this letter, "it is our finding that the applicant was not required to prove that claim for compensation was made within six months."

[1] This finding was not justified by the proof. At the time the letter was written, the six months allowed by the statute for presenting a claim for compensation had not expired. The defendants could not at that time have predicated a denial of liability on the applicant's failure to make a claim for compensation within the time prescribed.

[2] We have read this record with care. We cannot understand why the board was unable to find that a claim for compensation had been made by applicant within the six months following the accident. A claim, a form provided by the board, addressed to the baking company, and signed by the applicant, dated March 20, 1920, was received by the board on March 22, 1920. On being shown this paper, which was in the files of the board, Le Roy Kirkley, the son of applicant, who apparently had made an affidavit of mailing, was asked:

"Q. Mr. Kirkley, did you mail that notice, according to that affidavit, to the General Baking Company? A. Yes, sir.

"Mr. Lacey: We object to this. What affidavit?

"Q. Did you mail a notice of claim to the General Baking Company? A. I did, sir.

"Q. And when did you mail it? A. The same day that you gave it to mail." (He then refreshed his recollection from the affidavit.) "A. The 22d day of March. * * *

"Q. What day of March do you claim you mailed that paper? A. On the 20th. * * *

"Mr. Lacey: Is that when you mailed it, Le Roy? A. On the 20th day of March.

"Mr. Lacey: All right, thank you.

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"By Commissioner Brown:

"Q. Now, what was the paper that you mailed? A. Can't you make them understand?

"Q. Well, look at this paper, and can you tell, do you know whether that is a copy of the paper that you mailed? A. Yes, sir; it is. It is.

"Q. Who gave it to you to mail? A. Mr. Gillette gave it to me.

"Q. Refreshing your memory from this affidavit, you say that was the 20th of March? A. Yes, sir; I do.

"Mr. Gillette: The affidavit is no evidence, of course.

"Q. Who did you address it to? Who was it addressed to? A. One was addressed to the General Baking Company and the other one to Lansing.

"Q. General Baking Company, where? A. Detroit, Michigan—Cherry street.

"Q. Where did you put the letter? Where did you mail it? A. Ypsilanti post office.

"By Mr. Gillette:

"Q. Any doubt about that, Mr. Kirkley?

"A. No, it ain't no doubt about it. I mailed it."

The record does not show that this witness was cross-examined as to the testimony thus given. Mr. Kerr, one of the attorneys for defendants, was sworn as a witness. On being interrogated on cross-examination relative to the letter of May 29th, he was asked:

"Q. Well, you wouldn't deny liability unless there had been some claim made. * * * That letter that was offered in evidence here. Now, the facts are, aren't they, Mr. Kerr, that the firm, whatever it is, of the General Baking Company, notified you that they had received a claim for compensation and you wrote that letter in reply to it? A. No, that would not be the circumstance. I am not certain that we did not receive a claim from the General Baking Company. I do not remember as to that now, but that would not prompt this letter.

"Q. But you deny that any claim was ever made for compensation within six months? A. Claim for compensation was not made upon me, Mr. Gillette.

"Q. Oh, upon you personally. A. Neither Le Roy Kirkley nor Millie Kirkley said anything to me about claim for compensation."

The testimony of Le Roy fairly established the fact that a letter containing a claim for compensation, a copy of that appearing in the files of the board, the sufficiency of which is not questioned, addressed to the defendant baking company at its office in Detroit, was mailed by him on March 20th. There is nothing in the record to contradict his sworn statement to that effect, nor was there any denial of the receipt of the letter by any officer or employee of the company. The fact that such a claim was made was therefore fully established by the undisputed proofs.

[3] By the terms of section 12 of part III of the act (2 Comp. Laws 1915, § 5465), the findings of fact made by the board, in the absence of fraud, are conclusive; but this court on many occasions has reviewed such findings to ascertain whether they were supported by competent evidence or inferences fairly deducible therefrom, and in the absence of such evidence or inferences has set the award aside. Ginsberg v. Adding Machine Co., 204 Mich. 130, 170 N. W. 15; Chaudier v. Lumber Co., 206 Mich. 433, 173 N. W. 198, 5 A. L. R. 1673; Ortner v. Zenith Carburetor Co., 207 Mich. 610, 175 N. W. 122. If, in this case, the board had denied compensation, based on a finding that no claim therefor had been made within six months after the accident and such finding had been reviewed by the applicant in this court, there would seem to be no question but that such finding would have been set aside. The defendants can have no greater right on the review of a finding on which liability is based than

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the applicant where the finding is such as to preclude an award of liability. It is apparent to us that the board overlooked the uncontradicted testimony of Le Roy Kirkley when it made the finding above quoted.

[4] Under the provision of said section 12, it is made the duty of this court, when called upon to review the action of the board, "to make such further orders in respect thereto as justice may require." In view of the testimony heretofore quoted, our duty seems plain. Though we must hold that the board was in error in finding that defendants had waived proof that claim for compensation had been made within six months, we feel constrained to also hold that the record discloses that such proof had been made. It follows that justice requires us to affirm the action of the board so far as it is dependent on a compliance by applicant with the statute in that respect. See Andrejwski v. Wolverine Coal Co., 182 Mich. 298, 310, 148 N. W. 684, Ann. Cas. 1916D, 724.

2. The act as amended by Act No.. 64, Public Acts of 1919, provides (part II):

"Sec. 6. The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee:

"(a) A wife upon a husband with whom she lives at the time of his death, or from whom, at the time of his death, the industrial accident board shall find the wife was living apart for justifiable cause or because he had deserted her."

[5] The board found the plaintiff was the wife of the deceased and at the time of his death "was living apart from her said husband for justifiable cause." Was there competent proof to support this finding? It appears from the record that about 15 years before the death of plaintiff's husband he left the home in which they then lived at Ypsilanti without her consent and made his home in Detroit thereafter; that he visited her occasionally for a few days at a time, his last visit being about two years prior to his decease. At the time of such visits, marital relations were resumed. He brought and sent money and provisions for her support. His last contribution was made within a year before his death. Plaintiff was at all times ready and willing to have him return to her home. She would have shared his home in Detroit with him at any time, had he so requested. She received letters from him, and being unable to write herself procured a neighbor to answer them for her. She maintained a home in Ypsilanti. He had living rooms in Detroit. There can be no question but that she was "living apart" from her husband at the time of his death. Was there justifiable cause for her doing so? These words have a well-defined meaning in this state when applied to the separation of husband and wife. See Porritt v. Porritt, 18 Mich. 420; Randall v. Randall, 37 Mich. 563; Warner v. Warner, 54 Mich. 492, 20 N. W. 751; Powell v. Powell, 58 Mich. 299, 25 N. W. 199; Wright v. Wright, 80 Mich. 572, 45 N. W. 365; People v. Stickle, 156 Mich. 557, 121 N. W. 497; Beckmann v. Beckmann, 209 Mich. 628, 177 N. W. 144. By using them in this amendment, it must be assumed that the Legislature intended that they should be interpreted and understood as defined and construed by this court, where there is nothing in the act to show a contrary intention.

[6] It was the duty of the deceased to support his wife and to live with her. It was her duty to consort with him and discharge generally the duties of a wife. He failed to perform his duty as required by law. Their separation was not with her consent, nor was it owing to any failure of marital duty on her part. She was living apart from him for the reason that he would not live with her in the home at Ypsilanti or provide a home for her and consent to her occupying it with him in Detroit. She was in no way to blame for their separation. She was ready and willing to live with him at any time he requested her to do so and made provision therefor. What better or more justifiable cause for their living apart could there have been so far as she was concerned? We think there

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was ample proof to support the finding that at the time of his death she was "living apart" from the deceased "for justifiable cause."

Massachusetts seems to be the only state in which a similar provision is contained in the Compensation Law. Our attention is called to the following cases in which this provision has been construed by the Supreme Court of that state: Newman's Case, 222 Mass. 563, 111 N. E. 359, L. R. A. 1916C, 1145; Fierro's Case, 223 Mass. 378, 111 N. E. 957; Veber's Case, 224 Mass. 456, 116 N. E. 811. As these cases were decided prior to the adoption of the 1919 amendment, counsel for defendants call our attention to the rule stated in Drennan v. People, 10 Mich. 169, 177:

"As a general rule, it is a fair inference that the Legislature, in adopting a statute from another state, which has there been judicially construed, intended to give it the same interpretation it had there received by judicial construction."

Conceding the application of this rule, we are content to follow the holding in the Newman Case and the reasoning on which it is founded. It is there said:

"A careful examination of the evidence plainly shows that several years before the death of the husband, he and his wife separated by mutual consent and agreement, and continued to live apart up to the time of his death. * * * The correct determination of this question depends upon what is meant by the phrase 'living apart for justifiable cause.' These words have been interpreted by this court in numerous decisions. They have been construed in divorce proceedings brought by a wife against her husband for desertion, in petitions brought by her for separate support and maintenance, as well as in actions brought against the husband to recover for necessaries furnished to his wife. These words have acquired a peculiar and appropriate meaning in the law. We are therefore bound to construe them in accordance with such meaning. * * * Where a woman lives apart from her husband and it is contended that such separation is for justifiable cause, ordinarily it must appear that such living apart is due to some failure of duty or misconduct on the part of the husband, but this classification does not exclude cases of living apart because of physical or mental infirmities of either or both husband and wife. If the wife lives apart from her husband by mutual consent, she is not living apart from him for justifiable cause, and she is not entitled to a divorce upon the ground of desertion."

While the facts in the other cases were somewhat different and it may be said that the court inferred a consent on the part of the wife by reason of their long separation, the holding in each case is bottomed on the opinion in the Newman Case. It does not appear in any of these cases that the wife was hopeful and expectant that her husband would return to her or provide a home for her elsewhere and invite her to occupy it with him as appears from the proofs presented by this record.

[7] 3. The power of the Legislature to impose the duty on the board to make such a finding is challenged by the defendants. It is said to be a delegation of judicial power to a board contrary to section 1 of article 7 of the Constitution of Michigan, which provides that the judicial power of the state shall be vested in the courts. This question was raised as to several provisions of this act before this amendment. The powers and duties of the board and its exercise of such incidental quasi judicial powers as are necessary to carry its purposes into effect were considered and discussed at length by Mr. Justice Steere in Mackin v. Detroit-Timkin Axle Co., 187 Mich. 8, 153 N. W. 49, and the act upheld as a proper exercise of legislative power.

The board found that the plaintiff was living apart from her husband and the reasons therefor. The duty to determine whether she was so "living apart" from her husband "for justifiable cause" is no more ju-

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dicial than the determination whether the disability for which claim is made is due to an "accidental injury" arising out of and in the course of employment. It may be noted that this question does not appear to have been presented in any of the cases considered by the Massachusetts court.

The award is affirmed.

KOTTARI ET AL. v. EMPIRE IRON CASUALTY CO. ET AL. (No. 18.)

(Supreme Court of Michigan. Feb. 8, 1922.)

186 Northwestern Reporter, 400.

MASTER AND SERVANT—COMPENSATION CLAIM BY UNAUTHORIZED ATTORNEY HELD SUFFICIENT.

Where, shortly after an employee was killed, an attorney made claim on behalf of his dependents living in a foreign country. and the employer answered the claim without attacking its sufficiency, a finding by the Industrial Accident Board that the claim was sufficient to stop the running of limitations will be sustained, though the authority of the attorney who made the claim was afterwards repudiated by the attorney in fact of the dependents.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

Clark, J., and Fellows, C. J., dissenting.

Certiorari to the Industrial Accident Board.

Proceeding under the Workmen's Compensation Law by Hilma Kottari and others, as dependents, to recover compensation for the death of Nicoli Kottari, employee, opposed by the Empire Iron Casualty Company and the Fidelity & Casualty Company of New York. The Industrial Accident Board awarded compensation to the claimant, and the opposers bring certiorari. Affirmed.

Argued before Fellows, C. J., and Wiest, Stone, Clark, Bird, Sharpe, Moore and Steere, JJ.

Cummins & Nichols, of Lansing, for appellants.

L. A. Lyon, of Iron River, for appellees.

MOORE, J. This is certiorari to the Industrial Accident Board to review their action in making an award to claimants, growing out of the death of Nicoli Kottari, which occurred September 19, 1916. The accident was reported to the Industrial Accident Board October 14, 1916, by the superintendent of the mine, in which report appear the following questions and answers:

Place of birth: Finland.

Single. married, widowed, or divorced: Was supposed to be single

Number of children under sixteen years: Man who claims to be his brother-in-law says there is one.

Soon after the accident one A. W. Jurma, an attorney at Ishpeming, Mich., took up with the Fidelity & Casualty Company the matter of compensation for the death of Kottari, making the claim that there were

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a wife and child dependent upon him, living in Finland. The record does not disclose that a more formal claim was made until March 31, 1917.

The deposition of Mr. Jurma was taken. In it appear the following questions and answers:

"Q. Can you state at whose request this letter was written? A. I cannot. I don't remember who the party was who came in, but no doubt somebody did ask me to write it. * * *

"Q. State fully your best recollection of the circumstances in connection with the writing of that letter, as to who requested you to write it and why you did prepare it. A. I can answer this only in a general way. When a person comes to my office in these matters, and if he is not closely and vitally interested in the deceased I advise him to file a claim as a precautionary matter, and I am quite satisfied that such was the case here. I never make or prepare a claim in any case without the request of somebody.

"Q. Do you remember who authorized you to write this letter? A. I do not, except as stated before. * * *

"Q. At the time the first letter was written, did you know whether or not Mr. Kottari had dependents or not? A. I had no personal knowledge. What knowledge I might have had was hearsay, given to me as attorney."

At the trial it was stipulated certain correspondence might be received. We quote part of the stipulation:

"It is further hereby stipulated and agreed that the three letters hereto attached, addressed to 'Claude C. Ritze, Judge of Probate, Iron River, Michigan,' signed 'R. R. Freeman,' one of which is dated October 11, 1917, one September 14, 1917, one July 17, 1918, and the letter hereto attached addressed to Mr. Claude C. Ritze, judge of probate, Iron River, Michigan, signed 'W. C. Phillips, Examiner,' and dated July 15, 1918, may also be considered in evidence on the hearing of said claim by and before said Industrial Accident Board, with the same force and effect as if said letters were formally introduced in evidence upon said hearing, the genuineness of the signatures to said letters being hereby conceded, and that, at the time said letters were written, said R. R. Freeman was attorney for said insurer, and the said N. C. Phillips, at the time the letter signed by his name was written, was in the employment of said insurer, and authorized to write said letter."

We quote such of the correspondence as we think material:

"Jos. D. Griffin, Examiner,
313–18 Wells Building,
"Milwaukee, Wis., October 14, 1916

"Industrial Accident Board, Received Oct. 16, 1916, Lansing, Michigan."

"Industrial Accident Board Lansing Michigan—Gentlemen: In re Empire Iron Company Nicolai Kodderi, No. 1131. Herewith inclosed please find report of accident which was fatal to the above-named injured employee, and I wish to call your attention to the fact that this case will be handled through this office. I wish also to advise you that Attorney Jurma, of Ishpeming, Michigan, has now appeared in this case, and claims that the deceased had a wife and one child living in Finland.

"Yours very truly."

December 11, 1916, Mr. Griffin wrote:

"Industrial Accident Board, Lansing, Michigan—Gentlemen: In re Empire Iron Company, Nicolai Kodderi, No. 1131. Mr. Kodderi was killed on September 19, 1916, while in the employ of the Empire Iron Ore Company, of Palmer, Michigan. Attorney A. W. Jurma, of Ishpeming, Michigan, presents claim to dependency for wife and child in Finland. The assured has no definite knowledge as to whether there were depend-

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ents or not. John W Elliott, undertaker at Negaunee, Michigan, has presented to our assured a bill for $99.50, and there are a few other outstanding bills incurred on account of the funeral We are ready and willing to pay the funeral expenses"

—and inquired if an allowance would be made if dependents appeared. Later one Rantaaho wrote to the Industrial Accident Board a letter in which appears the following:

"I want it to be made known that the widow has given me an order and power to make settlement in this case; also, I am sure that Attorney A. W. Jurma, of Ishpeming, has never been asked by dependents to look after their rights in this case."

An amended answer was then filed, it being contended, if Jurma had no authority to act, that defendants were not liable because no claim was made within six months. The contention of counsel is (we quote from the brief):

"In the last analysis, the situation resolves itself into this: A claim was made, informally, which the insurance company recognized as a claim without having any notice that the person making the claim had no authority to do it. When it received such notice, it then denied liability upon the ground that no claim had been made in behalf of the dependents. We think this raises squarely the question of whether or not a claim made by a pure volunteer is a good claim, and will sustain a finding when the authority of the man making it was afterwards repudiated by the attorney in fact of the dependents."

After the amended answer was filed, the following letter was written:

"January 22, 1918.

"Hon. Claude C. Ritze, Judge of Probate, Iron River, Michigan—Dear sir: Re Kottari v. Empire Iron Company. I have your letter of December 27th in the above matter. It has not been answered before. due to the fact that I have been in Washington on work connected with the War Department since some time before Thanksgiving. I was just as much surprised as yourself to learn that an amendmended answer had been filed. During my absence, Mr Griffin, who is the adjuster for the Fidelity & Casualty Company of New York, called at the office and directed my assistant, Mr. Bendinger, to file such answer. You and I discussed this case thoroughly, and the only question evidently which any one thought was involved was that of the dependency. * * * It seems to me we are estopped to raise a defense of such a character at the present time, and in view of the fact that within the statutory time an attempt was made to negotiate the claim by paying expenses, certainly we had knowledge of the making of a claim, and the fact that we answered and affirmatively alleged the payment of funeral expenses shows conclusively that we recognized the making of the claim on behalf of the applicant. * * * In any event, I do not possibly see how the defense set up in the amendment can be in any way helpful to us at the present time; but I want you to know that I knew nothing of the filing of this amendment until my return home.

"Yours very truly, R. R. Freeman."

We now quote from the findings of the Industrial Accident Board:

"As to the question of whether or not claim for compensation was made within six months, when the cause was heard on arbitration, two letters were admitted in evidence and marked as exhibits by the deputy. One letter, admitted as evidence and marked as Exhibit 2 over the initials of the deputy, is a letter bearing the date of January 22, 1916, from Robert R. Freeman, of Milwaukee, Wisconsin, and addressed to Hon. Claude C. Ritze, Judge of Probate, Iron River, Michigan. Judge Ritze was at that time serving as attorney for claimants, or as attorney for Matt Rantaaho, who held power of attorney from Mrs. Kottari. Mr.

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Freeman was attorney for the respondents, and it is conceded by a stipulation in the file of the case that letters written as early as October 11, 1917, were written while he was attorney for the insurers; and in fact it appears from the files that he was at that time the attorney in charge of the case in behalf of respondents. * * *

"In the letter Mr. Freeman expressly says: 'Certainly we had knowledge of the making of the claim.' This admission on the part of Mr. Freeman, the attorney for respondents, in charge of the case from an early date, is prima facie evidence that claim was made. No proof has been introduced on the part of respondents to explain this statement, or to show that it was made under misunderstanding of the facts or conditions. There is no affirmative proof on the part of respondents that claim was not made. There being evidence that claim was properly made, and no testimony to rebut it, we have no alternative but to rely on the evidence before us."

We have, then, a case where a man was killed under such circumstances that, if he had dependents, they would be entitled as of course to compensation under the Employers' Liability Law, Comp. Laws 1915, §§ 5423–5495. The superintendent of the mine knew of this death, and within a month reported it to the Industrial Accident Board, with the information that the brother-in-law of the deceased advised him there was one child under the age of 16 years. October 14, 1916, only a little over a month after the death, Mr. Griffin, the claim examiner, advised the Industrial Accident Board the case would be handled through his office, and that he had been advised by Attorney Jurma that the dead man had a wife and one child living in Finland.

An original answer to the claim was filed, and while we are unable to find it in the return, the inference is fair from the language of Mr. Freeman, the attorney for defendants, in his letter which we have quoted, that it did not aver that the claim was not made in time, and it is not until long after the six months has expired that an amended answer is filed, in which for the first time the question is raised. The purpose and requisites of a claim for compensation have been considered by this court in Purdy v. City of Sault Ste. Marie, 188 Mich. 573, 155 N. W. 597, Ann. Cas. 1917D, 881, Matwiczuk v. American Car & Foundry Co., 189 Mich. 449, 155 N. W. 412, and Shafer v. Parke Davis & Co., 192 Mich. at page 580, 159 N. W. 304. While none of these cases is on all fours with the instant case, what was said therein requires this case upon its facts to be affirmed.

It is affirmed, with costs to the claimant.

Steere, Sharpe, Wiest, Stone, and Bird, JJ., concurred with Moore, J.

CLARK, J. (dissenting). Kottari was killed September 19, 1916. A formal claim for compensation was filed by Mr. Jurma April 2, 1917, more than six months after the death. But letters had passed between Mr. Jurma and defendants within the period of six months. Assuming that in such letters there was language sufficient to make an unequivocal claim of compensation, it still appears that Mr. Jurma had no authority to act for the dependents. His testimony discloses no authority, and the statement of Rantaaho, dependents' attorney in fact, that no such authority was given, is not disputed. The defendants recognized Mr. Jurma as representing the dependents until shortly after May 21, 1917, when Rantaaho filed his power of attorney.

Mr. Freeman's opinions, expressed in his letter of January 22, 1918, quoted by Justice Moore, as to estoppel, and as to the effect of recognizing Mr. Jurma as representing the dependents, are binding upon no one They do not constitute an admission by defendants that a claim for compensation was made by dependents within the statutory time. The recognition by defendants of Mr. Jurma and of the claim for compensation

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made by him was upon the belief that he represented the dependents, which belief later proved to be groundless. Defendants then claimed the benefit of the statute of limitations, contending that no claim for compensation had been made within the statutory period. There is no evidence to refute such contention.

The award is vacated.

Fellows, C. J., concurred with Clark, J.

NORBUT v. I. STEPHENSON CO. ET AL. (No. 44.)

(Supreme Court of Michigan. Feb. 8, 1922.)

186 Northwestern Reporter, 716.

1. MASTER AND SERVANT — COMPENSATION AGREEMENT APPROVED BY INDUSTRIAL ACCIDENT BOARD REVIEWABLE.

An agreement for weekly compensation approved by the Industrial Accident Board may be reviewed by the board on the employee's petition under Workmen's Compensation Act (Comp. Laws 1915, § 5467), and on showing injuries more serious than he had at first apprehended additional compensation may be awarded.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

2. MASTER AND SERVANT—COMPENSATION COMMUTED TO LUMP SUM REVIEWABLE.

Where an employee, receiving weekly payments fixed by agreement approved by the Industrial Accident Board filed a petition under Workmen's Compensation Act (Comp. Laws 1915, § 5452) for a lump sum payment, indorsed by the employer stating that it was not adverse to making payment prayed for in the petition, which alleged special circumstances requiring the judgment of board, the petition was within the provision of the section for commutation of payments without the employer's consent, so that the lump sum payment and settlement authorized by the board did not preclude a review under section 5467 on a petition for additional compensation for more serious injury discovered.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

Certiorari to Industrial Accident Board.

Proceedings by John Norbut before the Industrial Accident Board against the I. Stephenson Company and another for compensation. After payment of compensation and final payment in a lump sum a review was had in which additional compensation was awarded, on which defendants bring certiorari. Award affirmed.

Argued before Fellows, C. J., and Steere, Moore, Wiest, Stone, Clark, Bird, and Sharpe, JJ.

William Greene, of Chicago, Ill., for appellants.

Cady & Andrews, of Benton Harbor, for appellee.

CLARK, J. Following plaintiff's injury in February, 1917, he was paid by the defendant insurer $6.09 per week until December 15, 1919, when a supplemental agreement in regard to compensation was filed and approved

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by the Industrial Accident Board, by which plaintiff's compensation was fixed at $1 per week for 154 weeks. Plaintiff filed a petition for a lump sum payment of the $154. On such petition the following was indorsed by defendants:

"This is to certify that the respondents are not adverse to making payment of compensation in the form prayed for in the above petition."

After consideration the board, in accordance with section 5452. Comp. Laws 1915, by its order, authorized defendants to pay the compensation in a lump sum. It was paid, and final settlement receipt was filed January 3, 1920. In July, 1920, plaintiff petitioned for further compensation and for a review, and alleged that, with respect to the supplemental agreement and lump sum payment, he had been defrauded, and that he had discovered that he was seriously and permanently injured. Review was had. The board said as to the supplemental agreement that it was unable to find cause why it should be set aside. The board found plaintiff's injuries more serious than had at first been apprehended, and awarded additional compensation, and the facts supporting such findings and award are both sufficient and abundant. But defendants, on certiorari, urge certain legal obstacles to the making of such award:

[1] 1. That the board may not review weekly payments as provided in section 5467, Comp. Laws 1915:

"Any weekly payment under this act may be reviewed by the Industrial Accident Board at the request of the employer, or the insurance company carrying such risks, or the Commissioner of Insurance as the case may be, or the employee; and on such review it may be ended, diminished or increased, subject to the maximum and minimum amounts above provided, if the board finds that the facts warrant such action"

—because of the existing agreement for compensation approved by the board. This question has been determined adversely to defendants. See Winn v. Adjustable Table Co., 193 Mich. 127, 159 N. W. 372, 163 N. W. 906; Weidner v. Northway Motor & Manfg. Co., 205 Mich. 583, 172 N. W. 574.

[2] 2. That the board was without authority to review because of the lump sum payment and settlement The section above mentioned as to lump sum payments:

"Whenever any weekly payment has been continued for not less than six months, the liability therefor may be redeemed by the payment of a lump sum by agreement of the parties, subject to the approval of the Industrial Accident Board, and said board may at any time direct in any case, if special circumstances be found which in its judgment require the same, that the deferred payments be commuted on the present worth thereof at five per cent. per annum to one or more lump sum payments, and that such payments shall be made by the employer or the insurance company carrying such risk, or Commissioner of Insurance, as the case may be."

There are two provisions of the section. The first is that after payment of compensation for not less than six months liability for compensation may be redeemed by agreement of the parties and approval of the board and payment. Doubtless under this provision when the parties make a valid agreement for a lump sum payment in full for all compensation under the act, and such payment so agreed upon has been authorized by the board and the payment made, the stage of weekly payments and review thereof has been passed. The liability has been redeemed. The right to compensation has been terminated. See In re McCarthy, 226 Mass. 444. 115 N. E. 764; 14 Neg. and Comp. Cases, 355; L. R. A. 1916A, 173; Wilcox v. Clarage Foundry & Manfg. Co., 199 Mich. 79, 165 N. W. 925.

But we cannot agree with counsel that this case falls within such first provision. Plaintiff's petition is under the second provision of the

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section, and sets out the special circumstances requiring the judgment of the board. And defendant's indorsement upon the petition means nothing more than that the petition would not be opposed.

A direction by the board, required upon special circumstances found, under the second provision of the section, that deferred payments be commuted to one or more lump sum payments, presents no obstacle to a further review of weekly payments provided by said section 5467. See McMullen v. Gravette Construction Co., 207 Mich. 586, 175 N. W. 120, where this subject is considered.

No other question merits discussion.

The award is affirmed.

OLESZEK v. FORD MOTOR CO. (No. 60.)

(Supreme Court of Michigan. Feb. 8, 1922.)

180 Northwestern Reporter, 719.

2. MASTER AND SERVANT — DISABILITY COMPENSABLE, THOUGH INCREASED BY INTERVENING CAUSES.

In a proceeding under the Workmen's Compensation Act where there is right of recovery due to the original injury, and the disability at time of hearing is directly traceable thereto, the intervention of other and aggravating causes by which such disability has been increased, if the claimant is not himself to blame therefor, is no bar to recovery.

(For other cases, see Master and Servant, Dec. Dig. § 374.)

3. MASTER AND SERVANT—LOSS OF LEG BY SPREAD OF INFECTION AFTER TREATMENT OF INJURY HELD COMPENSABLE.

Where infectious germs entered a slight wound on an employee's leg, injured by falling on a greasy floor, and after treatment administered by the employer's employees pursuant to Workmen's Compensation Act (Comp. Laws 1915, § 5434), the infection spread, without his fault, resulting in the necessary amputation of the leg at the hip joint, he was entitled to compensation for the loss of his leg, and his action for damages was barred as provided by section 5426.

(For other cases, see Master and Servant, Dec. Dig. § 374.)

Error to Circuit Court, Wayne County; Samuel G. Houghton, Judge.

Action by Joseph Oleszek against the Ford Motor Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Argued before Steere, C. J., and Moore, Wiest, Fellows, Stone, Clark, and Sharpe, JJ.

Clarence P. Milligan, of Detroit, for appellant.

Henry C. Bogle, of Detroit, M. J. Kennedy, of Ishpeming, and Clifford B Longley, of Detroit, for appellee.

SHARPE, J. On September 15, 1916, the plaintiff, an employee of the defendant at its plant in Highland Park, while cleaning an oily, greasy floor, slipped and fell, dislodging an iron pipe, which in its fall struck and injured his right leg a few inches above the shoe top. The extent to

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which there was an abrasion of the skin does not appear. He was removed by his fellow workmen to a first aid room provided by defendant in the plant. Two young men, selected by the doctors, in charge of this room and employed by defendant, applied treatment to the wound, after which plaintiff resumed work, being assigned a task at which he could work sitting. The next morning his wound was examined and thereafter treated by one of the hospital doctors. He continued at work, though somewhat intermittenly, until March 30, 1917, when he was confined to his home. Other doctors were then employed by him. They diagnosed his trouble as necrosis of the bone and performed an operation, successful as they claimed, to relieve plaintiff therefrom. He thereafter resumed his work for defendant, but his leg continued to trouble him. On September 11th he was taken by defendant's employees to the Ford Hospital. An operation was recommended, but was delayed until October 8th, when his leg was removed at the hip joint. After recovery therefrom, he resumed his employment with defendant and continued thereat until this suit was begun on July 26, 1919. Soon after he was discharged by defendant's foreman.

The claim of the plaintiff is thus stated by his counsel:

"It was undisputed that the loss of plaintiff's leg was due to blood poisoning following infection subsequent to the original injury. On July 26, 1919, the plaintiff instituted suit against the Ford Motor Company under the common law, alleging in his declaration that the loss of his leg was due to the negligence of the defendant through its servants and agents in not giving plaintiff proper medical treatment at the time of the original injury."

At the conclusion of plaintiff's proofs, the trial court, on motion of defendant, directed a verdict in its favor for the reason that plaintiff's claim for compensation for disability should have been prosecuted under the provisions of the Workmen's Compensation Act, and that an action at law would not lie therefor. The plaintiff reviews the judgment entered by writ of error.

[1] As a verdict was directed in the defendant's favor the testimony must be viewed in the light most favorable to plaintiff's claimed right of action. When so considered, the following facts may be said to have been established: (1) That plaintiff sustained an injury to his right leg due to an accident arising out of and in the course of his employment; (2) that as a result of the injury there was an open wound on his leg below the knee, and that infectious germs entered such wound while he lay on the oily, greasy floor on which he had fallen; (3) that pursuant to the duty imposed on the defendant by the Workmen's Compensation Act (Comp. Laws 1915, §§ 5423–5495), both plaintiff and defendant being subject to its provisions, he was removed to a room in defendant's plant, where his wound was treated by men employed by defendant for that purpose; (4) that these employees failed and neglected to administer such treatment as would prevent or arrest the action of such infectious germs, and, as a result, the wound became infected, the bone diseased, the infection spread, resulting, about 13 months thereafter, in the necessary amputation of the leg at the hip joint.

The defendant contends, and the trial court so found, that these facts would support a claim for compensation under the act, and that plaintiff's right to recover must be so prosecuted.

[2, 3] Under the provisions of the act (2 Comp. Laws 1915, § 5423 et seq.), the plaintiff is barred of his remedy for any damages, to which he would have been entitled at common law, which flow from the injury due to the accident. If, under the facts stated, compensation would have been awarded under the act, this action will not lie. Section 5426 (section 4, part I), provides

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"* * * Nor shall such employer be subject to any other liability whatsoever, save as herein provided for the death of or personal injury to any employee, for which death or [personal] injury compensation is recoverable under his act."

The question here presented may be thus stated. Under the facts as claimed by plaintiff, could recovery have been had under the provisions of the act?

Where there is a right of recovery due to the original injury and the disability at the time of the hearing is directly traceable thereto, the intervention of other and aggravating causes by which such disability has been increased, if the claimant is not himself to blame therefor, is no bar to his recovery. Cook v Charles Hortz & Son, 198 Mich. 129, 164 N. W. 464; Reiss v. Northway Motor, etc., Co., 201 Mich. 90, 166 N. W. 840; Cramer v. West Bay City Sugar Co., 201 Mich. 500, 167 N. W. 843; Adams v. W. E. Wood Co., 203 Mich. 673, 169 N. W. 845. The rule is thus stated by the annotator in the note to Rocca v. Stanley Jones & Co., 6 N. C. C. A. 624:

"Where the immediate agency causing the death or second injury is one which the first injury rendered it essential to employ, the employer has been held liable for the resulting death or injury."

Had plaintiff presented his claim for compensation to the Board and supported it by proof of the accident and the resulting injury, of its treatment by defendant's employees, the failure of the wound to heal, the operation subsequently performed by which the disease bone was removed, the spread of the infection to the upper part of his leg, necessitating its removal, can there be any question but that the Board would have found that his disability due to the loss of his leg was caused by, or directly traceable to, the injury resulting from the accident? We think not. In making such claim, he would have been under no obligation to present for the consideration of the Board the failure or neglect of the defendant's employees to render proper first aid treatment.

Prior to the enactment of this law, no legal duty was imposed on an employer to provide medical or hospital service to an injured employee. Section 5434 (section 4, part II, of the act) provides:

"During the first three weeks after the injury the employer shall furnish, or cause to be furnished, reasonable medical and hospital services and medicines when they are needed."

The service rendered by defendant's employees, and of which plaintiff complains, was but a compliance by defendant with the duty imposed on it by the act. Clearly, it could not have interposed as a defense to plaintiff's claim for compensation the negligence of such employees in their failure to render proper first aid treatment. Under plaintiff's proofs, no other conclusion could have been reached by the Board than that the loss of plaintiff's leg was caused by the injury due to the accident, aggravated by the infection for which plaintiff was in no way to blame.

We have not overlooked plaintiff's claim that the loss of his leg was not caused by the injury resulting from the accident, but by the intervention of an independent cause, the failure of the hospital employees to so treat the wound as to prevent or arrest the infection. He relies upon the rule stated in Ruth v. Witherspoon-Englar Co., 98 Kan. 179, 157 Pac. 403, L. R. A. 1916E, 1201, quoted in Smith v. Battjes Fuel & Building Co., 204 Mich. 9, 13, 169 N W. 943. The quotation reads:

"In an action under the Workmen's Compensation Act a recovery can be had only upon the basis of disability to labor resulting from the injury received in the course of employment, without the intervention of an independent cause, the separate consequences of which admit of definite ascertainment."

The rule stated is not discussed in that case, nor do we find it necessary to discuss it here The contrary was held in Booth & Flynn v. Cook,

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79 Okl. 280, 193 Pac. 36, to which we invite attention. It was said not to be applicable in the Smith v. Battjes Case, nor do we find it applicable to the claim of the plaintiff here. The infectious germs were in the wound at the time of the claimed negligence of defendant's employees. The loss of his leg was due to the infection caused by these germs. The omission to so treat the wound as to prevent infection cannot be said to have been "the intervention of an independent cause, the separate consequences of which admit of definite ascertainment." Dr. Jones, a witness called for plaintiff, testified:

"We have no recognized standard treatment to avoid an infection in a wound of that character. All the doctors have different methods of treatment. * * * Lots of times we do everything we can to combat infection: still, in spite of it all, we have infection; in spite of everything we can do we have infections."

We find nothing in the record to contradict or weaken the effect of this testimony.

The judgment is affirmed.

SICHTERMAN v. KENT STORAGE CO. ET AL. (No. 40.)

(Supreme Court of Michigan. Feb. 8, 1922.)

186 Northwestern Reporter 498.

1. MASTER AND SERVANT—COMPENSABLE INJURY DEFINED.

Under the requirement of the Workmen's Compensation Act that compensation shall be paid only when the accident arises out of and in the course of the employment, compensation is to be awarded when the accident occurs in the service of the master and by reason thereof.

(For other cases, see Master and Servant, Dec. Dig. § 371.)

2. MASTER AND SERVANT—INJURY TO SALESMAN AIDING FELLOW TRAVELER HELD NOT COMPENSABLE AS ACCIDENT "ARISING OUT OF EMPLOYMENT."

Where a traveling salesman covering his territory by automobile left his car while on the higway for the purpose of offering assistance to another traveler, and was struck by another automobile, the accideent did not arise out of the employment within the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

(For other definitions, see Words and Phrases First and Second Series, Course of Employment.)

Certiorari to Industrial Accident Board.

Proceeding under the Workmen's Compensation Act (Pub. Acts Extra Sess. 1912 No 10) by Gertrude Sichterman for compensation for the death of her husband, Harry Sichterman, opposed by the Kent Storage Company, employer, and the Michigan Employers' Casualty Company, insurer. Compensation was awarded by the Industrial Accident Board, and defendants bring certiorari. Award vacated.

Harry Sichterman was a traveling salesman in the employ of defendant Kent Storage Company. His territory which he covered on a week, surrounded Grand Rapids, where he lived and where defendant's place of business was located He made his territory by automobile, leaving Grand

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Rapids in the morning and returning at night. Either at night or the following morning he turned in his orders to the company. On November 10, 1920, he made his usual trip for that day winding up at Freeport. The usually traveled road from that town to Grand Rapids is known as the "Cascade Road" and was the one taken by Mr. Sichterman. About two miles from Grand Rapids, and after it had grown dark, he came across a peddler, with his wagon at the side of the road. The peddler's wagon had been struck by an automobile about an hour before. Mr. Sichterman drove his car about 25 feet beyond where the peddler was, getting it to the side of the road and stopped, got out of the machine, and walked back in the road to where the peddler was, and had just asked him if there was anything he could do for him, when he was struck by an automobile and so seriously injured that he shortly after died, leaving a widow, the plaintiff, and a son Robert, only four years old. The defense to the claim for compensation is that the accident did not arise out of and was not received in the course of decedent's employment.

Argued before Fellows, C. J., and Wiest, Stone, Clark, Bird, Sharpe, Moore, and Steere, JJ.

Brown & Kelley, of Lansing, for appellants.
Martin H. Carmody, of Grand Rapids, for appellee.

FELLOWS, C. J. (after stating the facts as above). [1] This state, like many of our sister states, has followed the English act in providing that compensation shall be paid in industrial accidents where the accident arises out of and in the course of the employment. The English courts and the courts of this country with uniformity have agreed that both requirements must be met to justify an award. Both requirements are indicative of the underlying thought that compensation is to be awarded when and where the accident occurs in the service of the master and by reason thereof.

[2] In an exhaustive note found in L. R. A. 1916A, 23, following our case of Rayner v. Sligh Furniture Co., 180 Mich. 168, 146 N. W. 665, Ann. Cas. 1916A, 386, the subject of Workmen's Compensation Acts is fully treated. At page 41 of L. R. A. 1916A, the editorial writer lays down the general principle:

"It may be stated generally that the phrase 'out of and in the course of the employment' embraces only those accidents which happen to a servant while he is engaged in the discharge of some function or duty which he is authorized to undertake, and which is calculated to further, directly, or indirectly, the master's business."

The courts recognize the general principles which control, but encounter may difficulties in their application in determining whether the conditions justifying compensation have been met. In considering the case before us we shall first consider the authorities from other jurisdictions, reserving the consideration of our own cases until the last.

The case of Robinson v. State, 93 Conn. 49, 104 Atl. 491, supports plaintiff's contention. The court, however, cites no authorities to sustain its conclusion, and indulges in no reasoning in support of its holding. The English case of Corlett v. Lancashire & Yorkshire Ry. Co., 120 L. T. 236, and the opinion of the Court of Appeals of Indiana, In re Raynes ,66 Ind. App. 321, 118 N. E. 387, also have that tendency, although the English case is not fully in accord with Warren v. Hedley's Collieries Co., W. C. & Ins. Cas. (1913) 172, and in the Indiana case the employee had gotten out of the taxicab in which he was riding to allow the driver to get some gasoline, an incident of the trip.

In London & Edinburgh Shipping Co. v. Brown, 42 So. L. R. 357, Dragovich v. Iroquois Iron Co., 269 Ill. 478, 109 N. E. 999, and Gneral Accident, etc., Co. v. Evans (Tex. Civ. App.) 201 S. W. 705, liability was

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sustained where the accident occurred in attempting to rescue a fellow workman from a perilous position, the Illinois court saying:

"Under these authorities it is clear that it is the duty of an employer to save the lives of his employees, if possible, when they are in danger while in his employment, and therefore it is the duty of a workman in his employ, when occasion presents itself, to do what he can to save the lives of his fellow employees when all are at the time working in the line of their employment. Any other rule of law would be not only inhuman but unreasonable and uneconomical, and would, in the end, result in financial loss to employers on account of injuries to their employees. From every point of view it was the duty of the deceased, as a fellow employee, in the line of his duty to his employer, to attempt to save the life of his fellow employee under the circumstances here shown."

The Texas court, treating the question as a new one to that jurisdiction, said:

"The question has not been passed upon by any appellate court of this state, so far as we are aware, and in cases in which the question arose in other states the decisions ofthe courts are at some variance. In some of them it was held that a workman, who goes to the rescue of his master or of another workman, and is thereby injured, is not entitled to compensation. But courts of recognized ability have, on the contrary, held that it is the duty of a workman, when the necessity arises, to do what he can to save the life of his fellow employees, when they are at the time working in the line or course of their employment."

The Court of Appeals of New York went a step further, and in Waters v. Taylor Co., 218 N. Y. 248, 112 N. E. 727, L. R. A. 1917A, 347, held that there was liability under the New York act where an employee went to the rescue of an employee of another contractor engaged in a common enterprise, and held that liability was not defeated though Waters was "technically" working for another employer. But in concluding the opinion, it was said:

"Of course what we thus say is to be read in the light of the facts presented on this appeal. There is no trouble in outlining a case where an employee, even with the laudable purpose of helping another, might go so far from his employment and become so thoroughly disconnected from the service of his employer that it would be entirely unreasonable to say that injuries suffered by him arose out of and in the course of his employment. It is sufficient to say that we do not regard the case now presented to us as being such an one as we have suggested."

That the New York court had gone further in the Waters Case than other courts had gone was recognized by that court in Matter of Di Salvio v. Menihan Co., 225 N. Y. 123, 121 N. E. 766, where, after reviewing cases from other jurisdictions, it said, referring to the Waters Case:

"And this court perhaps went farther than any of these cases in extending the benefits of a compensation act."

In the Di Salvio Case the workman wished to say good-by to a fellow workman before he went to the front. In doing so he crossed the room and there received the injuries for which compensation was asked. Both New York cases were written by Justice Hiscock. In the Di Salvio Case he said, speaking for the court after considering the Waters Case and cases from other jurisdictions:

"In each of these cases an award was sustained because the court was able fairly to say that between the work for which the employee was engaged and the disputed act which led to the accident there was either naturally or as the result of some act of the emloyer or of custom a real relationship which brought the accident within the range of employment, and, therefore, it could be said to have arisen out of and in the course of the employment.

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"But in the present case we search in vain for any such feature or relationship. There was no connection between the employment for which claimant was engaged, of marking soles, and his trip across the shop to say good-by to a fellow employee. This act did not enable him either directly or indirectly, in any tangible sense, the better to perform his work, discharge his duties or carry forward the interests of his employer. It was not a natural incident to the work for which he was hired. It did not grow out of any emergency where he was justified in taking an unusual step to protect his employer's interests. It was simply and solely the expression of a private desire and the consummation of a personal purpose. However natural and even commendable his act may have been it was neither beneficial to his employer nor to himself in the way of completing and performing his work."

An English case frequently cited both by the courts of England and of this country is Reed v. Great Western Ry. Co., 99 L. T. 781 (also found reported in 78 L. J. 31), decided by the House of Lords in 1908. The workman, an engineer, left his engine when it was standing at rest to get a book from a fellow employee, and was injured so seriously that he died. It was held that the accident did not arise out of and in the course of the employment.

In Smith v. Lanchasire & Yorkshire Ry., 79 L. T. 633, a ticket collector collected the tickets from a certain train, but had not completed his day's work. He got on the footboard to speak to a girl he knew, and was injured. It was held that the accident did not arise out of the employment.

In Murray v. Allen Bros. & Co., W. C. & Ins. Cas. (1913) 193, the employee was injured while watching laborers at work repairing a vessel. He was returning by the shortest way to his place of employment. It was held that the accident did not arise out of the employment.

The Supreme Court of Illinois in Fairbanks Co. v. Industrial Com., 285 Ill. 11, 120 N. E. 457, has this to say:

"The Workmen's Compensation Act is designed to protect workmen and compensate them for injuries received while performing any duty necessary to be performed in the course of their employment or incident to it. It was not intended by this act that the employer who comes within the provisions of the act shall be the insurer of the safety of his employee at all times during the period of the employment. The employer is liable for compensation only for an injury which occurs to the employee while performing some act for the employer in the course of his employment or incident to it. * * *

"An injury occurs in the course of the employment, within the meaning of the Workmen's Compensation Act when it occurs within the period of the employment at a place where the employee may reasonably be and while he is reasonably fulfilling the duties of his employment or is engaged in doing something incidental to it."

In O'Toole's Case, 229 Mass. 165, 118 N. E. 303, the decedent, a city employee, was engaged in spreading cracked stone on the roads. A steam roller was used by the city in the work. Deceased went upon the roller at the invitation of the engineer for personal conversation. While there he was injured. In denying liability, the court said:

"There are cases which hold that an employee is protected by the Workmen's Compensation Act, although not at the time actually engaged in the work for which he was hired. If the employee is injured in going to or returning from his work upon the master's premises, or on premises available for the purpose, or if during intervals of leisure which occur in the course of his employment he is injured, he may still be within the scope of his employment and entitled to the benefits of the act. Sundine's Case, 218 Mass. 1. Blovelt v. Sawyer, 6 W. C. C. 16. But the principle of these cases is not applicable where the servant leaves the sphere of his employ-

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ment for some purpose of his own entirely disconnected with and not in any way incidental to the employment."

The same court in McNicol's Case, 215 Mass. 497, 102 N. E. 697, 46 L. R. A. 1916A, 306, had this to say:

"It is sufficient to say that an injury is received 'in the course of the employment when it comes while the workman is doing the duty which he is employed to perform. It 'arises out of' the employment, when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury, which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workman would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence."

This court has recognized the principle of this case, as we shall presently see.

Turning now to our own cases, we find that the precise state of facts here involved has not been before the court, although we are persuaded that our former opinions are by analogy controlling. In the recent case of Sebo v. Libby, McNiel & Libby, 216 Mich. 351, 185 N. W. 702, the employee was a gardener; he attempted to stop a runaway team, which was hauling milk consigned to the employer, and received injuries resulting in his death. We held that his act was one to prevent loss to the employer, and was in the furtherance of the employer's business, and sustained liability. But, in Spooner v. Detroit Saturday Night Co., 187 Mich. 125, 153 N. W. 657, L. R. A. 1916A, 17, where the employee as a friendly act took persons up on an elevator he was not employed to run, and while so doing was injured, this court held the master was not liable. Mr. Justice Stone who wrote for the court there said:

"At the time of the injury we think that he was engaged in an act outside of, and not in the course of, his employment, and the injuries he received and which caused his death did not arise out of and in the course of his employment. The elevator shaft was in pitch darkness, by the undisputed evidence, and in using it he not only risked his own life, but that of the men he took upon the elevator with him. Had he remained in the place where his duties called him and attended to those duties, he would not have been injured, so far as this record shows. The material question is not what he had done at times, for his own convenience or otherwise, while in the employ of Winn & Hammond Company, but the pertinent question is: What was he employed to do upon this night? Manifestly, to run and care for the engine and dynamo. This injury occurred while he was away from his work, and while he was a voluntary visitor to the employee of the appellant, and the act was for his own pleasure or satisfaction."

He then considers a Vermont case (Miner v. Telephone Co., 83 Vt. 311, 75 Atl. 653, 26 L. R. A. [N. S.] 1195) and says:

"We think the case readily distinguishable from the instant case. In fact it might be said the plaintiff there was in the performance of and carrying on the very work for which he was employed, to wit: He was assisting his foreman, who undoubtedly represented the master. In the instant case Spooner was rendering no service which was either accepted by or known to his superior, but was engaged in a voluntary, friendly act entirely outside the scope of his employment upon the night in question."

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In Carnahan v. Mailometer Co., 201 Mich. 153, 167 N. W. 9, the employee by direction of the shipping clerk delivered a heavy case of books to the home of one of the stockholders. He delivered it with safety to himself. At the request of the maid, and prompted by chivalrous motives, he carried the books upstairs. This extra strain produced the injury. After considering whether the delivery of the books was labor in the master's service, Mr. Justice Steere, speaking for the court, said:

"But passing these questions, and even conceding that in rendering this casual service, as directed, to a stockholder of the corporation during the noon hour, plaintiff was in the usual course of his employment, because obeying an order emanating from the manager under whom he was employed, his own testimony shows that he had executed the order as given and fully performed the service directed before the accident occurred. Neither the nature of his employment nor the special order given him by the shipping clerk can be said to contemplate that after he had succeeded in delivering this heavy box, weighing 140 pounds and containing 100 books, as he estimated, at Mr. Hunt's residence, he would then, at the unreasonable request of some woman whom he hated to refuse, undertake to carry it on his back up a winding stairs to the second floor—an undertaking on which he 'wouldn't take a chance even around the factory' with which he was employed. There is no competent evidence in the case to support the finding that an injury resulting from such an undertaking arose out of and in the course of his employment."

These three cases we think clearly show the line of demarcation. In the Sebo Case the act was one in the master's interest, for his benefit and in furtherance of his business and liability was sustained. In the Spooner Case the act was a friendly act to a stranger, not in furtherance of the master's business; in the Carnahan Case, the act was an act of chivalry, not in the furtherance of the master's business; in both these cases the act which caused the injury did not arise out of the employment, and liability was denied. That this court has constantly kept in mind the provision of the statute requiring that the accident must arise out of the employment will be demonstrated by an examination of our own authorities, to a few of which we shall refer. In Clark v. Clark, 189 Mich. 652, 155 N. W. 507, the claimant was injured by a missile thrown by a party attacking his brother for whom he was at work. Mr. Justice Bird, speaking for the court, said:

"It may have been commendable in him to volunteer to assist his brother against such great odds, but that does not satisfactorily answer the question what connection his acts had with his employment. He was not called upon to protect his master's property, as on the previous day. He was not asked to assist his master in the fight on the second day. His action was purely a voluntary one, and it seems to us no different than as though he had discovered the same men fighting with his brother a week afterward ten blocks away, or as though claimant had observed a fight going on across the street and had gone there to get a better view, and while there had been hit by a flying missile and injured. Had claimant remained at his work he would not have been injured. His presence at the place of fighting was in pursuance of no demand of his employment."

In Marshall v. Baker-Vawter, 206 Mich. 466, 173 N. W. 191, the plaintiff was foreman of the composing room, and was shot by the janitor. The board found that the shot was fired through personal spite, and denied liability. We affirmed the award because of the finding of the board on the disputed question of fact, but recognized the doctrine of McNicol's Case, supra.

In Tarpper v. Weston Mott Co., 200 Mich. 275, 166 N. W. 857, L. R. A. 1918E, 507, we held that, where the injury resulted from "larking," as our English brethren term it (Fitzgerald v. Clarke & Son, 1 B. W. C. C. 197; Federal Rubber Mfg. Co. v. Havolic, 162 Wis. 341, 156 N. W. 143, L. R. A. 1916D, 968), there could be no recovery. The injury may occur when the employee is at work for the master, and be produced by a fel-

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low workman, but it does not arise out of the employment, and as we there said:

"That the injury suffered by the employee must arise out of the employment as well as in the course of the employment is well settled by our own decisions."

The following cases are of interest: Bayer v. Bayer, 191 Mich. 423, 158 N. W. 109; Bischoff v. American Car & Foundry Co., 190 Mich. 229, 157 N. W. 34; Kennelly v. Salt & Lumber Co., 190 Mich. 629, 157 N. W. 378; Borck v. Simon J. Murphy Co., 205 Mich. 472, 171 N. W. 470; Buvia v. Oscar Daniels Co., 203 Mich. 73, 168 N. W. 1009, 7 A. L. R. 1301; Guastelo v. Michigan Central R. R. Co., 194 Mich. 382, 160 N. W. 484, L. R. A. 1917D, 69; Draper v. Regents of University, 195 Mich. 449, 161 N. W. 956; Mitchinson v. Day Bros., 6 B. W. C. C. 191; Davies v. Crown Perfumery Co., Id. 649; Collins v. Collins, 2 Ir. Rep. (1907) 104; Aitken v. Finlayson Bousfield & Co., Ltd., 7 B. W. C. C. 918; State v. District Court, 141 Minn. 61, 169 N. W. 275; Erickson v. St. Paul City Ry. Co., 141 Minn. 166, 169 N. W. 533; State v. District Court, 141 Minn. 348, 170 N. W. 218; note to Spooner Case, 9 N. C. C. 647.

This unfortunate accident occurred when the deceased was performing an act of humanity entirely dissociated from the master's work. It did not arise out of the employment.

The award must be vacated.

POAST v. OMAHA MERCHANTS' EXPRESS & TRANSFER CO. (No. 22193.)

(Supreme Court of Nebraska. Jan. 26, 1922.)

186 Northwestern Reporter, 540.

(Syllabus by the Court.)

1. MASTER AND SERVANT — COMPENSATION ALLOWABLE FOR TEMPORARY TOTAL DISABILITY AND FOR PERMANENT PARTIAL LOSS STATED.

Where an employee, working under the provisions of the Workmen's Compensation Act before the 1921 amendment became effective (Laws 1919-21, c. 122), sustains an injury resulting in temporary total disability, he is entitled to recover compensation under subdivision 1, § 3662, Rev. St. 1913, as amended by chapter 85, § 7, Laws 1917, during the period of total disability, not exceeding 300 weeks, and, in addition thereto, when it becomes ascertainable that the injury will result in a certain percentage of permanent partial loss of the use of the injured member, the employee is entitled to compensation for such loss under the provisions of subdivision 3 of said section 3662, Rev. St. 1913.

(For other cases, see Master and Servant, Dec. Dig. § 387.)

2. MASTER AND SERVANT — COMPENSABLE DISABILITY SHOWN.

Evidence examined, and *held* to sustain the judgment of the trial court.

(For other cases, see Master and Servant, Dec. Dig. § 405[6].)

Appeal from District Court, Douglas County; Wakeley, Judge.

Action by E. W. Poast against the Omaha Merchants' Express & Transfer Company under the provisions of the Workmen's Compensation Act. Judgment for the plaintiff, and the defendant appeals. Affirmed.

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Kennedy, Holland, De Lacy & McLaughlin, of Omaha, for appellant.
Bigelow, Peterson & La Violette, of Omaha, for appellee.

Heard before Morrissey, C. J., and Letton, Rose, Dean, Aldrich, Day, and Flansburg, JJ.

DAY, J. This action is based upon the provisions of the Workmen's Compensation Act (section 3642–3696, Rev. St. 1913, as amended by chapter 85, Laws 1917).

It appears that the plaintiff, while in the employ of the defendant, on January 31, 1919, sustained an injury resulting in a comminuted fracture of the tibia and fibula of the left leg just above the ankle joint. There is no question but that this injury arose out of, and in the course of the plaintiff's employment. At the time the plaintiff was receiving a weekly wage of $24.40, and under the law was entitled to receive compensation at the rate of $12 a week. Following the injury the plaintiff was taken to a hospital, where he remained. receiving needful medical attention, until February 21, 1919, when he was permitted to return to his home. About the middle of April he began walking with crutches, and a short time thereafter began walking with the use of a cane. On July 28, 1919, he had so far recovered as to resume work, and applied to the defendant, in whose employ he had been for 21 years, for employment, but was not able at that time to secure work with the defendant. He did, however, secure employment as a freight handler with a railroad company, and continued work in that capacity until October 21, 1919, when, singularly enough, he again sustained a fracture of his left leg at the same point as the prior injury. Following the injury of January 31, the defendant paid compensation to the plaintiff at the rate of $12 a week up to June 27, a period of 21 weeks, at which time it was the theory of the defendant that the plaintiff had entirely recovered, and that they were under no legal obligation to make further payments. After plaintiff had received the second injury, as above indicated, he filed with the compensation commissioner in December, 1919, a petition praying for compensation for permanent partial disability resulting from the injury sustained on January 31. Before the compensation commissioner the plaintiff was awarded an additional sum of $42.80. together with medical and hospital expenses. From the award of the compensation commissioner the plaintiff appealed. Upon the trial in the district court there was a finding and judgment that the plaintiff had suffered a loss of 35 per cent. of the normal use of his foot as a permanent partial disability; that under the law he was entitled to compensation for such permanent partial disability at the rate of $12 a week for 43¾ weeks, making an aggregate sum of $525, beginning June 27, 1919; and in addition he was awarded the sum of $7 hospital expenses. This sum of $525 was allowed in addition to the compensation paid by the defendant for the period from January 31, 1919. to June 27, 1919, a period of 21 weeks. From this judgment the defendant appeals.

[1, 2] It is first urged by the defendant that the evidence is not sufficient to support the finding and judgment that the plaintiff suffered a permanent partial disability as a result of the injury of January 31, 1919. Upon this question the medical testimony was somewhat at variance. There was testimony which supported the plaintiff's theory that he had sustained a permanent partial disability in the use of his foot. One of the physicians gave it as his opinion that the plaintiff had lost 35 per cent. of the normal use of his foot; that the plaintiff in using his foot stood upon the outer edge of the foot, and was not able to stand squarely upon it; that the foot was out of alignment; and that the injury was permanent Other physicians gave it as their opinion that the injury was not of a permanent character. There being testimony in the record which supports the judgment, the rule is well established that, where there is a conflict of evidence, the judgment will not be set aside unless it appears to

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be clearly wrong. Under the facts of this case we are not at liberty to disturb the judgment upon the ground that the evidence does not support it.

It is the main contention of the defendant that the total amount of plaintiff's recovery is limited to compensation for 43¾ weeks, and it is argued that, inasmuch as the defendant has heretofore paid to the plaintiff compensation for 21 weeks, during the period of his total disability, therefore it should be required to pay only for the additional period of 22¾ weeks. The question thus presented turns upon the meaning of section 3662, Rev. St. 1913, as amended by chapter 85, Laws 1917, which was the law in force at the time of the injury. That section of the statute establishes a schedule of compensation to be paid for injuries to employees resulting in disability, and is divided into several subdivisions. Subdivision 1 prescribes that there shall be paid to the injured employee "for the first 300 weeks of total disability" $66^2/_3$ per cent. of the wages received at the time of the injury, not exceeding, however, $12 a week. This subdivision does not contemplate that compensation should be paid for a full period of 300 weeks, unless there is a total disability for that length of time. It is clearly the meaning of this subdivision that the payments should continue during the time of total disability. Subdivision 3 prescribes a schedule of compensation to be paid for the loss of various members and provides that the compensation so fixed "shall be exclusively as follows:" Then follows a number of short paragraphs declaring what compensation shall be paid for the loss of various members, among them, "for the loss of a foot $66^2/_3$ per centum of daily wages during 125 weeks." Another subparagraph provides:

"In all cases involving a permanent partial loss of the use of function of any of the members mentioned in subdivision 3 of section 3662, the compensation shall bear such relation to the amounts named in said subdivision 3 of section 3662 as the disabilities bear to those produced by the injuries named therein."

These several provisions of the act must be construed together, giving effect to each of them if possible to do so. Under subdivision 1 of section 3662, it appears that it was the manifest intention of the Legislature that in all cases the injured employee is entitled to compensation for injuries resulting in a total disability. It is a matter of common knowledge that most of the industrial accidents result in total disability for some time at least. Where the employee, for instance, suffers a broken limb, it is certain that he will be totally disabled for an indefinite period. Whether such an injury will ultimately result in the total loss of the member, or whether it will result in a permanent partial loss of the use of the member, or whether a complete restoration to normalcy will be effected, cannot at the outset be foretold with any degree of certainty. During this period of total disability and uncertainty of the ultimate outcome, the injured employee is entitled to compensation under the first subdivision of section 3662. When the time arrives when it becomes ascertainable that he will suffer a total loss of the use of the member, or a permanent partial loss of the use of the member, then the injured employee is entitled to compensation under the provisions of subdivision 3 of section 3662. That this must have been the intention of the Legislature, as applied to this class of injuries, is, we think, made clear by a simple illustration: Suppose that an employee receives an injury to his foot of such a character that it is uncertain whether it will be necessary to amputate the member. In order to save the foot he is treated by physicians and surgeons for a period of one year, during which time he is under constant treatment, and totally incapacitated for work. During this period he is paid as for a total incapacity at the rate of $12 a week, aggregating $624. At the end of the year it develops that the efforts of the physicians and surgeons have been successful; the employee's foot has been saved from amputation, and he is left with a 10 per cent. permanent loss of the use of the foot, which, under the provisions of sub-

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division 3 of said section 3662, would entitle him to receive compensation for 12½ weeks. aggregating $150. It becomes apparent in the illustration given that, if the limit of the employee's recovery is $150, he has been overpaid, and would be owing his employer the difference between these two amounts, or $474. This was not the spirit of the law. A fair construction of the law would imply that where an employee sustains an injury resulting in temporary total disability, but of such a character that the extent of the disability cannot then be determined, the employee is entitled to receive compensation under subdivision 1 of section 3662 until such time as a cure is effected, or until it can be determined definitely what percentage of permanent partial loss the employee will suffer, when the provisions of subdivision 3 of section 3662 apply. This we understand to be the purport of the decisions in Hall v. Germantown State Bank, 105 Neb. 709. 181 N. W. 609, and Ulaski v. Morris & Co. 106 Neb. —, 184 N. W. 946. There are some classes of injuries in which it may be determined at once that the injured party will lose the injured member. Many cases in which the first treatment calls for amputation arise. In such cases it is at once ascertainable that the ultimate result of the injury will be the loss of the member. In such cases it seems to be within the contemplation of the statute that the employee is limited in his recovery to the number of weeks prescribed in subdivision 3 of section 3662 for the loss of the member. The case of Abel Construction Co. v. Goodman, 105 Neb. 700, 181 N. W. 713, falls within this latter rule. In that case, as we understand it, the loss of the eye was complete at the time of the accident.

From the foregoing discussion, it follows that the judgment of the district court is right, and it is, therefore, affirmed.

URAK v. MORRIS & CO. (No. 22208.)

(Supreme Court of Nebraska. Jan. 13, 1922.)

186 Northwestern Reporter 345.

(Syllabus by the Court.)

1. MASTER AND SERVANT—REVIEWING COURT'S FINDING IN WORKMEN'S COMPENSATION CASE CONCLUSIVE.

Where the district court in a workmen's compensation case finds, on substantially conflicting evidence, that the employee was injured in a certain manner, such finding of fact will not be reversed on appeal unless clearly wrong. Swift & Co. v. Prince, 106 Neb. —, 183 N. W. 557.

(For other cases, see Master and Servant, Dec. Dig. § 418]6[.)

2. MASTER AND SERVANT—INJURY IN PERSONAL ALTERCATION BETWEEN EMPLOYEES HELD NOT COMPENSABLE.

An injury inflicted upon an employee by a fellow employee not arising from any order, direction, duty or act connected with the employment, but arising out of and occurring during or immediately following a personal altercation between the two, concerning matters not arising out of the perfomance or supposed performance of any duty or service in the employment, and resulting from what amounted to an assault by one upon the other. is not such an injury as will entitle the injured employee to compensation from the employer under the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

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Appeal from District Court, Douglas County; Wakeley, Judge.

Proceedings under the Workmen's Compensation Act (Laws 1913, c. 198) by Elizabeth Urak, to recover for personal injuries, opposed by Morris & Co., employer. Compensation was awarded by the Compensation Commissioner, and on appeal from the award to the district court, compensation was denied, and claimant appeals. Affirmed.

J. P. Uvick and Henry J. Beal, both of Omaha, for appellant.
J. C. Kinsler, of Omaha, for appellee.

Heard before Letton, Day, and Dean, JJ., and Blackledge and Tewell, district Judges.

BLACKLEDGE, D. J. This cause was tried in the district court for Douglas county upon appeal from an award of compensation by the Compensation Commissioner. There is no quesion that the plaintiff sustained severe and probably permanent injury. The accident occurred in the sausage room in defendant's plant on August 29, 1919, the plaintiff being struck upon the hip by a shovel which was in use by a fellow workman. There is conflict in the testimony as to whether the striking by the shovel was accidental purely, or whether the shovel was in the hands of the fellow employee and the blow given "just for fun," or whether the blow was given as the result of an altercation between the plaintiff and her fellow employee in reference to whether plaintiff was a member of a certain union. It is also contended that the plaintiff had, a day or two prior to the time of the particular occurrence of August 29, sustained another fall by slipping upon a piece of meat, as the result of which she injured her knee or leg. The evidence as to this prior injury was excluded by the district court upon the theory that it was not included in the issues raised before the Compensation Commissioner, and that it was barred by the satute of limitations at the time of the trial. The trial court found, upon the issues from the evidence received, that plaintiff failed to establish by a preponderance of the evidence that she was injured as the result of an accident arising out of and in the course of her employment, and that she was not so injured, and, further, that on the date in question the plaintiff entered into a controversy with a fellow laborer regarding a matter wholly foreign to plaintiff's employment, to wit, regarding the question whether or not plaintiff belonged to a certain union, and that in the course of this controversy the said fellow laborer intentionally struck plaintiff over the hip with a shovel, and that whatever injuries plaintiff sustained were the result of said assault.

Appellant presents two assignments of error: That the court erred, first, in finding plaintiff was not injured as the result of an accident arising out of and in the course of her employment; and, second, that the court erred in refusing leave to plaintiff to amend the pleadings and submit evidence as to the prior fall or injury of plaintiff.

[1, 2] A careful reading of the record discloses the fact that, while the circumstances surrounding this accident and which led up to it are not so clearly shown as will enable us to reach an entirely satisfactory conclusion as to just what did take place, yet that was the particular province of the trial court, which was also better situated to do so, and had the advantage of seeing and heaing the witnesses. It has become the established rule in this state that in such cases the finding of the trial court will not be disturbed unless from the record the reviewing court is convinced that such finding is clearly wrong. It cannot be said that there is not sufficient evidence in the record to sustain the finding of the trial court in this case. Under the terms of such finding, we do not think it can reasonably be contended that the accident did arise out of and in the course of plaintiff's employment. There must be somewhere a dividing line, and, unless we are to hold that all accidents or injuries which result during

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the term of employment, or hours of duty, are covered by the act, it would seem that this accident must be excluded. An eminent authority has said that argument by analogy in these cases is valueless and that each case must be decided with reference to its own attendant circumstances. Under the finding, the employment had no connection, causal or otherwise, with the injury. It was, so far as appears a purely personal affair, not arising out of the work or concerned with anything incidental to it. It was not shown that the place of employment was either a closed shop or an open shop, or that the matter of a union, the subject of their quarrel, had anything to do with plaintiff's employment, or her standing or relations toward the employer or her fellow workmen. The trial court found that it was a personal quarrel between these two, regarding a matter that was wholly foreign to the plaintiff's employment, and, under the rule stated, this finding should not be set aside.

With reference to the second assignment, the original complaint before the Compensation Commissioner designated an injury, as the foundation of the complaint, which had occurred August 29, 1919. There was, in fact, an injury, upon which plaintiff sought to rely, occurring on that date. Therefore the rule which would perhapse allow the plaintiff to show a different date than that alleged had no application, and the prior injury became, in effect, an additional ground of action as to which the statute of limitations had run at the time of the trial, and this evidently was the theory upon which the trial court acted. However, the application made for amendment and to be allowed to introduce evidence as to this claimed prior injury did not go to the extent of a showing, or offer of proof, that such injury had materially or substantially contributed to cause the plaintiff's condition, or that any result thereof was or might have been serious, but was only to the exent "that on the 27th or 28th day of August, 1919, plaintiff fell to the floor in the plant of Morris & Co., striking the same hip on a pipe, or a similar article, probably about three inches in diameter, and that as a result of this fall, she limped the next day and complained to the matron and to one or two of the employees." The plaintiff in her testimony, which was first admitted and later stricken by the court, was to this effect:

"I fell down. I cannot tell you just the day, but it was a day or two before I got hit with the shovel. I stepped on a piece of meat and slipped and fell. I don't know how I hurt myself, but I slipped and fell, hit my knee on the side and I grabbed by the barrel and that side was brought close to the floor, and every one started to laugh and I was scared and I got up quick and run back to my place. Q. When you say your side, what do you mean? A. Left knee."

This does not, either by the testimony given or by the offer of proof made upon the application to amend, carry the matter far enough to show that the prior occurrence did, or reasonably could, have any material effect on the plaintiff's condition at the time of the trial, and it is not clearly shown to have been part of the issues originally in the case or claim when it was before the Compensation Commissioner. We cannot say that the trial court erred in this particular.

It follows that the judgment of the trial court should be, and it is,

Affirmed.

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WAY v. GEORGIA CASUALTY CO. (No. 22442.)

(Supreme Court of Nebraska. Jan. 26, 1922.)

186 Northwestern Reporter, 357.

(Syllabus by the Court.)

MASTER AND SERVANT—DISTRICT COURT'S FINDINGS OF FACT IN COMPENSATION CASE CONCLUSIVE.

Findings of the district court in determining issues of fact in proceedings under the workmen's compensation law will not be disturbed on appeal unless clearly wrong.

(For other cases. see Master and Servant, Dec. Dig. § 418[6].)

Appeal from District Court, Lancaster County; Stewart, Judge.

Proceeding by Girard H. Way by Charlotte J. Way, his mother and next friend, against the Georgia Casualty Company, insurer, for personal injury resulting while plaintiff was in the employ of his father, C. F. Way. Judgment for plaintiff, and the insurer appeals. Affirmed.

Brogan, Ellick & Raymond, and Casper Y. Offutt, all of Omaha, for appellant.

H. N. Mattley, of Lincoln, for appellee.

Heard before Morrissey, C. J., and Letton, Rose, Dean, Aldrich, Day and Flansburg, JJ.

ROSE, J. This is a proceeding under the workmen's compensation law. In a motorcycle accident plaintiff broke his right arm and his right leg and fractured his skull March 3, 1921. He claims he was at the time engaged in the service of his father, C. F. Way, in the capacity of an employee of the Elm Park Grocery, in Lincoln, at $25 a week. Defendant is charged with liability as an insurer. The claim was presented to the compensation commissioner and rejected. Plaintiff appealed to the district court, where he was awarded $645, including $200 for hospital expenses. He was also allowed $10 a week for 11 weeks. From this judgment defendant has appealed.

Two questions are presented by the appeal: The first is that the evidence is wholly insufficient to sustain a finding that plaintiff was an employee of his father within the meaning of the workmen's compensation law; the view of defendant being that plaintiff and his father were partners in the grocery business. The second point is that the evidence fails to show the injuries arose out of and in the course of the employment of plaintiff, who, as contended by defendant, was not on duty at the time of the accident. These propositions were clearly presented in the brief of defendant and were ably argued at the bar, but it is nevertheless the unanimous opinion that there is a reasonable view of the evidence in which it sustains the findings of the trial court on both issues of fact. The appeal, therefore, is controlled by the familiar rule that findings of the district court in determining issues of fact in proceedings under the workmen's compensation law (Laws 1913, c. 198) will not be disturbed on appeal unless clearly wrong.

Affirmed.

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MOORE v. HOYT. (No. 1737.)

(Supreme Court of New Hampshire. Merrimack. Oct. 4. 1921.)

116 Atlantic Reporter, 29.

1. MASTER ANR SERVANT—MINOR'S ELECTION UNDER COMPENSATION ACT VOIDABLE.

Workmen's Compensation Act, § 4, providing that election by the employee to proceed under the act is a bar to recovery at common law, does not make an election by a minor binding upon him and the provision of section 8 that the guardian of a "mentally incompetent" employee may act for him does not show a legislative intent to make a minor's election binding.

(For other cases. see Master and Servant, Dec. Dig. § 357.)

2. MASTER AND SERVANT—NEGLIGENCE AS TO MINOR EMPLOYEE HELD FOR JURY.

In an action by an infant employee for injury by a defective stamping machine, evidence that the employee was inexperienced and not properly instructed, and that the machine was unusually dangerc , *held* sufficient to take the case to the jury.

(For other cases, see Master and Servant Dec. Dig § 286[2].)

Exceptions from Superior Court Merrimack County.

Action by Andrew G. Moore, guardian of Albert M. Moore, against Adrian Hoyt. From judgment for plaintiff, defendant excepts. Overruled.

Case for negligence. Trial by jury and verdict for the plaintiff. Albert Moore was employed in the defendant's factory. The defendant had accepted the provisions of Laws 1911, c. 163, and the case was tried at common law.

Albert was 18 years old at the time of the accident. He had had but little experience with machinery and was put to work upon a stamping machine cutting out small pieces of brass. The die was operated by a foot treadle, and if the operative kept his foot upon the treadle too long, or if the machine was defective, it would repeat, bringing the die down a second time. While Albert was engaged in this work the machine repeated for some cause unknown to him, and his fingers were caught and injured. A workman who was put upon the machine immediately thereafter found that the machine was worn and tripped easier than the others. It repeated with him several times when his foot was not on the treadle, and he complained of it to the boss.

The defendant's motions for a nonsuit and a directed verdict were denied, su' ect to exception.

After the accident a man described as an "insurance agent" came to Albert and took his statement. wherein it is said that he kept his foot upon the treadle too long. At the trial Albert denied that such was the fact, and he and others testified that when the statement was taken he insisted that the machine must have repeated from some other cause. The agent declared that it could not be so; that it would be better for Albert to say he kept his foot upon the treadle; that half pay was all that he could get; and that it would be better for him to accept it. Thereupon the statement was signed, and compensation for several weeks was accepted and receipted for. Albert then repudiated the settlement, notified the defendant to that effect, and tendered back the money he had received. Subject to the exception, the court ruled that there was a right to rescind

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In arguing the case to the jury the plaintiff's counsel claimed that the statement was obtained by the artifices of the insurance agent and was not true. The defendant excepted.

Robert W. Upton and Joseph C. Donovan, both of Concord, for plaintiff.

Lucier & Lucier and Alvin J. Lucier, all of Nashua, for defendant.

PEASLEE, J. [1] The Employers' Liability Act provides that—"* * * In case the injured workman * * * shall avail himself of this act, either by accepting any compensation hereunder, by giving the notice hereinafter prescribed, or by beginning proceedings therefor in any manner on account of any such injury, he shall be barred from recovery in every action at common law or under any other statute on account of the same injury." Laws 1911, c. 163, § 4.

In the present case the injured employee was a minor and accepted and receipted for compensation for several weeks. He then repudiated the transaction, tendered back the money that had been paid to him, and fully rescinded the election to take under the act, so far as he could do so legally. The ruling that thereafter he could maintain an action at common law presents the question whether the statute makes an election under it by a minor binding upon him, or whether he has the same privilege in this matter as in others of a similar kind.

Whether such election is to be treated as contractual in its nature, or whether the statute provides for a change of status at the election of the employee, is not of controlling importance here. The test to determine the effect of a minor's acts is not the fact that they would result in a contract obligation (if binding upon him), but whether they are acts requiring the exercise of knowledge, judgment, and discretion in the surrender or acquisition of his rights, or in the assumption of liability by him. "If the rule was otherwise, the protection which the law extends to him would be completely eluded." Person v. Chase, 37 Vt. 647, 649, 88 Am. Dec. 630. The result of the election here claimed would amount to a release or discharge of the defendant's common-law liability for the accident. That it would be voidable at common law does not admit of serious doubt. Young v. Sterling Leather Works, 91 N. J. Law, 289, 102 Atl. 395. "The general rule of the present day is that an infant shall be bound by no act which is not beneficial to him." Schouler, Dom. Rel. § 400.

Beliveau v. Amoskeag Co., 68 N. H. 225, 40 Atl. 734, 44 L. R. A. 167, 73 Am. St. Rep. 577, is relied upon by the defendant. The decision in that case is that the acts of an attorney employed by the minor's next friend, through whom a suit has been brought, are binding upon the minor. This is put upon the ground that the next friend is in law a representative of the minor and is clothed with power to conduct the suit. The whole tenor of the opinion carries the implication that, if the minor had attempted to act independently, she would not have been bound. The case has only a remote bearing upon the present controversy, but as far as it goes it is an authority for the plaintiff rather than for the defendant. There is nothing in the opinion to cast any doubt upon the accepted rule that in general minors may avoid their acts. Stack v. Cavanaugh, 67 N. H. 149, 30 Atl. 350.

Nor is there anything in the language of the statute to indicate a legislative intent to curtail the rights of minors in this respect. The suggestion that, as one purpose of the act was to induce employees to accept its provisions (Sullivan Machinery Co. v. Stowell, 114 Atl. 873), therefore existing rights of minors are abrogated, is not of a convincing character. The statute seeks to induce acceptance by the offer of benefits thought to be calculated to appeal to the judgment of employees. But their judgment is still to be exercised; and it is not to be presumed that a provision

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that rights shall be cut off by the exercise of judgment in making a selection was intended to apply to those who in the eye of the law have no judgment. It is not reasonable to infer that a proposition calling for the exercise of qualities commonly lacking in minors was intended to be applicable to them.

It is also urged that the provision of section 8 that, if the employee is "mentally incompetent," his guardian may act for him in these matters, shows that minors are to act for themselves; otherwise they would have been mentioned therein. The argument is that the legislative intent was to protect those who are mentally incompetent because they are abnormal, and at the same time to leave without protection those whose normal condition is one of incompetency. The use of the expression "mentally incompetent" instead of the statutory terms "insane" (P. S. c. 179) and "disabled" (Laws 1899, c. 35) suggests an intent that the provision shall have a broader application. The term used is an appropriate one to describe, not only the insane, but also the infirm and the immature. The thought expressed by the Legislature was that the election should be binding only when made by one fully competent to transact his ordinary business.

The Legislature has the right to take away the protection which the law has always given to minors; but such a radical departure from well-established principles cannot be shown by doubtful inferences or uncertain implication. If such a change had been intended, it should have been, and probably would have been, plainly expressed. The utmost that can be said for the defendant upon this question is:

"That the Legislature in passing this act did not have in mind such a case as here is presented. * * * The Legislature simply had not covered the case." King v. Viscoloid Co., 219 Mass. 420, 424, 106 N. E. 988, 989 (Ann. Cas. 1916D, 1170).

There was no error in the ruling that the action at law could be maintained. The same conclusion was reached in England upon a somewhat similar statutory provision. Stevens v. Duxbridge Iron Works Co. [1904], 2 K. B. 225.

[2] The defendant's motions for a nonsuit and for a directed verdict because of insufficiency in the evidence were also rightly denied. There was testimony that the employee was immature and inexperienced, that he was not properly instructed, and that the machine he was put to work upon was out of repair and unusually dangerous to operate. It could be found that the accident resulted from a combination of these conditions, and that the defendant was liable therefor.

[3] A statement by the employee was taken shortly after he was injured. It assigned a cause for the accident for which the defendant would not be liable. It is insisted that this statement should be taken to be true, and that therefore the case should not have been submitted to the jury. But there was also evidence that Moore refused to assign such a cause for the accident until urged to do so by the man who took the statement, and who insisted that the accident could have happened in no other way. At the trial Moore denied the existence of this cause, and it was for the jury to pass upon the discrepancy.

The plaintiff claimed to avoid the election to take under the act upon the ground that the acceptance was induced by fraud, as well as because of infancy. When the presiding justice ruled that the plaintiff could avoid upon the latter ground, the issue of fraud was withdrawn from the jury. Subject to expectation, the paintiff's counsel was permitted to argue to the jury that the statement before referred to was obtained by fraud.

The ruling withdawing from the consideration of the jury the issue of fraud in obtaining a consent to accet compensation did not remove from the case the question how and under what circumstances the statement was given. The accuracy or inaccuracy of the statement was a vital question in the case, and comment upon any fact in evidence bearing thereon was legitimate argument.

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The claim that, because the party who took the statement was merely described as an insurance agent, therefore it did not appear that the defendant was liable for his conduct, is beside the mark. It is not necessary to decide whether the defendant in taking advantage of what the insurance agent did, would be bound by his acts. Conceding that the defendant would not be so bound, the circumstances under which the statement was made were plainly competent evidence tending to show how much or how little weight should be given to the admissions contained therein. Whitman v. Morey, 63 N. H. 448, 2 Atl. 899.

Exceptions overruled. All concurred.

MERRILL v. PENASCO LUMBER CO. ET AL. (No. 2625.)

(Supreme Court of New Mexico. Jan. 13, 1922.)

204 Pacific Reporter, 72.

(Syllabus by the Court.)

1. MASTER AND SERVANT—DEPENDENCY WITHIN COMPENSATION ACT QUESTION OF FACT.

Actual dependency within the meaning of the Workmen's Compensation Act is a question of fact, to be determined by the circumstances of each case.

(For other cases, see Master and Servant, Dec.. Dig. § 388.)

2. MASTER AND SERVANT—DEPENDENCY WITHIN COMPENSATION ACT NOT PROVED BY LIABILITY TO SUPPORT.

Legal liability to support does not of itself prove dependency.

(For other cases, see Master and Servant, Dec.. Dig. § 388.)

3. MASTER AND SERVANT—DEPENDENCY WITHIN COMPENSATION ACT NOT NEGATIVED BY NONSUPPORT.

Failure of a husband to support his wife and children for a considerable time prior to the accident which caused his death does not of itself prove that they were not actual dependents.

(For other cases, see Master and Servant, Dec.. Dig. § 388.)

4. MASTER AND SERVANT—INJURY BY FALLING TREE HELD TO "ARISE OUT OF EMPLOYMENT" WITHIN COMPENSATION ACT.

An accident to a workman employed in a forest, caused by a falling tree, and resulting in his death, under the circumstances of this case, arose out of his employment within the meaning of the Workman's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

Appeal from District Court, Otero County; Ed Mechem, Judge.

Proceeeding by Ida B. Merrill against the Penasco Lumber Company, employer, and the Western Indemnity Company, insurer, for compensation under the Workmen's Compensation Act for the death of plaintiff's husband, J. M. Merrill. Judgment for plaintiff, and defendants appeal. Affirmed.

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W. H. Winter and Winter, Goldstein, Miller, McBroom & Scott, all of El Paso, Tex., for appellants.

Lee R. York, of Alamogordo, for appellee.

DAVIS, J. In March, 1920, J. M. Merrill was an employee of the Penasco Lumber Company, working in the woods in the Sacramento mountains as a teamster. On the 3d of that month he was driving a team skidding logs. It was a very windy day, one of the witneses describing the wind as a "fierce gale." Many trees blew down, not an uncommon occurrence in those woods. One of these trees in falling struck Merrill and killed him. No one was working on the tree, and his employer in no way caused its fall. Merrill was a married man with three children. This proceeding was commenced by the widow on behalf of herself and children to recover the compensation for his death allowed by the Workman's Compensation Act. Judgment was rendered in her favor.

[1] Appellants contend that the widow and children were not actual dependents upon Merrill, and consequently not entitled to compensation. The argument is that the burden was upon them to show actual dependency under chapter 83. § 12 (J) 2, Laws 1917, and that they failed in the proof, and indeed proved the contrary, since it was shown that at the time of his death Merrill was not actually supporting them. The statute provides that a widow, if living with the deceased, or legally entitled to be supported by him, and actually dependent upon him, is entitled to compensation under the act. Appellee and deceased were living separate and apart at the time of his death, but she was still legally entitled to his support. She was without income of her own. She had done washing, ironing, and canvassing, had received a small sum of money from the sale of a piece of property, and had had some assistance from her father and uncles. From these sources she had supported herself and her children.

While the statute uses the word "actually" as limiting the word "dependent," this can mean nothing more than that the widow must have been dependent in fact as well as in law. In a sense every wife and child is legally dependent upon the husband and father, and there may in some instances be a distinction between such legal dependency and the dependency in fact contemplated by the statute. Courts have met with considerable difficulty in laying down a general rule as to who are actually dependents under such a statute, and the rules established are of a negative rather than a positive character. It seems to be well settled by authority that the existence of a marriage, with consequent liability to support does not of itself prove actual dependency, and instances easily come to mind of married women who are not actually dependent upon their husbands for support. Many statutes create a presumption of dependency in favor of certain classes, but ours does not, following in this respect the original English act. But just as the existence of the marital status does not of itself prove dependency, so the lack of actual support by the husband does not of itself negative dependency. The failure to support is only one circumstance for consideration. The reasons for it, the length of its continuance, the mutual attitude and means of the parties, the probable resumption of duty, and other similar matters may have a distinct bearing on the subject. If dependency were determined only by the fact of contribution to support, a wife and children might be dependent one week and cease to be the next according to the caprice of the husband and father. Such a theory lacks support from authority. In Parson v. Murphy, 101 Neb. 542, 163 N. W. 847, L. R. A. 1918F, 479, a mother was held to be dependent on her son although he had not actually supported her and was not contributing to her support at the time of his death. He had written five months before that he would come and live with her and support her but for reasons beyond his control did not do so. The court said:

"Defendants' argument on this point cannot be sustained. We believe the statute is susceptible of an interpretation that more nearly accords

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with the main purpose of its enactment. The act is one of general interest, not only to the workman and his employer, but as well to the state, and it should be so construed that technical refinements of interpretation will not be permitted to defeat it. Among its objects are these: That the cost of the injury may be charged to the industry in which it occurs; the prevention of tedious and costly litigation; a speedy settlement between employer and employee; and to prevent dependent persons from becoming a public burden. * * * It is not shown that the widow's son made any contributions to her support. But in any event this feature is not important in view of our holding that the question of contribution, as it is contended for by defendants, is not controlling. * * *

"That plaintiff's son was capable of earning the wages usual to his employment affirmatively appears. * * * But for the accident he would now, in human probability, be a wage-earner, and thus be in a position to supply plaintiff in pursuance of his promise. It is always presumed, until overcome by proof, that a man will do his duty. It cannot be known and will not be presumed, that Nels Parson, if living would be unmindful of his filial duty, with or without promise, to support his aged and dependent parent. The question of legal liability to support does not of itself determine the question at issue."

In Re Carroll, 65 Ind. App. 146, 116 N. E. 844, the court said:

"Among the elements that are indicia of a state of dependency are an obligation to support, the fact that contributions have been made to that end, that the claimant in any case is shown to have relied on such contributions and their continuing, and the existence of some reasonable grounds as a basis for a probability of their continuance, or of a renewal thereof, if interrupted. We would not be understood as indicating that all these elements must exist in each case, in order that there may be a state of dependency."

In Sweet v. Sherwood Ice Co., 40 R. I. 203, 100 Atl. 316, the doctrine was recognized that, while the obligation to support does not of itself determine dependency yet, when such legal obligation is coupled with a reasonable probability that it will be fulfilled, it constitutes one of the tests of dependency. Case notes upon this question will be found in L. R. A. 1918F, 483, and Ann. Cas. 1918B, 749.

[2, 3] Coming now to the particular facts in this case, we find that Merrill and his wife separated in March, 1918, Merrill remaining in the vicinity for a short time and then going to Kentucky. Before leaving he arranged with local merchants to furnish her with groceries and dry goods, paying the bills thus contracted up to about July, 1918. He sent her money on two occasions. After this he became sick, and wrote his sister saying he was unable to work, and to send him money. Shortly before the employment in which he met his death he returned to the place of his wife's residence, gave her a small sum of money, and told her he was going to support her and the children, and that he did not want her to work longer. She could reasonably expect this promise to be kept, and there was probability that her expectations would be realized. Without the temporary aid from the proceeds of the sale of her proprty, and without the voluntary assistance of her family, her ability to support herself and children may be doubted. In spite of his failure to contribute to her support for a coniderable period, and of the fact that she was able to maintain herself and her children in some fashion through her own efforts, and with the assistance of her relatives, we conclude that, under the circumstances shown, she and they were nevertheless actual dependents upon him at the time of his death within the meaning of the statute.

[4] Appellants further contend that the accident which caused Merrill's death did not arise out of his employment and argue that the tree fell through no act or negligence of the employer but because of a violent storm, for which no human agency could be responsible, and it is argued that the employee was in no greater danger from such accident

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than were the other employees or the general public. If we were dealing with a common-law action for personal injuries to an employee, the negligence of the employer would be the first subject of inquiry, for it would be the basis of the liability. But no such question arises under the Workman's Compensation Law. The economic theory of its enactment is to place upon the industry instead of upon the individual the loss resulting from injuries to its employees, and the loss is to be thus shifted in the case of all accidents arising out of and in the course of the employment. It is a new liability created entirely by statute, and having no relation in principle or effect to that which arose at common law for injuries, or under statutory provisions covering death by wrongful act.

The words "arising out of" the employment are found in the original English act and are in the statutes of most of the states. The question as to whether a particular accident falls within their scope has been the subject of frequent decisions. Certainly the employment must have had some causal connection with the accident; the accident must result from a risk reasonably incident to the employment, or the injury cannot be said to arise out of it. A risk common to the public generally, and not increased by the circumstances of the employment would not fall within this language of the act. A risk peculiar to the industry certainly would. Between the two extremes comes the gradation in instances which are more difficult of solution as they reach middle ground.

The rule is illustrated by the decisions in cases where the death of the employee was caused by lightning. Without attempting to law down an absolute rule, for each case must be determined according to its own facts, the authorities seem to hold that, if the deceased by reason of his employment was exposed to a risk of injury by a storm or other action of the elements greater than that to which the public was subject, or his employment necessarily accentuated the natural hazard, the injury arose out of the employment. Thus in State v. District Court, 129 Minn. 502, 153 N. W. 119, L. R. A. 1916A, 344, dealing wih the death by lightning of the driver of an ice wagon whose duties required him to be out of doors at all times and in substantial disregard of weather conditions, and in holding that such an accident arose out of his employment, the court said:

"If the deceased was exposed to injury from lightning by reason of his employment, something more than the normal risk to which all are subject, if his emplyoyment necessarily accentuated the natural hazard from lightning, and the accident was natural to the employment, though unexpected or unusual, then a finding is sustained that the accident from lightning was one 'arising out of employment.' An injury, to come within the Compensation Act, need not be an anticipated one; nor, in general, need it be one peculiar to the particular employment in which he is engaged at the time."

A general discussion of the principle applicable will be found in 28 R. C. L. 796, and many cases are collected in the notes to Central Ill. Public Service Co. v. Industrial Commission, 13 A. L. R. 974.

Examining the facts of the case now before us, we find that the accident occurred in the course of lumbering operations in the Sacramento mountains. It needs no proof to show that the mountain regions of New Mexico are subject to sudden fierce and violent storms. It is a matter of common knowledge that the blowing down of trees in such storms is not an unusual occurrence, and, if proof were necessary as to the particular region where this accident occurred, it is found in the evidence. The risk of injury from the falling of such trees is one naturally incident to an employment in that industry, and one which both employer and employee must anticipate. Their work is necessarily in the woods among the trees, and usually far from considerable habitations. The employees from the very conditions under which they must work are subjected to this risk in a much greater degree than the general public. Their work is

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carried on in a place peculiarly subject to such danger. Under the principle already pointed out, the accident which is the basis of this proceeding did not arise out of the employment.

The decision of the district court was correct, and is affirmed, and it is so ordered.

Raynolds, C. J., and Parker, J., concur.

TURPIN v. ST. REGIS PAPER CO. ET AL.

(New York Supreme Court, Appellate Division, Third Department. December 28, 1921.)

192 New York Supplement, 85.

1. MASTER AND SERVANT — PERCENTAGE OF LOSS OF VISION MATTER OF ESTIMATE. AND QUESTION OF FACT FOR INDUSTRIAL BOARD.

The percentage of loss of vision is at best a matter of rough estimate and approximation, and the question is one of fact for the Industrial Board, to be determined by it on such proof as physicians may give, in accordance, however, with its own experience, good sense, and judgment.

(For other cases, see Master and Servant, Dec. Dig. § 385[9].)

2. MASTER AND SERVANT — ELEMENTS OF EVIDENCE OF LOSS OF VISION, WITHIN COMPENSATION LAW, INCLUDE "FIELD VISION" AND "BINOCULAR VISION."

In a proceeding under the Workmen's Compensation Law, the test to be used to determine the extent of loss of vision is only an element of the evidence, and the board must determine what evidence it shall accept and the weight to be given to it, and the elements of vision that must be taken into account to determine the "useful vision," namely, "field vision" and "binocular vision"; the former meaning the general vision used in catching in sight, following and locating objects, and the latter being the vision of the two eyes acting together, used in determining depth, width, distance, and comparative placing of different objects.

(For other cases, see Master and Servant, Dec. Dig. § 405[6].)

Cochrane, J., dissenting.

Appeal from State Industrial Board.

Proceeding by Joe Turpin under the Workmen's Compensation Law (Consol. Laws, c. 67) to obtain compensation for personal injuries, opposed by the St. Regis Paper Company, employer, and the Travelers' Insurance Company, insurance carrier. From an award of compensation, the employer and insurance carrier appeal. Award affirmed.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Van Kirk, JJ.

Benjamin C. Loder, of New York City (E. C. Sherwood and William B. Davis, both of New York City, of counsel), for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, of counsel), for respondent.

VAN KIRK, J. The claimant was given an award for 16 per cent. loss of vision. 20.48 weeks at $20, plus 2 weeks at $10. The award is

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questioned, upon one ground only, namely, that the evidence did not show a loss of 16 per cent. of vision.

[1] This presents a plain question of fact for the board. A similar question arose in Johnson v. United States Railroad Administration, 193 App. Div. 580, 185 N. Y. Supp. 338, where the question was, what loss of use of an arm had been suffered. The court said:

"There is, of course, no method by which the percentage loss of the use of an arm can accurately be determined. It is at best a matter of rough estimate and approximation. * * * The question is one of fact for the Industrial Commission, to be determined by it upon such proof as physicians may give, in accordance, however, with its own experience, good sense and judgment."

We think this is the correct rule to be applied here.. In this record is introduced an unusual condition. The case was tried before Deputy Commissioner Richardson. He stated in open hearing that the Snellen test had always been used by the commission. "We do not accept any system but the Snellen." Later, during the examination of Dr. McCaw, he said:

"The idea that we have to follow in our cases here is that the commission desires to follow only the Snellen test table, until such time as some table is adopted."

And again:

"In order to get this case right, and in order to bring the eye question properly before the proper people, including the commission and the courts, it seems to me advisable for us to follow instructions of the commission and award on the acuity of vision as set forth here, which would give this man 16 per cent. loss of vision."

One gets the impression that, disregarding all other evidence in the case, he had simply decided that the Snellen test was the proper test to determine the percentage loss of vision, without any finding that he considered 16 per cent., the loss given by the Snellen test. to be the actual loss sustained by this claimant. If this were the actual result in the case, it would have to go back to the Industrial Board, to make a finding of the percentage loss of vision suffered by the claimant. But the findings were made, not by the deputy commissioner, but by the State Industrial Board, John D. Higgins, chairman, and. at the time of making the finding, they had the entire record before them.

[2] It appears in the testimony of Dr. McCaw that a test or formula, adopted about a year before the hearing by the New York State Medical Society, is a more accurate test than the Snellen test, and, if we were called upon to decide the question upon the evidence in this case, we should have to hold that a wrong test had been used, and send the case back to the board; but we do not think that the court should determine whether the Snellen test or some other test furnishes a proper rule for guidance of the board in determining percentage of loss of vision. Necessarily some test must be used, but this is only an element of the evidence, and the board must pass upon the evidence, and determine what evidence it shall accept, and what weight shall be given to its various parts. The Industrial Board had the entire record before it, and we think there was sufficient evidence to uphold its finding. It appears that, in the Snellen test, a chart having on it characters of different sizes is used. If a man standing 20 feet from the chart can see those details on the chart which a man of normal vision can see at 40 feet, his vision is characterized as 20–40. The claimant's eyes showed this condition of vision; but, with the aid of glasses a correction is enjoyed, so that his vision is represented by the figures, 20–30, and it is agreed by all parties that this indicates, or is equivalent to, 84 per cent. of normal vision, showing a loss of 16 per cent.

Evidence is also presented by the appellant tending to show that this is the measure of the "direct or central vision" only. The direct

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or central vision is that used directly upon objects in seeing distinctly and clearly size, form, color, etc., but that there are other elements of vision that must be taken into account to determine the "useful vision," namely, "field vision" and the "binocular vision." The field vision means the wide, general vision used in catching in sight, following, and locating objects. The binocular vision is the vision of the two eyes acting together, used in determining depth, width, distance, and comparative placing of different objects. In determining "useful vision," as the term is used by the appellants' witnesses an arbitrary formula has been accepted by the occulists. An arbitrary value is given to each of the elements of vision. For normal sight—direct vision, 100; field vision, 100; binocular vision, 50—the total of 250 is used as the denominator. Then the sum of the percentages of each element of normal useful vision, found by an examination of the patient, is used as the numerator. In this case direct vision is found to be 84 per cent.; field vision, 100; binocular vision, 50, making a total of 234; and the fraction is $^{234}/_{250}$, showing a per cent. of useful vision, under this standard of measurement, of 93.5 per cent., showing a loss of 6.5 per cent., which we are asked to hold is the loss suffered by claimant.

While Dr. McCaw testified that the formula used by the New York Medical Society is the more accurate, still the board was not bound by the evidence of the expert, and it was for them to determine, the nature of the test having been fully explained, which test they should use in determining what partial loss of the use of the eye this claimant had suffered. They were still at liberty to make use of their experience, good sense, and judgment in determining what the actual loss suffered in this case was. The Industrial Board may have been of opinion that the direct vision is the vision most essential to the employee engaged in hazardous employments, and that he is handicapped in his work to the extent that his direct vision is damaged, even though his field vision and binocular vision were normal.

The award should therefore be affirmed. All concur, except Cochrane, J., who dissents, on the ground that there is no evidence as to the accuracy of the Snellen test.

SUN COAL CO. ET AL. v. STATE INDUSTRIAL COMMISSION ET AL. (No. 12606.)

(Supreme Court of Oklahoma. Jan. 10, 1922.)

203 Pacific Reporter, 1042.

(Syllabus by the Court.)

1. MASTER AND SERVANT—COMPENSATION AWARD SUBJECT TO MODIFICATION OR TERMINATION.

The power and jurisdiction of the State Industrial Commission under the Workman's Compensation Law (chapter 246, Sess. Laws 1915) over each case submitted to it is continuing, and the Commission may from time to time make such modification or change of its former findings or orders relating thereto as, in its opinion, may be just, and under section 12, art. 2, or said act the Commission may at any time, upon its own motion or upon the application of any party in interest, on the ground of a change in conditions, review any award, and on such review may make an award ending, diminishing, or increasing the compensation previously awarded, subject to the maximum or minimum provided in the act.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

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2. MASTER AND SERVANT—DECISION OF COMMISSION IN COMPENSATION CASE FINAL ON FACT QUESTIONS.

The decision of the Commission is final as to all questions of fact, and the court is not authorized to weigh the evidence upon which any finding of fact is based.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Appeal from State Industrial Commission.

Proceedings by Fred Cole Burd under the Workmen s Compensation Law for an award, opposed by the Sun Coal Company, employer, and Consolidated Underwriters, insurer, and from an order of the Industrial Commission making an award, the employer and insurer appeal. Affirmed.

Simpson, Hummer & Foster, of Okmulgee, and Breck Moss, of Oklahoma City, for appellants.

E. W. Smith, of Henryetta, for respondents.

KANE, J. This is an appeal from an order of the Industrial Commission. The facts necessary for a consideration of the question presented for review may be briefly summarized as follows:

On the 7th day of March, 1921, the Commission made an order awarding the claimant Fred Cole Burd, compensation for injuries received while in the employ of the Sun Coal Company. In this order the court found that claimant was injured on the 26th day of November, 1920, and that his disability ceased on the 3d day of January, 1921, and that he was entitled to compensation from the 26th day of November, 1920, at the rate of $18 per week for a period of five weeks and two days, aggregating the total sum of $96. No exception to this order was taken, and the award was paid the claimant as directed by the Commission.

On the 13th day of April, 1921, the claimant filed a motion to reopen the cause and to grant a further hearing upon the following grounds:

(1) That he has suffeered a partial permanent injury to the index finger on his right hand and is entitled to partial permanent disability pay.

(2) That his injury was such that neither himself, the respondent, nor his physician were able to tell the extent of his injuries thereof.

(3) That the injured member is still very painful, and that he is unable to use the same, and no proper reward has been made for same.

On the 11th day of August, after a full hearing upon this motion, the Industrial Commission found from the evidence that the physial condition of the claimant continued to be such that he was entitled to compensation, in addition to the award previously made, from the 6th day of January, 1921, to the 19th day of January, 1921, and made an order awarding the respondent additional compensation for disability during this period. It is from this later action of the Commission that this appeal was taken, the contention being that:

"The State Industrial Commission is without jurisdiction or authority to review its decisions, except upon the ground of a change in conditions, and the motion filed by the respondent with the Commission to reopen and review said award did not state that there was any change of conditions, and did not, therefore, invoke the jurisdiction of the Industrial Commission."

In our opinion, this contention is wholly without merit.

[1] Section 12 of article 2, c. 246, of the Session Laws of 1915, provides as follows:

"Upon its own motion or upon the application of any party in interest, on the ground of a change in conditions, the Commission may at any time review any award, and, on such review, may make an award ending, diminishing, or increasing the compensation previousy awarded, subject to the maximum or minimum provided in this act, and shall state

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its conclusions of fact and rulings of law, and shall immediaely send to the parties a copy of the award. No such review shall affect such award as regards any money already paid."

Section 14 of the same act provides as follows:

"The power and jurisdiction of the Commission over each case shall be continuing, and it may, from time to time, make such modification or change with respect to former findings or orders relating thereto, as in its opinion may be just."

In a similar case, Choctaw Portland Cement Co. v. Lamb et al., 79 Okl. 109, 189 Pac. 750, these sections of the Workmen's Compensation Act were under consideration. In construing them, Mr. Justice Rainey, who delivered the opinion for the court, says:

"The power and jurisdiction of the State Industrial Commission under the Workmen's Compensation law (chapter 246, Sess. Laws 1915), over each case submitted to it is continuing, and the Commission may, from time to time, make such modifications or change of its former findings or orders relating thereto, as in its opinion may be just, and under section 12, art. 2, of said act, the Commission may at any time upon its own motion or upon the application of any party in interest, on the ground of a change of conditions, review any award, and, on such review, may make any award ending, diminishing, or increasing the compensation previously awarded, subject to the maximum or minimum provided in the act."

[2] It was also held that the decision of the Commission is final as to all questions of fact, and that the court is not authorized to weigh the evidence upon which any finding of fact is based.

It seems to us that the action of the Commission complained of herein falls so clearly within the purview of these sections of the Compensation Act, as construed in the above-entitled case, that further discussion of the point raised would serve no useful purpose.

For the reason stated, the order of the Industrial Commission is affirmed.

Pitchford, V. C. J., and Johnson, Elting, and Nicholson, JJ., concur.

STARK v. STATE INDUSTRIAL ACC. COMMISSION.

(Supreme Court of Oregon. Jan. 31, 1922.)

204 Pacific Reporter, 151.

1. MASTER AND SERVANT—INJURY IN PLAY HELD COMPENSABLE AS "ACCIDENT ARISING OUT AND IN COURSE OF EMPLOYMENT" NOT DUE TO "DELIBERATE INTENTION."

Where a workman, in an establishment in which it was the custom of the men to divert the use of air hose to sport during working hours commenced the sport and while scuffling with a fellow workman holding a hose started to turn around and stumbled over a skid block, and in stumbling forward came within the range of the air, which entered his rectum, causing peritonitis causing death, the death resulted from an "accident arising out of and in the course of his employment" caused by violent external means, within Workmen's Compensation Law (Or. L. § 6626), and not from the "deliberate intention of the workman himself," within section 6627, barring compensation for injury from such intention.

(For other cases, see Master and Servant, Dec. Dig. §§ 373, 380.)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

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4. MASTER AND SERVANT — VERDICT IN COMPENSATION CASE CONCLUSIVE.

Under Workmen's Compensation Law (Or. L. § 6637), the Supreme Court is bound by the verdict of the jury as to questions of fact.

(For other cases, see Master and Servant, Dec. Dig. § 418[6].)

5. MASTER AND SERVANT—FINDING IN FAVOR OF COMPENSATION CLAIMANT ON ISSUE OF DESERTION CONCLUSIVE.

Whether deceased workman's wife had deserted him within the meaning of Workmen's Compensation Law (Or. L. § 6626 [j]), so as to bar her claim for compensation, *held* a question of fact for the trial court, whose finding for her supported by testimony was conclusive on appeal.

(For other cases, see Master and Servant, Dec. Dig. § 418[6].)

6. MASTER AND SERVANT—FINDING OF COMPENSABLE INJURY INVOLVES MIXED QUESTION OF LAW AND FACT.

The question whether an injury arose out of and in the course of the employment within the Workmen's Compensation Law is a mixed question of law and fact, and findings of the trial court thereon supported by testimony should not be disturbed on appeal.

(For other cases, see Master and Servant, Dec. Dig. § 418[6].)

Department 2.

Appeal from Circuit Court, Multnomah County; Robert G. Morrow, Judge.

Proceeding by Wanda Stark, as an individual, and Wanda Stark, as administratrix of the estate of Ray E. Stark, deceased, and also as general guardian of Raye Maxine Stark, an infant, before the State Industrial Accident Commission, for an award. From a decision of the Accident Commission disallowing the claim, an appeal was taken to the circuit court. From judgment of the circuit court that compensation should be allowed, the Accident Commission appeals. Judgment affirmed.

Upon the trial of this cause in the lower court a stipulation of the facts was entered into relative to the following questions:

"First. Whether or not decedent, Ray E. Stark, met his death as a result of an accident arising out of and in the course of his employment under the Workmen's Compensation Law of Oregon.

"Second. In case the first question is answered in the affirmative, is Wanda Stark, widow of decedent, entitled to compensation on her own behalf as distinguished from compensation on behalf of her child, in view of the facts relating to her separation and living apart from her husband at the time of his death?"

The substance of the stipulation of facts is as follows:

"On June 19, 1919, Ray E. Stark, deceased, was employed by the Columbia River Shipbuilding Corporation as a chipper and caulker at the wage of $6.88 per day; that both employer and decedent were working under and subject to the provision of chapter 112, General Laws 1913, as amended; that on June 19, 1919, said Ray E. Stark sustained internal injuries while participating in a scuffle with a fellow workman, said injuries causing the death of said Ray E. Stark on June 24, 1919; that the facts respecting said scuffle and accident are as follows:

"That the employees returned to work about 12:30 p. m. and had been working about 1½ hours when the accident happened; W. T. Cooper, an employee, was working on tank 2 or 3 at the forward end; T. C. Turley was working on the aft end of the tank; Turley had started to use the air hose to blow the water off the bottom of the tank to ascertain whether or not the rivets were sweating or leaking and in this work used the open

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air hose without the air gun attached or fastened to it. Turley had just finished using his hose for blowing water off bottom of tank and had started to connect the air gun to the hose, when Ray E. Stark took the hose from Turley and purposely pointed it towards Cooper. Cooper was about 15 or 20 feet from him. The air blew Cooper's hat and goggles off. Cooper had just finished disconnecting the air gun from his air hose and was preparing to blow the water off the bottom of the tank, when Stark blew his hat and goggles off; then Cooper turned his air house on Stark and was blowing air around Stark's chest and arms and was walking towards Stark. When Cooper and Stark got close enough to each other, Stark grabbed Cooper's hose and Cooper grabbed the air hose of Stark; then one of the employees took the Turley hose from Stark and left Stark and Cooper holding the air hose used by Cooper. While Stark was holding the air hose he started to turn around and stumbled over a skid support block stumbling forward, and in stumbling the air hose got in such a position that the air from it was blown into his rectum, causing peritonitis which caused his death, on June 24, 1919, at 7:00 p. m. at St. Vincent's Hospital, Portland, Or. On June 21, 1919, at St. Vincent's Hospital, just prior to Ray E. Stark's death, Stark made and signed the following statement in the presence of Richard Diech, Tom Coleman, Glenn Howell, and Anna McMillan, which each of the parties to this stipulation agree is true, to wit:

"When asked with whom he was scuffling, he said: 'That is the man' (pointing to Cooper). 'It was as much my fault as his; we were scuffling." At the request of Cooper, Stark was asked who started the scuffling; answered by Stark, 'I did.'

"And as a part of this stipulation relating to the first question, it is agreed that testimony will be taken and the fact found by the court, as to whether or not it was the custom of the fellow employees of the decedent to use the air hose and apparatus in scuffling and horseplay prior to the happening of this accident. * * *

"And as a part of this stipulation relating to the second question, it is agreed that testimony will be taken and the fact found by the court as to whether or not Wanda Stark left her husband, Ray E. Stark, on or about two weeks prior to June 2, 1919, with the intention of deserting him and not living with him again."

The claims were disallowed by the Accident Commission, upon the ground that the injuries were not sustained by an accident arising out of and in the course of his employment. An appeal was allowed, and the case tried before the circuit court without a jury. The trial court found that compensation should be allowed. The Accident Commission brings this appeal.

Testimony was taken upon the trial of the cause. The stipulation of facts was incorporated into the findings of fact by the trial court. The court also found:

"In addition to the stipulation on file herein, the court finds as a fact that at the works and shipyards of the Columbia River Shipbuilding Company, in Portland, Or., it was, during the latter part of 1918, and the first half of the year 1919, the custom of the employees of said company, while engaged in their work, to use the air hose and apparatus, supplied by the company for the performance of the necessary work, in scuffling, horseplay, and general recreation during working hours."

"That prior to June, 1919, Wanda Stark, petitioner in this case, had ceased to reside with her husband, Ray E. Stark, and had left his home with the definite intention of not thereafter associating with him as his wife, but that she had not left with the intention of deserting him."

The court concluded as a matter of law:

"That the occurrence described in the stipulation was an accidental occurrence and arose out of and in the course of the employment of Ray

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E. Stark bv the Columbia River Shipbuilding Company," and that prior to the accident, Wanda Stark, petitioner, had not deserted her husband and was not living apart from him in the sense which the terms are used in section 21, c. 112, General Laws of Oregon 1913.

J. A. Benjamin, Asst. Atty. Gen. (I. H. Van Winkle. Atty. Gen., on the brief), for appellant.

Henry S. Westbrook, of Portland, for respondent.

BEAN, J. (after stating the facts as above). By chapter 112, General Laws of Oregon 1913, the Legislature, recognizing that the prosecution of the various industrial enterprises which must be relied upon to create and preserve the wealth and prosperity of the state, involves the injury of large numbers of workmen resulting in their partial or total incapacity or death, that under the law as it then existed an unequal burden was cast upon its citizens. that the adjudication of the responsibility of the employer on account of injuries sustained by his workmen entailed unnecessary cost divided between the workmen, the employers, and the taxpayers, that the people of the state were subjected to a heavy burden in providing for the care and support of such injured workmen and their dependents, and that this burden should be more fairly distributed, enacted the Workmen's Compensation Law contained in sections 6605 to 6659, Or. L. The act was amended by Laws of 1917, c. 288; Laws of 1919, c. 55; and Laws of 1921, c. 311. By the provisions of this act an Industrial Accident Commission was created. Its duty and authority were defined. Hazardous occupations, employers, and beneficiaries under the act were defined. By section 6614 the elective privilege of the employer is given not to accept the act, by filing with the Commission a written notice of such election. An employee may also give notice to his employer of his election not to become subject to the act. Section 6615. By section 6624, every employer engaged in the hazardous occupations enumerated in the act who shall not have served notice of his election not to contribute under the act, except as provided therein, is required to pay to the Commission each month a certain percentage of his total pay roll for the preceeding month of workmen subject to this act at the rate set forth therein, as a part of the industrial accident fund. Such employers are required to retain from the earnings of each of his workmen one cent per day and pay the same to the Commission. There is also appropriated annully after June 30, 1921, by the state a sum equal to one-seventh of the total sum received under the provisions of section 6624.

The compensation is provided in section 6626, the first portion of which reads:

"If any workman while he is subject to this act and in the service of an employer who is thus bound to contribute to the industrial accident fund shall sustain a personal injury by accident arising out of and in the course of his employment caused by violent or external means, he or his beneficiaries or dependents, if the injury result in death, shall receive compensation according to the following schedule:"

Then follows a schedule of the amounts to be paid to such workman and his dependents. Section 6627 reads in part thus:

"If injury or death results to a workman from the deliberate intention of the workman himself to produce such injury or death, neither the workman nor the widow, widower, child or dependent of the workman shall receive any payment whatsoever out of the accident fund."

[1] It is the position of the Attorney General on behalf of the State Industrial Accident Commission that the accident in question did not arise "out of and in the course of his employment" within the meaning of the statute. The contrary is maintained on behalf of plaintiff. The main question is: Do the findings of fact support the judgment?

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The workmen's compensation acts, while alike as to the object sought to be attained, are so numerous and so varied as to details of administration that any attempted definition of them must of necessity be general in its terms. The courts with practical unanimity have accorded to the workmen's compensation acts a broad and liberal construction in order to effectuate their evident intention and purpose. Under this rule the courts cannot do otherwise than to give the words employed their ordinary meaning. The construction given to the statute must conform to the intent of the lawmakers. Workmen's Compensation Acts, Corpus Juris Treatise, 4, 40; Grant v. State Industrial Accident Com'n, 201 Pac. 438-444; Bidwell Coal Co. v. Davidson, 187 Iowa, 809, 174 N. W. 592, 8 A. L. R. 1058. The statute under consideration does not mean one thing when it is to the advantage of one employee so to maintain, and at the same time mean something to the contrary when it is to the advantage of some other employee to make a different claim. C. J. Treatise, p. 41; International Harvester Co. v. Industrial Commission, 157 Wis. 167, 147 N. W. 53, Ann. Cas. 1916B, 330. The great object of workmen's compensation acts is to shift the burden of such economic waste from the employer to the industry in order that it may ultimately be borne by the consumer. lessen the expense to the state of caring for dependents and numerous and prolonged litigation, to protect the employer from unjust and excessive verdicts resulting from the hardship of particular cases, and to secure to an employee having a just claim the full amount of compensation awarded him without diminution by reason of the expense of litigation.

The following is said of the Washington Compensation Act:

"It is founded on the basic principle that certain defined industries, called in the act extra hazardous, should be made to bear the financial losses sustained by the workmen engaged therein through personal injuries, and its purpose is to furnish a remedy that will reach every injury sustained by a workman engaged in any of such industries, and make a sure and certain award therefor, bearing a just proportion to the loss sustained, regardless of the manner in which the injury was received." State v. Clausen, 65 Wash. 156. 175, 117 Pac. 1101, 1105 (37 L. R. A. [N. S.] 466).

Practically all of the American statutes, while differing widely in other provisions and exceptions, provide compensation in cases of "injury" or "injury by accident," "arising out of and in the course of the employment." This phrase is borrowed from the English Workmen's Compensation Act. The terms "out of" and "in the course of" are not synonymous, and under some of the acts if either of these elements is missing there could be no recovery. These two questions are to be determined by different tests. The words "out of" refer to the origin or cause of the accident, and the words "in the course of" to the time. place, and circumstances under which it occurs. It has therefore been said that an injury which occurs while an employee is doing what he might reasonably do at the time and place is one which arises "out of and in the course of the employment." It has been said that under the New Jersey act. an accident which is the result of a risk reasonably incident to the employment is one which arises out of the employment; and that the injuries for which compensation is to be paid under the Wisconsin act are such as are incident to, and grow out of the employment. The question of whether or not the injury is one "arising out of and in the course of the employment" within the meaning of the compensation act is not to be determined by the common- law rules in negligence cases. That the injury was caused by the negligence of a fellow servant or was contributed to by the negligence of. the injured employee is no reason for disallowing compensation. It is not necessary that the injury or accident should be one reasonably to be anticipated as an incident of the employment in order that it should arise "out of and in the course of" the employment. The main purpose of the different statutes is much the same. One of the very purposes of the compensation

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act was to increase the right of employees to be compensated for injuries growing out of their employment. L. R. A. 1916A, note pages 232-233.

It is not a test of the right of an employee or his dependents coming within the provisions of the act, that the circumstances should be such that a right of action could be maintained against the employer. It may be assumed that an employee coming within the provisions of the act was palpably negligent and at fault yet this would not prevent compensation if other circumstances warranted the same. 1 Bradbury. Workman's Compensation, p. 47.

Before alluding to the circumstances in the present case we will again to refer to our compensation act. The first clause of section 6626 provides generally that when a workman who is subject to the act and in the services of an employer who is thus bound to contribute to the industrial accident fund, shall sustain a personal injury by accident arising out of and in the course of his employment caused by violent or external means, he or his beneficiaries or dependents. in case of resulting death, shall receive compensation. There is an exception, however, to the granting of such compensation. or provision contained in section 6627 quoted above, prescribing the instance or circumstance under which neither the workman nor his dependents shall receive compensation. This provision is that—

"If injury or death results to a workman from the deliberate intention of the workman himself *to produce such injury or death*, neither the workman nor the widow, widower. child or dependent of the workman shall receive any payment whatsoever out of the accident fund." (We underscore.)

Applying the maxim "inclusio unius est exclusio alterius," to this proviso or exception, it would seem that an employee, while subject to the act and in the service of an employer who is also subject to the act, if he shall sustain a personal injury by accident arising out of and in the course of his employment caused by violent or external means, will be entitled to compensation, although no action for negligence could be maintained against the employer under the circumstances if the statute did not exist, even if the employee himself, may have been grossly negligent and largely contributed to his injury; or the injury had been the result of the negligence of a fellow workman, or that the workman may have been at fault during the time he was in the services of his employer, and labored in a dilatory and slovenly manner, or mingled sport with his labor, if the injury or death did not result "from the deliberate intention of the workman himself to produce such injury." The intent to play or the intent to take daring unnecessary chances in a dangerous place may have been deliberate, if it was without any intention on the part of the workman to produce the injury. Applying to this clause in section 6627 the general rules of construction, it will be noticed that the introduction of an exception or saving clause may have an important bearing upon the construction of the statute. It may show it to be more comprehensive than would appear merely from the words used, on the principle that when certain exceptions are specified no others are intended. This rule is alike applicable to grants inter partes and to public laws. When first there are general words and afterwards an exception of some particular, all that is not within the particular is within the general; what is not excepted is within the grant. Black on Interpretation of Laws, p. 277; 2, Lewis' Sutherland, Statutory Construction, §§ 345, 351. In the latter work we read at page 672:

"Where there is a prohibition, grant or regulation in general words, and a saving of particular things, there is a strong implication that what is excepted would have been within the purview if it had not been excepted; and thus the purview may be made more comprehensive than it would otherwise have been. Thus if there be a grant of all trees on a piece of land, which, if nothing more had been said, would only have em-

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braced forest trees, but there is an exception of apple trees, other fruit trees, as peach and pear trees, will pass.

In Kansas nothing save the deliberate intention of the employee to cause the injury, his willful failure to use guards or protection provided for him, his deliberate breach of some statutory regulation, or his intoxication, can deprive him of his statutory right to compensation. 4 A. L. R. note page 124, VIIIa; Messick v. McEntire, 97 Kan. 813, 156 Pac. 740. Even where the compensation is paid by the employer in order to defeat an award for injury under the Workmen's Compensation Act the case must come clearly within the statutory exceptions barring the award. It is held that the burden of proof is on the employer to establish the facts constituting a bar to compensation. Wick v. Gunn (Okl.) 169 Pac. 1087, 4 A. L. R. 107.

The generally accepted theory upon which the compensation law is based is that when an employee is killed or injured there is an economic loss which must be made up, or compensated in some way; that most accidents are attributable to the inherent risk of employment, that is, no one is directly at fault, yet the burden of such loss should be borne by the industry rather than by society as a whole; and that a fund should be provided at least in part, by the industry from which a fixed sum should be set apart as every accident occurs to compensate the person injured, or his dependents for his or her loss. State v. Industrial Commission, 92 Ohio St. 434, 450. 111 N. E. 299, L. R. A. 1916D, 944, Ann. Cas. 1917D, 1162.

It is one of the principles of the workingmen's insurance and compensation laws which are the products of the development of social economic ideas that the industry which has always borne the burden of depreciation and destruction of the necessary machinery, whether such destruction was caused within or without the industry, shall also bear the burden of repairing the efficiency of the human machine necessary to the life of the industry. Lewis, etc., County v. Industrial Acc. Board. 52 Mont. 6, 155 Pac. 268, L. R. A. 1916D, 628. In Peet v. Mills, 76 Wash. 437, 439. 136 Pac. 685, L. R. A. 1916A. 358, Ann. Cas. 1915D, 154, Workmen's Compensation Acts, C. J. Treatise, p. 9 note, we read:

"The conclusion is evident that,, in the enactment of this new law, the Legislature declared it to be the policy of this state that every hazardous industry within the purview of the act should bear the burden arising out of injuries to its employees; and that it was the further policy of the state to do away with the recognized evils attaching to the remedies under existing forms of law and to substitute a new remedy that should be ample, full, and complete, reaching every injury sustained by any workman while employed in any such industry, regardless of the cause of the injury or the negligence to which it might be attributed. We can conceive of no language the Legislature might have employed that would make its purpose and intent more ascertainable than that made use of in the first section of the act."

"The obligation to pay compensation under the workmen's compensation act equally is absolute when the fact is established that the injury has arisen 'out of and in the course of' the employment. Part II, § 1. It is of no significance whether the precise physical harm was the natural and probable or the abnormal and inconceivable consequence of the employment. The single inquiry is whether in truth it did arise out of and in the course of that employment." In re Sponatski, 220 Mass. 526, 531, 108 N. E. 466, 468 (L. R. A. 1916A, 333); C. J. Treatise, p. 74 note.

"If the nature of the employment, or the conditions under which it was pursued, or the exposure to injury it entails, or the doing of something incidental to the employment, was a proximate cause of the injury, it arises out of the employment. An injury of this description is one of the risks of the employment; for it is due to it and arises from it. either directly or as incident to it, or to the conditions and exposure surrounding it. And the proximate cause of the injury is not necessarily that which

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immediately arises out of the employment, but may be that which is reasonably incidental to it." Larke v. John Hancock Mut. L. Ins. Co., 90 Conn. 303, 309, 97 Atl. 320, 322 (L. R. A. 1916E, 584); C. J. Treatise, p. 74 note.

There must be a causal connection between the employment and the injury and the injury must be the rational consequence of some hazard connected with the employment. The danger to which the employee is exposed may originate from the employment or outside of it, if the exposure is peculiar to it. In the one case the conditions of danger from the conduct of the employment cause the injury; in the other, the conditions of danger which arise outside the employment, but are peculiar to it, cause it. C. J. Treatise, 74, 75; Larke v. John Hancock Mutual Life Ins. Co., 90 Conn. 303, 97 Atl. 320, 322. Where there is an incidental or causal connection between the employment and the accident, the injury is deemed to have arisen out of the former even when the connection is somewhat remote and when the direct and immediate agency is foreign. C. J. Treatise, p. 74; Archibald v. Workmen's Compensation Commissioner, 77 W. Va. 448, 87 S. E. 791, 792. L. R. A. 1916D, 1013. Injury from frostbite arises out of the employment of an insurance solicitor and collector who was compelled to drive fifteen or twenty miles on a very cold day, going in and out of heated houses in making upward of 50 calls. Larke v. John Hancock Mut. L. Ins. Co., supra. Where the conditions of the employment required the employee to cross a street where he was struck by an automobile, the injury arose out of the employment. Zabriskie v. Erie R. Co., 86 N. J. Law, 266, 92 Atl. 385. L. R. A. 1916A, 315, C. J. Treatise, p. 75. Re Sundine, 218 Mass. 1, 105 N. E. 433, L. R. A. 1916A, 318, was a case where the employer was liable to pay compensation under the act. and the London Guaranty & Accident Company, Ltd., insured and assumed the liability of the employer. The injury to the employee occurred upon the stairway which was not under the employer's control but afforded the only means of going to and from the work room, while leaving the premises for the purpose of procuring a luncheon. It was held that the injury "arose out of and in the course of" the employment within the meaning of the Workmen's Compensation Act.

In the McNicol Case, 215 Mass. 497, 498, 102 N. E. 697, L. R. A. 1916A, 306, the employee was injured and died as the result of "blows or kicks" administered to him by a fellow workman in an intoxicated frenzy, who was in the habit of becoming so intoxicated and when in that condition was quarrelsome and dangerous. The injury came while the employee was doing work for which he was engaged. Compensation was allowed. We quote from the opinion in that case:

"An injury * * * 'arises out of' the employment, when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause, and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work, and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence." Workmen's Compensation Acts, C. J. Treatise, pp. 73, 74, note.

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The Massachusetts statute. while it provides a different plan of insurance, contains language much like that of ours under consideration. Acts of Mass. 1911, c. 751, pt. 2, § 1 reads:

"If an employee" etc., "receives a personal injury arising out of and in the course of his employment, he shall be paid compensation by the association, as hereinafter provided, if his employer is a subscriber at the time of the injury."

Section 2. "If the employee is injured by reason of his serious and willful misconduct, he shall not receive compensation."

In re Loper. 64 Ind. App. 571, 116 N. E. 324, was a case of compensation for an injury "by accident arising out of and in the course of the employment." The assistant superintendent of the employer in an act of sport or horseplay turned the air from the compressor maintained at the time in the employer's factory upon the employee which caused him to jerk quickly and strain his body. At the time the employee was suffering from an abscess in the region of the gall bladder. The strain ruptured the abscess and resulted in acute general peritonitis which caused the employee's death. The employees had established the custom of using the air compressor to blow the dust off their clothes. The employees had also formed the habit of using the compressor in acts of sport or horseplay by turning the air therefrom upon one another. The deceased had frequently participated in such sport to the knowledge of the superintendent. No objection was made. Compensation was allowed. The opinion reads at page 576 of 64 Ind. App., at page 325 of 116 N. E. :

"The existence of a duty on the part of the employer and its breach resulting in injury to a workman, however, are not the tests by which the right to an award under compensation acts is determined. A duty and its breach is negligence, but negligence on the part of the employer is not essential in order that there may be compensation under such acts. The test of the right to compensation under such acts., in so far as concerns the elements now under consideration, is whether the injury resulted from some peril incident to the employment; whether the cause of the injury, although not foreseen, may reasonably be deduced from the circumstances and surroundings peculiar to the place, and under which the workman was required to perform his labors. regardless of whether such perils or surroundings involve negligence on the part of the employer."

The Indiana Compensation Act contains this provision, Acts of Indiana 1915, p. 394:

"Sec. 8. No compensation shall be allowed for an injury or death due to the employee's willful misconduct, including intentional self-inflicted injury, intoxication, and willful failure or refusal to use a safety appliance or perform a duty required by statute."

This provision is much broader than the one quoted above from our statute.

In several of the cases it is indicated that where the injury is caused on account of the general surroundings of the place in which the injured employee is laboring and particularly where the instrument or appliance which is a part of the plant and used in the prosecution of the work is what causes the injury, or is a concurring cause, the accident may be said to arise out of and in the course of the employment. Heitz v. Ruppert, 218 N. Y. 148, 112 N. E. 750, L. R. A. 1917A, 344; Rayner v. Sligh, etc., Co., 180 Mich. 168, 146 N. W. 665, L. R. A. 1916A, 25, notes. Ann. Cas. 1916A, 386.

The cases direct attention to the difference in the several statutes. It should be noticed that the present proceeding under our statute is not for the purpose of fixing the liability upon the employer. The provisions of our law are in the nature of an insurance. It is as much for the benefit of the employer, if not more, than an injured workman and his dependents be compensated, as it is to any one else. Under many of the statutes if the injury is caused by the "wrongful act" or "willful misconduct" of an employee compensation cannot be allowed. Under our statute if the

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injury or death results to a workman from the deliberate intention of the workman himself "to produce such injury" compensation cannot be allowed. It is not enough to bar compensation that the injury occurred by reason of the wrongful act of the workman, if he did not intend to produce the injury.

The injury in question was caused by an industrial accident. It was a peril of the service. Under the usual conditions there prevailing the employees were more or less subject to such peril. It was an unexpected accident, but nevertheless may reasonably he said to have arisen out of and in the course of the employment. It was an incident of such employment by reason of the appliance used in the work. and the custom which prevailed of the employees, without the infraction of any enforced rule of the establishment, diverting the use of the air hose to sport. The play which had been going on between Stark and Cooper was entirely mutual. The question as to who started the sport can become material only for the purpose of fixing the fault, and as we have already pointed out, fault of the injured employee under certain conditions. such as prevailed in this case, does not constitute a reason for not allowing compensation. This is not an action against the employer.

The contention of the Attorney General on behalf of the State Industrial Accident Commission, to the effect that Stark and Cooper were at fault in the manipulation of the air hose, partakes of the nature of contributory negligence, and assumption of the risk, of an act of a fellow servant, neither of which have any place in the Workmen's Compensation Act. Some of the cases cited were brought under the Employers' Liability Act. See Knopp v. Am. Car Co., 186 Ill. App. 605. Other cases are considered much as though they were under such an act, and apparently some of the workmen's compensation acts partake of the na- [illegible]ployer's liability laws, and the cases are brought to enforce compensation from the employer. See Laws N. J. 1911, c. 95, p. 134; Pierce v. Boyer-Van Kuran Lbr. Coal Co., 99 Neb. 321, 156 N. W. 509, L. R. A. 1916D, 970, a case under the Employers' Liability Act (Rev. St. 1913, § 3650) which contains this:

"Except accidents caused by, or resulting in any degree from willful negligence, as hereinafter defined, of the employee."

In Coronado Beach Co. v. Pillsbury, 172 Cal. 682, 158 Pac. 212, L. R. A. 1916F, 1164, the syllabus reads:

"The fall of an employee down a flight of stairs while engaged in the course of his employment, occasioned by the playful act of a employee in thrusting a newspaper in his ribs with intent to tickle him, is not an accient 'arising out of' his employment, within the meaning of the Workmen's Compensation Act, and injuries resulting therefrom are not compensable."

The opinion relates to the liability of the employer, and reads at page 685 of 172 Cal. at page 213 of 158 Pac. (L. R. A. 1916F. 1164):

"We cannot see that it is our duty to measure the dynamics of assaults and to hold that the master must be charged with foreseeing and insuring against those which are playfully intended and which may be sanctioned by a custom existing among his servants."

In the case at bar it is clear that at the time of the accident Stark and his employer were subject to the compesntion act. Stark, while in the service of his employer, sustained a personal injury by accident. He had immediately prior to the aecident been engaged in sport or horseplay. He appears to have desisted therefrom, handed the hose which he had obtained rfom Turley to another workman, "started to turn around" and stumbled over a "skid support block," and by so doing came within the range of the air from the air compressor. It is not shown that Cooper purposely aimed the air hose at Stark at that time. It may be said that two things concurred to cause the injury: First, stumbling over the skid block; second, coming in contact with the air from the air compressor.

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Both the skid block and the air compressor were a part of the surroundings under which he had labored for more than a year. It is not necessary to say that the employer was at fault or that Cooper was at fault, or that Stark was free from fault. It might be remarked parenthetically that it is not to be supposed that a crew of men could be obtained unless some of them during working hours would play practical jokes on their fellow workmen especially if such men were red blooded Americans. It is not conceivable that it was the intention of the Legislature to preclude an injured workman or his beneficiaries from the benefits of the Workmen's Compensation Act for the reason that at the time of, or immediately prior to, the accident causing the injury, such workman had been engaged in play, unless the injury or death results to such workman "from the deliberate intention of the workman himself to produce such injury." We think it may fairly be said under the facts in this case that the accident arose "out of and in the course of his employment." It was unquestionably caused by violent external means. The pressure in the air hose varied from 70 to about 110 pounds to the square inch. The appliance was known by some of the workmen to be an instrument of danger.

It is claimed on behalf of defendant that the court erred in finding that Wanda Stark, plaintiff, had not deserted her husband. Section 6626, Or. L. (j) provides that a husband or wife of an injured workman who has deserted and is living apart from the injured workman at the time of the injury shall not be a beneficiary under this act.

[2] As we understand the argument counsel on both sides consider that there is no bill of exceptions in the record in this case. We find, however, a transcript of the whole testimony and all of the proceedings at the trial with the exceptions taken at the trial, duly certified by the trial judge. This constitutes a sufficient bill of exceptions to bring the testimony before this corut. Section 171, Or. L.; Malloy v. Marshall-Wells Hdwe. Co., 90 Or. 303, 173 Pac. 267, 175 Pac. 659, 176 Pac. 589; Farmers, etc., Bank v. Davis, 93 Or. 655, 184 Pac. 275; Hartman v. Selling, 97 Or. 368, 396, 189 Pac. 887, 192 Pac. 408.

[3, 4] We have carefully read the testimony. This, however, does not change the result in this case. In a cause tried by the court without a jury the findings of fact are deemed to be a verdict. Section 159, Or. L. In construing this section this court has repeatedly and uniformly held that such findings of the trial court cannot be set aside on appeal if there is any competent eidence to support them. Flegel v. Koss, 47 Or. 366, 83 Pac.. 847; Smith v.. Badura, 70 Or. 58 139 Pac. 107; Gilbert v. Sharkey, 80 Or .323, 156 Pac. 789, 157 Pac. 146. In a case under the Workmen's Compensation Act, the court is bound by the verdict of a jury as to a question of fact. Section 6637, Or. L.; Grant v. State Industrial Acc. Com., 201 Pac. 438.

[5, 6] At the time of the injury of Stark, his wife, who was in a delicate condition, was stopping at the home of her mother and there had been a disagreement between her and her husband in regard to employing a chiropractic physician. The testimony supports the finding that she had not deserted her husband and was not living apart from him at the time of the injury within the meaning of the Workmen's Compensation Act. Under the circumstances of this case this was a queestion of fact. There was testimony in the case to sustain all of the findings of the trial court, including the finding that the injury of Stark was caused by accident arising out of and in the course of his employment. Workmen's Compensation Act, Corpus Juris Treatise, p. 59, § 50. This was a mixed question of law and fact. Bradbury's Workmen's Compensation (3d Ed.), p. 1007, § 25; Grant v. State Indutrial Acc. Com., supra. Therefore such findings should not be disturbed.

The judgment of he circuit court is affirmed.

Burnett, C. J.. and Brown and McCourt, JJ., concur.

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CALLIHAN v. MONTGOMERY.

(Supreme Court of Pennsylvania. Jan. 3, 1922.)

115 Atlantic Reporter 889.

1. MASTER AND SERVANT—SCOPE OF REVIEW IN COMPENSATION PROCEEDINGS DEFINED.

Under Workmen's Compensation Act 1915, art. IV, § 409, and section 427 as amended by Act June 26, 1919 (P. L. 665, 666, § 6; Pa. St. 1920, §§ 22055, 22061), the revisory powers of the appellate court on appeal from award of compensation commission are limited to a determination of whether there is any evidence to support the findings of fact, and whether the law has been properly applied to them.

(For other cases, see Master and Servant, Dec. Dig. § 417[1].)

2. MASTER AND SERVANT—COMPENSABLE INJURY QUESTION OF LAW REVIEWABLE ON APPEAL.

Whether the accident occurred in the course of the employment as defined in Workmen's Compensation Act, art. III, § 301 (Pa. St. 1920, §§ 21983, 21984), and whether the person injured or killed was an employee, as defined in article I, § 104 (section 21919), under given state of facts, are questions of law reviwable on appeal.

(For other cases, see Master and Servant, Dec. Dig. § 417[6].)

3. MASTER AND SERVANT—INJURY IN COURSE OF EMPLOYMENT COMPENSABLE.

Injury to employee may not have arisen out of employment to render employer liable under Workmen's Compensation Act, art. III, § 301 (Pa. St. 1920, §§ 21983, 21984); it being sufficient if the accident occurred in the course of the employment.

(For other cases, see Master and Servant, Dec. Dig. § 371.)

4. MASTER AND SERVANT—COMPENSATION CLAIMANT'S CONTRIBUTORY NEGLIGENCE IMMATERIAL.

In proceedings under Workmen's Compensation Act (Pa. St. 1920, § 21916 et seq.), the fact that claimant may have been guilty of contributory negligence is immaterial.

(For other cases, see Master and Servant, Dec. Dig. § 371.)

5. MASTER AND SERVANT—INJURY BY ACCIDENT IN "COURSE OF EMPLOYMENT" WITHIN COMPENSATION ACT DEFINED.

"Injury by accident in course of employment" within Workmen's Compensation Act, art. III, § 301 (Pa. St. 1920, §§ 21983, 21984), includes every injury on the premises of the employer during the hours of employment, so long as the nature of the employment demands the employee's presence there, regardless of whether his presence at the particular place where the injury occurred was actually required, unless he had virtually abandoned the course of his employment or was engaged in something foreign to it.

(For other cases, see Master and Servant, Dec. Dig. § 371.)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

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6. MASTER AND SERVANT—INJURY TO MECHANIC AWAITING TRANSPORTATION FROM EMPLOYER'S PREMISES HELD AN INJURY BY ACCIDENT IN COURSE OF EMPLOYMENT WITHIN COMPENSATION ACT.

Where a mechanic paid by the hour for repairing a pump engine found it necessary to take the cylinder to his own shop for reboring, and while waiting for the empolyer to transport him stepped into adjoining pumphouse on the employer's premises and was caught in the machinery, he was "injured by an accident in the course of his employment" within Workmen's Compensation Act, art. III, § 301 (Pa. St. 1920, §§ 21983, 21984), though it did not appear that employment required him to enter pumphouse.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

7. MASTER AND SERVANT—EMPLOYMENT HELD "CASUAL" AND OUTSIDE "REGULAR COURSE OF BUSINESS" OF EMPLOYER WITHIN COMPENSATION ACT.

An oil well operator's employment of skilled mechanic engaged in business for himself to repair an engine under aggreement to pay him his customary charge of $1.25 an hour for time required to make repairs *held* "casual" and not in the "regular course" of the business of the employer, within Workmen's Compensation Act, art. I, § 104 (Pa. St. 1920, § 21919); the term "regular course" meaning the normal operations which regularly constitute the business excluding incidental or occasional operations arising out of the transaction of the business, such as making repairs to premises, appliances, or machinery.

(For other cases, see Master and Servant, Dec. Dig. § 362.)

(For other definitions, see Words and Phrases, First and Second Series, Regular Course of Business.)

Appeal from Court of Common Pleas, Butler County; Aaron E. Reiber, President Judge.

Proceedings by Mrs. Ida Callihan for compensation for the death of her husband, O. F. Callihan, opposed by Noble Montgomery, employer. Award for claimant affirmed by the court of common pleas, and employer appeals. Judgment of court of common pleas and award of Compensation Board reversed, and judgment entered for employer.

Argued before Moschzisker, C. J., and Frazer, Walling, Simpson, Kephart, Saddler, and Schaffer, JJ.

James E. Marshall (of Marshall & Watson), of Butler, for appellant.
James M. Galbreath, of Butler, for appellee.

MOSCHZISKER, C. J. Defendant, operating an oil well, employed plaintiff's husband, O. F. Callihan, a skilled mechanic, engaged in business for himself, to repair an engine used to run a pump, under agreement to pay the latter his customary charge of $1.25 an hour for the time required to make the repairs; during the progress of this work it was found necessary to take the cylinder of the engine to Callihan's shop for reboring. After waiting a few minutes for a representative of defendant to get ready to transport him, Callihan, for some undisclosed reason, stepped into an adjoining pumphouse, on defendant's premises, was caught in the machinery and killed. The widow claimed compensation, which the referee allowed; when the award was sustained by the Compensation Board and the court below, defendant took the present appeal, contending: (1) That at the time of his death deceased was not engaged in the furtherance of the business of defendant; (2) that Callihan's employ-

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ment was merely casual; (3) that he was not employed in the regular course of the business of defendant; and (4) that he was an independent contractor.

In a broad sense, the Workmen's Compensation Law, Act of June 2, 1915 (P. L. 736; Pa. St. 1920. § 21916 et seq.) was passed for the mutual benefit of employers and employees directly engaged in the regular course of industrial or business life. It is a tacit recognition of the fact that such employees differ from those workers for hire who keep themselves detached, in order to use their labor and abilities in the best markets and most advantageous ways which may from time to time present themselves. The former class of employees, unlike the latter, are not as a rule in a position to seek out and grasp opportunnities for advantageously using what little capital they may accumulate; hence, in event of injury, these workers cannot as readily care for hemselves and those dependent on them for support. All of which, inter alia, created a public feeling that they were entitled to the protection of such a system as the statute before us sets up, and this brought about its enactment. The system thus inaugurated guarantees sandardized compensation in cases of injury to employees, but one who enlists in the army of industrial and business workers must, in order to entitle himself to the benefits of the act. undertake more than a mere casual or incidental job; he must enter the ranks of those employed in the regular course of the business of his particular employer, and when such a worker claims compensation, it must appear that he was injured in the course of his employment.

Article IV, section 409, of the Compensation Act (P. L. 1915, p. 751) originally provided that findings of the Compensation Board on questions of fact were to be final, and certain of our decisions have held that. under this section, the question whether deceased was engaged in the "furtherance of the business or affairs of [his] employer," that is, "in the course of his employment," at the time he received the injury complained of, being one of fact, the finding of the referee in that regard, when approved by the Compensation Board, was conclusive (Poluskiewicz v. Phila., etc., Co., 257 Pa. 305, 307. 101 Atl. 638; Messinger v. L. V. R. R. Co., 261 Pa. 336, 338, 104 Atl. 623; Gallagher v. Walton Mfg. Co., 264 Pa. 29, 32, 107 Atl. 327; Ferri v. Lenni Quarry Co., 266 Pa. 264, 266, 109 Atl. 845); but, in connection with these cases, see Flucker v. Carnegie Steel Co., 263 Pa. 113, 118, 106 Atl. 192, and other of our more recent decisions, which point out that such findings are also in the nature of comclusions of law, and are reviewable as such.

At the dates of the decisions in the cases just referred to, the evidence was not before the appellate court (Ambrose v. Coxe Bros. & Co., 266 Pa. 536, 537, 109 Atl. 642), the judicial review then being limited to an inspection of the record to ascertain whether the underlying facts duly found adequately sustained the ultimate conclusion appealed from, and whether the judgment was in conformity to law. McCauley v. Imperial Woolen Co., 261 Pa. 312, 323, 104 Atl. 617.

The amendment of June 26, 1919 (P. L. 642, 665, 666), made material changes in procedure; under article IV, section 427, of this act (Pa. St. 1920, §§ 22055, 22061), where an appeal is had to the common pleas, it is the duty of the board to certify to such court "its entire record, * * * including the notes of testimony," and it is provided that an appeal may be taken to the Superior or Supreme Courts, to be prosecuted "in the same manner and form and with the same effect as is provided in other cases of appeal" to those tribunals.

[1] Since the act of 1919, the appellate court has the entire record before it, but its revisory powers are limited to a determination of the question whether there is any evidence to support the findings of fact, and whether the law has been properly applied to them; this is somewhat analogous to the power of review in cases of appeal from confirmation

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of auditors' reports or from decrees in equity. Kuca v. L. V. Coal Co., 268 Pa. 163, 165, 110 Atl. 731; Strohl v. E. P. Ry. Co., 270 Pa. 132, 133, 113 Atl. 62.

[2] What constitutes injury or death by accident in the course of employment, and who is an employee within the meaning of the Compensation Law, are defined in article III, section 301, and article I, section 104; of that act (Pa. St. 1920, §§ 21983, 21984, 21919), the latter definition expressly excluding those whose employment is "casual in character and not in the regular course of the business of the employer." The ultimate determination of the meaning of these definitions, under any given state of facts, therefore, depends upon the interpretation or construction of the act, and is a question of law. This rule was applied in Flucker v. Carnegie Steel Co., 263 Pa., 113, 118, 106 Atl. 192, 194, where we said:

"As to the ultimate conclusion, upon which the award rests, that 'deceased met his death from injuries received by accident occurring in the course of his employment with the defendant company,' it is contended by appellant that this presents a mixed question of fact and law, which may be reviewed on its latter aspect. In a measure, the contention is sound, for since the compensation act undertakes to define the meaning of the phrase 'injury by an accident in the course of his emloyment' (see section 301. article III. P. L. 738, 739). in each instance the question of law is presnted as to whether or not the underlying findings of fact [and, since the act of 1919, the evidence] are sufficient to bring the case within the statutory definition."

A recent and relevant statement of the scope of review in compensation cases is found in the opinion of Mr. Justice Simpson in Stahl v. Watson Coal Co., 268 Pa. 452, 454, 112 Atl. 14, 15, as follows:

"The question whether or not the vital point [that decedent was injured in the course of his employment, as defined by the act] sought to be deduced from the basic facts may fairly be inferred therefrom, is one of law and may be reviewed; but, if it can be, the [ultimate] finding is one of fact and is not the subject of review."

Blake v. Wilson, 268 Pa., 469, 473-476, 112 Atl. 126, treats the point whether an employment was casual, and not in the regular course of the business of the employer, as one of law.

The rule applied in the decisions to which we have referred brings us to this determination: In a case like the present the proposition whether there is evidence to sustain findings that deceased was, or was not, doing certain things when injured, is one of law, which may be reviewed to the extent only of deciding whether there is such evidence in the record; but, if the evidence appears, the findings thereon are of fact, and are not subject to review. Whether, on the state of facts found, he was killed in the course of his employment, and, also, whether the employment was "casual in character and not in the regular course of the business of the employer," within the meaning of these several phrases as used in the act, are questions of law, and, as such, open to review.

Before examining into the character and nature of deceased's employment, we shall first consider whether he was killed in the course thereof? for, if not, there is no necessity to inquire further.

[3, 4] In order to come within the act, an injury to an employee need not arise out of his employment: all that is necessary is that it occur in the course of that employment, and this includes all such injuries, except those caused by the intentional acts of third persons, done for reasons personal to the employee and not directed against the employer, and self-inflicted injuries. The fact that claimant may have been guilty of contributory negligence is immaterial. Dzikowska v. Superior Steel Co., 259 Pa. 578, 583, 103 Atl. 351, L. R. A. 1918F, 888.

The definition, in article III, section 301, of the act (P. L. 738, 739; Pa. St. 1920, § 21984), of what is meant by an injury occurring in the course of the employment, expressly provides, inter alia, that—

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It includes "all injuries caused by the condition of the premises or by the operation of the employer's business or affairs thereon, sustained by the employee, who, though not so engaged [in the furtherance of the business or affairs of the employer], is injured upon the premises occupied by or under the control of the employer, or upon which the employer's business or affairs are being carried on, the employee's presence thereon being required by the nature of his employment."

[5] The provision just quoted is broad enough to include every injury received on the premises of the employer, during the hours of employment, so long as the nature of the employment demands the employee's presence there regardless of whether his presence at the particular place where the injury occurrd is actually required if there is nothing to prove a virtual abandonment of the course of his employment by the injured person, or that, at the time of the accident, he was engaged in something wholly foreign thereto.

[6] In the case at bar. the employment of Callihan had not ceased when the accident happened; there yet remained the work of reboring the cylinder and replacing it on the engine, which was to be put in running order. The employer undertook to transport him, his tools and the cylinder, to and from his shop. The actual work had ceased only until it could be resumed in the shop, and the employment continued during the time needed for the transportation. It is true there is nothing to show that the employment of deceased required him to enter the pumphouse, but the latter immediately adjoined the place where he was engaged, and the engine on which he was working was used to operate the pump. There may well have been some valid reason, in connection with his work, for entering the pumphouse; but, if not, his stepping into it was merely a temporary digression while waiting the few minutes required for the return of the employer, and, according to our decisions, there was no break in the course of the employment under such circumsances.

In connection with the statement just made, see Flucker v. Steel Co., 263 Pa. 113, 119, 106 Atl. 192, 194. We there said:

"While no facts appear indicating anything to the contrary, it may be presumed logically that an employee at his regular place of service, during his usual working hours, is there in discharge of some duty incident to his employment; and, when the dead body of an employee is found on the premises of his employer, at or near his regular place of service, under circumstances fairly indicating an accidental death which probably occurred during the usual working hours of the deecased, the inference may fairly be drawn, in the absence of evidence, to the contrary, that the employee was injured in the course of his employment."

In Dzikowska v. Superior Steel Co., 259 Pa. 578, 582, 103 Atl. 351, 352 (L. R. A. 1918F, 888); an employee, whose regular occupation was in the shipping room of his employer's plant, came from the room during a temporary break in his work and went into a box car; a few moments after this he was seen running out with his clothing aflame. There was no direct proof of how the unfortunate man caught fire, but it was supposed that he went into the box car to smoke, and, in striking a match, his clothing, which was saturated with oil, became ignited. We held the claimant was entitled to compensation, saying:

"This was not a rest period; it was not a period when, by the rules of the employment, the employee was free from the duties of his employment; it was an indeterminate period of waiting for the occurrence of an event which would renew the active operations of the employment; * * * if an accident happened at such a time, there would be no break in the employment, even though the workman is paid by the hour for the time he is actually at work, especially where the accident occurs on the employer's premises or about his property, unless the workman is doing something that is wholly foreign to his employment."

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In Knorr v. Central R. R. of N. J., 268 Pa. 172, 175, 110 Atl. 797, we held that one furnished with free transportation, to and from his work, was still engaged in his general employment during such transportation, albeit he stopped off a short period on the way home to transact some personal business; and we sustained an award of compensation. See, also, Blouss v. Delaware, L. & W. R. R. Co., 73 Pa. Super. Ct. 95, 97; Hale v. Savage F. B. Co., 75 Pa. Super. Ct. 454, 459; Messer v. Mfg., etc., Co., 263 Pa. 5, 8, 106 Atl. 85; Haddock v. Edgewater Steel Co., 263 Pa. 120, 123, 106 Atl. 196.

It is true that in Kuca v. Lehigh Valley Coal Co., 268 Pa. 163, 167, 110 Atl. 731, compensation was refused where the deceased deliberately left his regular working place and traveled some distance to another part of defendant's mine, entering an abandoned opening, where he caused an explosion of gas; but there the facts presented indicated that the injured man had voluntarily abandoned the course of his employment, whereas here, as previously pointed out, they indicated the contrary. We conclude that deceased was "injured [and killed] by accident in the course of his employment," in the sense of these words as used in the Compensation Law.

The question remains, however, Was the employment, during the performance of which Mr. Callihan met his death, "casual in character and not in the regular course of the business of defendant," within the meaning of such phrases in the act under consideration? It will be noticed that, in order to come within the exception of those employees not covered by the law in question, the employment must be both casual in character and outside the regular course of the business of the employer. Article I, section 104, of the Compensation Act (P. L. 1915, p. 736); Tarr v. Hecla Coal Co., 265 Pa. 519, 522, 523, 109 Atl. 224.

In Marsh v. Groner, 258 Pa. 473, 479, 102 Atl. 127, L. R. A. 1918F, 213 (note, p. 275), we held that one employed to do some plastering, in connection with the remodeling of defendant's dwelling, was a casual employee, not engaged in the regular course of the employer's business, and therefore not entitled to compenstion. Again, in Blake v. Wilson, 268 Pa. 469, 477, 112 Atl. 126, one employed by a farmer to paint a silo was held to be a casual employee. An investigation of the outside authorities sustains the position taken by us in these cases, as we shall proceed to show.

In Chicago, etc., R. R. Co. v. Industrial Com., 284 Ill. 573, 120 N. E. 508, it was held that a structural iron worker, engaged for a few days to complete a driveway in connection with a freighthouse, was engaged in casual employment, the court correctly saying (284 Ill. 579, 120 N. E. 510):

The Legislature certainly intended * * * to give some meaning to 'casual,' and we assume from a reading of the statute that it intended to give the ordinary, common meaning, that is, workmen are engaged in casual employment when they are employed only 'occasionally,' 'irregularly' or 'incidentally,' as distinguishing them from regularly and continuously."

Maryland Casualty Co. v. Pillsbury, 172 Cal. 748, 158 Pac. 1031, holds that one engaged by the owner of a farm to repair a tractor was a casual employee, the court saying (172 Cal. 751, 158 Pac. 1033), that "casual" is "something which comes without regularity and is occasional and incidental"; in State v. Dist. Court, 138 Minn. 103, 107, 164 N. W. 366, a person employed to construct a temporary building to replace one destroyed by fire, on a farm owned by the employer, though not operated by him, was held a casual employee.

Western Union Tel. Co. v. Hickman, 248 Fed. 899, 900, 161 C. C. A. 17, 18 (construing the W. Va. act), where a lineman, temporarily employed by a telegraph company to assist in repairing a portion of its line, was held to be but a "casual" employee, contains an interesting discussion of the subject in hand, pointing out differences in phraseology in the English and certain of the American compensation acts, and saying:

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"This noticeable departure from the language of the English statute indicates a legislatie intent to broaden the exception and place it on a different basis; its apparent effect is to make exemption depend not on the nature of the work performed, but on the nature of the contract of employment. If the hiring be incidental or occasional, for a limited and temporary purpose, though within the scope of the master's business, the employment is 'casual,' and covered by the exception. And so it has been held by the courts of states whose compensation acts have substituted 'casual employment,' or words of the same import, for the 'employment of a casual nature,' found in the English statute. In re Gaynor, 217 Mass. 86, 104 N. E. 339, L. R. A. 1916A, 363; In re Cheevers, 219 Mass. 244, 106 N. E. 861; Aurora Brewing Co. v. Industrial Board, 277 Ill. 142, 115 N. E. 207; Maryland Casualty Co. v. Pillsbury, 172 Cal. 748, 158 Pac. 1031. Thus in the Gaynor Case, supra, in which the subject is discussed at length, the court says that 'casual' is the antonym of 'regular,' 'systematic,' 'periodic,' and 'certain.' These decisions, and the convincing reasons on which they rest, warrant the conclusion that plaintiff was engaged in 'casual employment' when the accident occurred."

See, also, Blood v. Industrial Acc. Com., 30 Cal. App. 274, 275, 157 Pac.. 1140..

While the rule adopted in Wisconsin and some other states (see Holmen Creamery Ass'n v. Industrial Com., 167 Wis. 470, 471, 167 N. W. 808; Gross Bros. & Co. v. Industrial Com., 167 Wis. 612, 614, 167 N. W. 809) differs from that in most jurisdictions, the weight of opinion supports the view that the word "employment" refers to the contract of hiring, more than to the kind of services rendered; that if a person is engaged incidentally and occasionally and for a limited and temporary purpose, though the work may be within the scope of the employer's business, he is a casual employee; and that the word "casual," as thus construed, means "incidental." In this connection, it may be noted that the Standard Dictionary gives "incidental" as the only synonym for "casual."

[7] When the tests stated in the authorities reviewed are applied to the circumstances at bar, we have a case of "casual" employment, and, in fact, the court below so found; but it further found that "nevertheless what he [deceased] was doing [at the time of the accident] was in the regular course of the business of the employer," and, therefore, notwithstanding the casual nature of his employment, he came within the Compensation Law. We must next consider the legal soundness of this last conclusion, so far as the finding of the regular course of the business of the employer is concerned.

This court held, in Marsh v. Groner, 258 Pa. 473, 478, 102 Atl. 127, 129 (L. R. A. 1918F, 213), that a man, employed by a married woman to do plastering in connection with the remodeling of her dwelling, was not engaged in the regular course of the business of the employer because, as a matter of fact, she was not pursuing a business within the meaning of the act; and we there defined one's buiness to be "the habitual or regular occupation that the party was engaged in with a view to winning a livelihood or some gain." Following this case, we held, in Blake v. Wilson, 268 Pa. 469, 479, 112 Atl. 126, 129, that the employment of a person to complete a silo, on which work had been suspended for some time, was not in the regular course of the business of the owner of the farm on which it was constructed, saying:

"With the particular object determined, the regular course of the business can only refer to the experience and custom in the conduct of the business as is of usual, if not daily, occurrence and observation. It is suggested that if such had been the meaning the Legislature intended to convey, an apter expression would have been 'in the course of the regular business of the employer.' We think, on the contrary, such change in phraseology would have made the thought obscure. Not only so, but there can be no warrant for transposition of the terms; the meaning, as

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it stands is not doubtful when it is considered that the word 'regular,' as it is used, does not qualify the word 'business' but the course of the conduct of that business; when that is 'regular' the condition of the act has been met."

The decisions of other jurisdictions do not wholly agree, either in the interpretation of the meaning of the phrases under consideration or as to their application, but the strong trend of opinion coincides with the view expressed in the Pennsylvania cases just referred to.

Holbrook v. Olympia Hotel Co., 200 Mich. 597, 603, 166 N. W. 876, 878 (a Michigan case, in which state the act excludes "any person whose employment is but casual or is not in the usual course of the trade, business, profession or occupation of his employer"), held that a painter and decorator, employed to paint and decorate rooms in a hotel, was not an employee engaged in the usual course of the business of the employer, the court stating:

"It would seem that occasionally renovating the rooms of a building, or the building itself. owned or occupied by the owner as a home, with paint or paper or both, is not in the usual course of the trade, business, profession or occupation of the owner. unless he is himself in the business of painting and decorating. No reason can be found for concluding that the owner of the hotel is pursuing his business, within the meaning of the law, when he causes the rooms to be occasionally painted and decorated, although it is usual to have work of that nature done from time to time."

In Blood v. Industrial Commission, 30 Cal. App. 274, 276, 157 Pac. 1140, it was decided that one employed to paint a house was not in the usual course of the employer's business, the court saying:

"The contract of employment of Heck by the petitioner to paint his house was casual. It was a mere occasional and incidental contract, not constituting or connected with any regular, systematic, periodic, or certain business."

See. also, Maryland Casualty Co. v. Pillsbury, 172 Cal. 748, 158 Pac. 1031, a case of repairs to a farm tractor; La Grande Laundry Co. v. Pillsbury, 173 Cal. 777, 779, 161 Pac. 988, concerning repairs to the roof of a house; London, etc., Co.. v. Industrial Acc. Com., 173 Cal. 642, 645, 161 Pac. 2, where an injured railroad man was fighting fire on a farm, not belonging to the railroad company, and asked compensation from the latter; and Armstrong v. Industrial Com., 36 Cal. App. 1, 2, 171 Pac. 321, where a carpenter was employed at a daily wage to erect a dwelling house. In all of these cases compensation was refused.

State v. Dist. Court, 138 Minn. 103, 106, 164 N. W. 366, 368, held that a man employed to construct a temporary building to replace one destroyed by fire, on a farm owned by the employer, though not operated by him, was engaged in work which was "not in the usual course of the trade, business, profession, or occupation of the employer"; it is there stated:

"The words 'usual course' must be regarded as more restrictive than the language employed in the Connecticut and English acts. * * * Assuming * * * the lease obligated defendant to erect a shelter for his tenant's stock * * * we may say, in a certain sense; * * * the erection became his business or duty, but that cannot be the meaning of the word 'business' in this statute. It must * * * refer to the employer's ordinary vocation and not to every occasional, incidental, or insignificant work he may have to do. * * * Certainly neither the renting of the farm nor the construction of this shed can be referred to as coming within the 'usual course' of defendant's business or occupation."

In Carter v. Industrial Acc. Com., 34 Cal. App. 739, 740, 168 Pac. 1065, 1066, it was held that one employed by a grain dealer to load cars with grain, which had been left on the station platform because of a shortage of cars, was not engaged in the usual course of the business of his employer; it is there said:

"The loading was not within the usual business of the employer, the employment must come within the normal operations of the usual

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and ordinary business of the employer in order to make him liable. This usual and ordinary business here did not involve the loading of the grain but embraced simply the purchase and transportation after the grain was loaded upon the cars.

"In other words, the applicant was casually employed to do work which was not ordinarily and usually done by or under the direction of the employer in the business in which he was engaged."

Perhaps the decision in this case goes a little far.

The English cases are of little value in construing the Pennsylvania statute, because of differences in phraseology between the English act and our own. The American compensation acts pretty generally employ the words "regular" or "usual" course of the employer's business. Undoubtedly, there are American cases, such as State v. Dist. Ct., 141 Minn. 83, 169 N. W. 488, and others there cited, which construe these words differently from the authorities mentioned in this opinion; but the latter are in the majority, and agree more nearly with the view indicated in the Pennsylvania decisions already cited, and here relied on to support the ruling that Callihan, at the time of his injury, was not employed in the regular course of the business of defendant.

The casual employment of one, for the performance of an odd job, may occur in conducting a business and still not be within its regular course. For instance, emergency repair work on a machine used in the operation of a business can always be said to take place in the course of that business, as all machinery, at some time or other, is bound to need repair; but such work, if not of a kind usually performed by or under the control of the person conducting the business, would be outside the regular course thereof. The Legislature evidently intended, by the use of the words "regular course," to give them some definite significance, and the most natural meaning is that they refer to the normal operations which regularly constitute the business in question, excluding incidental or occasional operations arising out of the transaction of that business, such as now and again repairing the premises, appliances or machinery used therein. While repair work may be considered an important incident to any business using machinery, and, in some cases, may enter into the customary operations of such a business (for example, when men are engaged as regular employees for the purpose of keeping the machinery in order), yet the repairs we are here considering were no part of the regular course of the business conducted by defendant, which is producing oil; they represent merely an odd job, incidental to that business, but not part of the work ordinarily done by or under the control of the employer in this particular case. On the other hand, such repairs might well be classed as within the regular course of the business of plaintiff's deceased husband.

As the employment of deceased to repair the machine in question was casual and not in the regular course of the business of defendant, his widow is not protected by the Pennsylvania act.

The view just stated would not exclude from the benefit of the Compensation Law all those employed at unit, sometimes called "contract," prices, based on quantity of work done, as is argued by plaintiff, because in many such cases the duties performed are neither casual nor out of the regular course of the business of the employer.

While we have overruled appellant's first contention, we have sustained the second and third, which control the case; therefore, it is unnecessary to consider the question whether deceased was an independent contractor.

We take occasion to say that, although many cases from other jurisdictions are mentioned in this opinion, they are cited, not as authorities with us, or to signify our approval of all the conclusions therein reached, but merely to show the trend of opinion on the points under discussion.

What we said in Kuca v. Lehigh Valley Coal Co., 268 Pa. 163, 165, 110 Atl. 731, 732, to the effect that, "when the common pleas sustain an

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exception to an award and reverses the action of the board, it must remit the record to [that body] for further hearing and determination (article IV, section 427, Act of June 26, 1919, P. L. 642)," concerns only exceptions to findings of fact as may be seen by its context and the part of the statute in question there being dealt with.

The judgment of the court below and the award of the Compensation Board are both reversed; judgment is here entered for defendant.

KELLY v. WATSON COAL CO. ET AL.

(Supreme Court of Pennsylvania. Jan. 3, 1922.)

115 Atlantic Reporter, 885.

1. MASTER AND SERVANT—EVIDENCE HELD TO SHOW COMPENSABLE INJURY TO WORKMAN DEVELOPING TUBERCULOSIS CAUSING DEATH.

In a proceeding under the Workmen's Compensation Act (Pa. St. 1920, § 21916 et seq.), to obtain compensation for the death of an employee struck by the crank of a crab, medical testimony *held* to show that the accident was a contributory cause in the development of tuberculosis, which resulted in his death, upon the theory that the shock rendered him subject to the quick development of the disease and that such development was due to the injury.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Appeal from Court of Common Pleas, Indiana County; J. N. Langham, President Judge.

Proceedings under the Workmen's Compensation Act by Carrie S. Kelly for the death of H. E. Kelly, opposed by the Watson Coal Company, employer, and the Ætna Life Insurance Company, insurer. Award of the Compensation Board affirmed by the court of common pleas and the insurer appeals. Affirmed.

Argued before Moschzisker, C. J., and Frazer, Walling, Simpson, Kephart, Sadler, and Schaffer, JJ.

John M. Reed, of Pittsburgh, and James W. Mack, of Indiana, Pa., for appellant.

S. J. Telford, of Indiana, Pa., for appellee.

MOSCHZISKER, C. J. At the inception of this suit, Carrie S. Kelly made a compensation claim against defendant coal company for the death of her husband, H. E. Kelly; this was allowed by the Board and the decision was affirmed by the court below; the insurance carrier has appealed, contending that the evidence was insufficient to connect Kelly's death with the accident here in question and that the testimony of certain of the medical experts should not have been considered.

[1] It appears from the evidence that Kelly, a carpenter in defendant's service, was injured March 19, 1918; he had been employed by the coal company for three years prior to the accident, was "a steady worker," and had lost no time on account of sickness, although there is some testimony that he was not what would be termed a robust man. Deceased was winding a crab, turning over a car to make some repairs on its bottom, when the crank flew out of his hands striking him on the head and

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at a point on the left side of his abdomen near the waistline, knocking him down. The head was quite badly cut, but the injury to the body was not at first considered serious, although claimant testified there was a bruise "between the hip and waistline," and the patient told his doctor of an uneasy feeling on the left side of the abdomen; five days after the injury, he complained of soreness in the region of the left testicle, which, upon examination, was seen to be swollen, inflamed, and tender; subsequently, about a month after the accident, an operation was performed to remove the testicle, and it was found to be infected with tubercular baccilli; following this, deceased had trouble with his hip and a general consumptive condition developed. On November 6, 1918, he died, at the age of 46, of tubercular peritonitis.

On the facts above stated—and as to them there is no conflict—it was found that—

The "injuries sustained by the decedent" were due to "violence to the physical structure of his body," which "so lowered his vital resistance that a tubercular condition * * * quickly developed, hastening and causing his death."

There is ample medical testimony on the record to sustain the findings just recited; it being the opinion of several competent doctors, at least one of whom was an eminent expert, that the accident under investigation was a "contributory cause of the development of the tuberculosis * * * which resulted in his [Kelly's] death." The doctors said there was "a direct connection between the trauma, injury, and the tubercular condition," upon the theory that the shock of the accident and consequent lowered vitality rendered the injured man particularly subject to the quick development of the disease from which he died, and that such development was, in all probability, due to the assigned cause. Under our cases, this was sufficient to warrant and sustain the award. Dumbluskey v. Coal & I. Co., 270 Pa. 22, 112 Atl. 745; Tracey v. Coal & I. Co., 270 Pa. 65, 112 Atl. 740; Zukowsky v. Coal & I. Co., 270 Pa. 118, 113 Atl. 62; Miller v. Director Genl. of Railroads, 270 Pa. 330, 113 Atl. 373. Compare Fink v. Sheldon Axle Co., 270 Pa. 476, 113 Atl. 666.

[2] While certain of the medical experts testified that they based their conclusions on a reading of the evidence in the case, yet each of them clearly stated the facts they assumed to be true, and which formed the basis of their conclusions, just as much as though these facts had been put to them in the form of a hypothetical question; and some of those who gave expert testimony were doctors who either actually attended or operated on the deceased. Under these circumstances, there is no merit in appellant's complaint concerning the alleged incompetency of the testimony in question.

The assignments of error are overruled, and the judgment is affirmed.

CIACCIA v. GENERAL FIRE EXTINGUISHER CO. (No. 525.)

(Supreme Court of Rhode Island. Feb. 3, 1922.)

115 Atlantic Reporter, 801.

MASTER AND SERVANT—CHILDREN NECESSARY PARTIES TO PROCEEDING FOR COMMUTATION OF WORKMEN'S COMPENSATION.

Infant children of deceased employee were necessary parties to widow's proceeding for a commutation of future payments due her under the Workmen's Compensation Act, since, if the widow should die during

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compensation period, the children would become entitled to future compensation under article 2, § 6.

(For other cases, see Master and Servant, Dec. Dig. § 400.)

Appeal from Superior Court, Providence and Bristol Counties; Willard B. Tanner, Presiding Justice.

Proceeding by Maria Felicia Ciaccia for compensation under the Workmen's Compensation Act for death of her husband, opposed by the General Fire Extinguisher Company, employer. From a decree of the superior court, denying her petition for a commutation of future payments which would become due her under the act, claimant appeals. Appeal dismissed. Decree of superior court affirmed, and cause remanded.

William A. Gunning, of Providence, for appellant.

Ralph T. Barnefield, of Providence, for respondent.

VINCENT, J. This is an appeal by Maria Felicia Ciaccia from a decree of the superior court denying her petition for a commutation of the future payments which would become due to her under the Workmen's Compensation Act (Laws 1911-12, c. 831).

On November 6, 1920, the husband of Maria sustained injuries, in the course of his employment by the respondent Fire Extinguisher Co., which, a few days later resulted in his death. He left a widow and two minor children. On December 31, 1920, an agreement was entered into, which was duly filed in, and approved by, the superior court, which provided for the payment to the petitioner, as the widow of the deceased, of the sum of $10 per week for a period of 300 weeks.

On June 18, 1921, said payments having been made for a period of more than 26 weeks, the said Maria filed her petition in the superior court, praying that the future weekly payments be commuted. On June 29, 1921, this petition was heard in the superior court, and on September 14, 1921, the same was denied, and the following decree entered:

"(1) It appears that the petitioner is the mother of two minor children, Filipo and Cosimo, aged 14 and 12, respectively; that no provision is made in said petition for the protection of the interests of said minor children in said future compensation payments, should the petitioner predeceased said children within the time of the remaining compensation period. (2) That a commutation of future payments is not for the best interests of the petitioner."

From this decree the petitioner has appealed to this court, setting forth in her reasons of appeal that the findings of the superior court, as expressed in its decree, are erroneous and against the law.

At the hearing in the superior court it was claimed by the Fire Extinguisher Company that the minor children of the deceased employee should be made parties to the petition, either as petitioners or respondents, on the ground that their possible rights and interests in future payments were necessarily involved, and that the employer and insurer were entitled to protection against their future claims, in case the widow should die within the compensation period.

We think that the children were necessary parties to the proceeding. If the widow should not live through the compensation period, the children, upon her death, would become entitled to the compensation, thereafter payable, for their own use under section 6, article 2, of the act. These rights of the children are contingent, but they are nevertheless legal rights, which must be considered. These rights cannot be extinguished, unless the children are made parties and are before the court.

The employer is also entitled to protection. If the children are not parties to the petition, any decree entered thereon commuting future payments would not bind them. Upon the death of the petitioner within the

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compensation period, the children could, under the plain terms of the statute, legally call upon the employer to make payments to them thereafter for the portion of the 300 weeks then remaining.

The petitioner further contends that she is entitled to have a commutation of future payments on the ground that she is about to remove from the United States and take up her residence in Italy. There is nothing before us to show that any evidence was presented to the superior court to the effect that the petitioner was about to remove from the United States, and we see no occasion for any consideration of that feature of the petitioner's claim.

The appeal of the petitioner is dismissed, the decree of the superior court is affirmed, and the cause is remanded to said court for further proceedings.

WILSON v. DAKOTA LIGHT & POWER CO. (No. 4964.)

(Supreme Court of South Dakota. Feb. 8, 1922.)

186 Northwestern Reporter, 828.

1. MASTER AND SERVANT—FINDINGS REVIEWABLE UNDER COMPENSATION LAW.

The rule that, where there is any reasonable or substantial evidence tending to establish the findings of the board of arbitration and Industrial Commissioner, such findings are not subject to review, had no application where neither the board nor the Commissioner made any findings as to the nature of decedent's employment; the finding being merely that the accident arose out of or in the course of the employment.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

2. MASTER AND SERVANT—INJURY TO ENGINEER VOLUNTARILY ASSISTING IN REMOVING OLD WALL HELD NOT COMPENSABLE AS "ARISING OUT OF AND IN COURSE OF EMPLOYMENT."

Where one employed as chief engineer of an electric light and power company, without any emergency calling for his assistance in the tearing down of an old wall adjoining the engine room which was being removed by persons engaged for that purpose, proceeded to dig the support from under one side of the wall, causing it to fall on him, the accident did not arise out of or in the course of his employment within the Workmen's Compensation Law.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

Smith, J., dissenting.

Appeal from Circuit Court, Moody County; L. L. Fleeger, Judge.

Proceedings under the Workmen's Compensation Law by Arthur A. Wilson for compensation for the death of his son, Herbert L. Wilson, opposed by the Dakota Light & Power Company, employer. Compensation was awarded by the board of arbitration and Industrial Commissioner, but denied by the circuit court, and the petitioner appeals from the judgment and the order denying a new trial. Affirmed.

Frederick A. Warren, of Flandreau, and Robert J. Gamble and Bates, Johnson & Simons, all of Sioux Falls, for appellant.

Rice & Rice, of Flandreau, for respondent.

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POLLEY, J. Appellant filed a claim against the respondent for compensation under the terms of the Workmen's Compensation Law (Rev. Code 1919, §§ 9436-9491), for the death of his son, Herbert L. Wilson, who was killed while in the employ of the respondent on the 29th day of July, 1918. The defendant resisted the claim, and a board of arbitration was appointed under the terms of the law. Testimony was taken, and the board found that the decedent's death was caused by an accident which "arose out of and in the course of his employment." An award was made accordingly. Upon demand made by the respondent the case was reviewed by the Industrial Commissioner, who affirmed the findings and award of the board of arbitration. From this award the defendant appealed to the circuit court of Moody county. The case was tried by the court without a jury upon the evidence taken before the board of arbitration. The trial court found that the decedent's duties, under the terms of his employment, were to keep the engines and producers in proper condition and to attend to everything pertaining to the running of the machinery inside the plant, and that he was not employed or authorized to do any other work or discharge any other duty; that the accident which caused decedent's death did not arise out of and was not in the course of his employment and was not incidental thereto; that in doing the work he was engaged in at the time of the accident he was a mere volunteer and doing work not in the course of his employment. Conclusions of law and judgment were entered accordingly, and from such judgment and an order denying his motion for a new trial plaintiff appeals.

[1] Appellant's first proposition is stated as follows:

"Where there is any reasonable or substantial evidence tending to establish the findings of such board and the Commissioner, such findings are not subject to review."

[2] Such has already been declared to be the rule by this court. Day v. Sioux Falls Fruit Co., 43 S. D. 65, 177 N. W. 816; Shaw v. Harms, 184 N. W. 204, and cases cited. But neither the board of arbitration nor the Industrial Commissioner made any finding as to what decedent's employment was, or from which any inference as to whether the accident arose out of or in the course of his employment might be drawn. The facts relative to what were decedent's duties, as found by the trial court, are fully sustained by the evidence. In support of the finding by the trial court that in doing the work he was doing at the time of the accident the decedent was a mere volunteer, the evidence shows that the defendant is a corporation engaged in the production and sale of electric light and power and selling electrical supplies. At, and for some time prior to, the time of the accident, decedent was employed by defendant as its chief engineer. During the summer of 1918 defendant enlarged the building which inclosed its power plant and office. Such enlargement required the removal of one of the old walls adjoining the engine room. This wall was composed of hollow tile and cement. A bricklayer and plasterer were engaged to tear down and remove it. These parties were taking the wall down from the top. Decedent, thinking to expedite the work, took a "pinch bar" and proceeded to dig the support out from under one side of the wall. The result was that the wall fell over, and decedent being unable to get out of its way, the wall fell on him, causing his death.

It is contended by appellant that in his attempt to help in tearing the wall down he was working in his employer's interest, and that therefore such work should be held to be in the course of his employment within the meaning of the law. It is also contended that it was the custom of decedent to do occasional small jobs not strictly in line with his regular employment, and that defendant knew of such practice; but there is no evidence to show that defendant had any such knowledge, and defendant's superitendent testified positively that he had no such knowledge. The work decedent was attempting to do when injured was in no wise connected with or incidental to the performance of his duties. There was no emergency that called for his assistance. There was no more justifi-

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cation for his attempt to assist in tearing down the wall than there would have been for one of the bricklayers to have gone into the engine room and undertaken to operate the engines or dynamos. Had a bricklayer, believing he could further his employer's business by helping to operate a dynamo, made the attempt, and been electrocuted, he nor his dependents would hardly be in a position to claim that the accident arose out of or in the course of his employment. Yet the bricklayer would have been no more out of place in the engine room than the decedent in this case was in attempting to tear down the wall. The rule that appears to be generally adopted by the courts is that a workman cannot recover under the Workmen's Compensation Law unless the injury was received while he was acting within the scope of his employment, and unless there was a "causal connection between the conditions surrounding the performance of his work and the resulting injury." Mann v. Knitting Co., 90 Conn. 116, 96 Atl. 368, L. R. A. 1916D, 86. The accident must result from a risk reasonably incident to the employment. The duties of the decedent as chief engineer of the defendant did not expose him to the danger of the falling wall. Haas v. Light & Power Co., 109 Kan. 197, 198 Pac. 174, and cases cited. The evidence fully supports the finding by the trial court that the accident that caused decedent's death did not arise out of nor in the course of his employment.

The judgment and order appealed from are affirmed.

SMITH, J. (dissenting). I regret that I cannot concur in the conclusion reached by my majority associates in this case.

The courts, generally, appear to be in hopeless confusion in their attempts to define the phrase "arising out of and in course of his employment," found in practically all of these statutes. The line of decisions construing and applying this phrase, cited by appellant, seems to me to be more consistent with the real purposes of such laws than the decisions which interpret the phrase strictly and technically. The finding and award of the board of arbitration, approved by the Commissioner, are in accord with the liberal view of the statute, and I think there is evidence in the record sufficient to sustain the findings of the board. Bushman, the manager, only testified that he did not remember Wilson's doing the things testified to by Billam.

Doubtless the views expressed by my majority associates, which reflect the strict, technical construction and application of the statute, will become the law of this jurisdiction, and a further elaboration of my own views would serve no useful purpose. I shall therefore refrain from a discussion of either the law or the facts.

GORDON v. BUSTER. (No. 1884.)

(Court of Civil Appeals of Texas. Amarillo. Jan. 11, 1922. Rehearing Denied Feb. 1, 1922.)

236 Southwestern Reporter, 803.

MASTER AND SERVANT—NONSUBSCRIBING EMPLOYER OF "RANCH LABORER" HELD NOT ENTITLED TO DEFENSES EXCLUDED BY WORKMEN'S COMPENSATION ACT; "FARM LABORER."

A "farm laborer" and a "ranch laborer" are not one and the same thing, and, in an action against a ranch owner by a ranch laborer for personal injuries, the defendant could not interpose the defense of contri-

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butory negligence and assumed risk, where he had as many as three employees and was not a subscriber to the Workmen's Compensation Act, in view of Vernon's Ann. Civ. St. Supp. 1918, art. 5246—1, before amendment of article 5246—2. by Acts 37th Leg. (1921) c. 115.

(For other cases. see Master and Servant, Dec. Dig. § 363.)

(For other definitions, see Words and Phrases, Second Series, Farm Laborer.)

Appeal from District Court, Deaf Smith County; Reese Tatum, Judge.

Action by Jack V. Buster against John W. Gordon. Judgment for plaintiff, and defendant appeals. Affirmed.

Carl Gilliland, of Hereford. for appellant.

W. H. Russell, of Hereford. for appellee.

HALL, J. Appellee, as plaintiff below, sued appellant to recover damages in the sum of $5,000. He alleges that he was injured while working for appellant as a ranch hand. The substance of the petition is that, on or about December 2, 1920, one Smith, who was at that time running appellant's Castro county ranch, employed appellee to work thereoen, his duties being to feed cattle, fix fences, and do general ranch work; that such employment was with the knowledge of appellant; that soon after his employment Smith left for Mississippi on a visit, and never returned, and appellee was left in charge of the ranch; that while so employed, on or about the 12th day of February, 1920, appellee was en route from the ranch to the town of Summerfield, for the purpose of buying groceries and supplies to be used by the employees of the ranch; that he drove a span of small mules to an old hack; that the hack was worn out, and practically worthless, the neck yoke of which was out of order, in that, instead of having a proper and necessary ring to fit over the end of the tongue of the vehicle, there were a number of strands of old baling wire used as a substitute; that while driving to Summerfield the baling wire which was being used as a ring broke; the tongue of the vehicle fell to the ground, frightening the mules; that they ran away, throwing appellee from the hack, breaking his leg, causing other permanent injuries, resulting in the damages set out. The appellant answered by general denial, pleas of contributory negligence and assumed risk. By supplemental petition appellee charged that appellant was engaged in a general ranch business in Castro, Deaf Smith, and Terry counties; that he owned and controlled large ranches in each of these counties, upon which ranches he pastured large herds of cattle; that the farming operation conducted by appellant on said Castro county ranch were only incident to the ranching business, and that appellant had in his employ three or more persons, and was not a subscriber to nor had he complied with the provisions of the Workmen's Compensation Act. The case was submitted to a jury upon a general charge, and resulted in a verdict for appellee in the sum of $650.

The controversy is presented in this court upon the single assignment that the court erred in not directing a verdict for the appellant. The physician who attended appellee after his injury, and appellee himself, were the only witnesses who testified upon the trial. Appellee testified that Smith never returned from Mississippi, and that he continued to work in the same way as when he started until the time of his injury; that at the time he commenced to work there was an old hack on the place with a broken wheel; that he used appellant's wagon in hauling feed to the cattle until the rough feed had all been consumed; that appellant said, "I will take that hack and have the wheel fixed and use it in feeding cake, and we will not have to pull the wagon over the pasture"; that this was done, and that appellee began to use it instead of the wagon; that on February 12th, the day he was hurt, he had fed cattle in the west pasture in the morning and had spent part of the forenoon in feeding cattle before

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he started to Summerfield for the groceries and supplies; that on the way to Summerfield he took a load out for the cattle, and, after feeding it, went on for the groceries; that where he fed the cattle was between the ranch and Summerfield; that after he drove out of the pasture, and about a mile and a half on the way to Summerfield, he started down a grade, the hack ran down on the breast yoke, the baling wire used as a substitute for a ring broke, dropping the tongue of the vehicle to the ground, frightening the mules, and causing them to run away when he was thrown from the hack. Appellee further testified that he had been raised on a ranch and had lived on a ranch and farm practically all of his life, knew about the use of baling wire, and had used it for most all purposes except as a substitute for rings on neck yokes, and had never seen a ring made of it; that he had put it on hames for rings, made links in trace chains with it, and at the time he was using it on the neck yoke knew it was in strands and had used the breast yoke in that condition after he went to work for appellant; that in making repairs with baling wire he only made them for temporary purposes; he knew that the wire soon wore out and had to be replaced; that there were three employees on th ranch at the time he was injured; that the other two boys had been heading kaffir corn; that he had done no farm labor. but looked after the cattle, the fences, and general ranch work. Justice Higgins, in the case of C. C. Slaughter Cattle Co. v. Pastrana, 217 S. W. 749, held that a cowboy working upon a ranch where farming was carried on merely as an incident to the conduct of the ranch was not a farm laborer within the meaning of the Workmen's Compensation Act. Article 5246—2, Vernon's Civ. St. A writ of error was sued out in that case, and was dismissed by the Supreme Court for want of jurisdiction. Thereafter the Thirty-Seventh Legislature (Gen. Laws, c. 115, p. 221) amended section 2 of the above statute, adding the words "ranch laborers." It is recited in the emergency clause of the amendment that—

"The fact that this act as now construed by the courts applies to actions to recover damages for the personal injuries of, and for death resulting from personal injuries sustained by ranch laborers. while actions by farm laborers and other domestic servants are exempted from its provisions; that labor upon ranches as they are now conducted, is no more hazardous employment than farm labor, and that the producers of live stock are being caused to incur much unnecessary expense for their protection, creates an emergency," etc.

The passage of this amendment would indicate that the Legislature did not concur with the construction placed upon section 2 by the Court of Civil Appeals in the Slaughter Case. We have had some difficulty in arriving at a conclusion as to what should be a proper disposition of this appeal, but have finally decided to hold. as was held in the Slaughter Case, that a farm laborer and a ranch laborer are not one and the same thing. It appearing that appellant had as many as three employees, there being no proof that he was a subscriber under the Workmen's Compensation Act, it follows that he cannot interpose the defenses of contributory negligence and assumed risk. Vernon's Civ. St. art. 5246—1.

The judgment is therefore affirmed.

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BINGHAM MINES CO. ET AL. v. ALLSOP ET AL. (No. 3668.)
(Supreme Court of Utah. (Dec. 29, 1921.)
203 Pacific Reporter, 644.

1. MASTER AND SERVANT—FINDINGS NOT ESSENTIAL TO VALID AWARD UNDER COMPENSATION ACT.

It is advisable that the Industrial Commission make findings of the ultimate facts in a proceeding under the Workmen's Compensation Act, but such findings are not essential to a valid award.[1]

(For other cases, see Master and Servant, Dec. Dig. § 416.)

2. MASTER AND SERVANT — EXISTENCE OF SUBSTANTIAL EVIDENCE SUPPORTING AWARD UNDER COMPENSATION ACT QUESTION OF LAW.

Whether there is any substantial evidence to support an award of compensation under the Workmen's Compensation Act is a question of law, and to ascertain whether there is some substantial evidence supporting the award is the only purpose of a review.[2]

(For other cases, see Master and Servant. Dec. Dig. § 417[6].)

3. MASER AND SERVANT—COMPENSABLE INJURY MUST BE PROVED BY CLAIMANT.

In a proceeding under Workmen's Compensation Act to obtain compensation for death of servant, it is incumbent upon the beneficiaries to prove that death resulted from an accident arising out of and in the course of deceased's employment.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

4. MASTER AND SERVANT—FINDINGS ON EVIDENCE CREATING; "PROBABILITY" NOT REVIEWABLE UNDER COMPENSATION ACT.

If there is any substantial evidence sustaining conclusions reached by the Industrial Commission in a proceeding under the Workmen's Compensation Act, though it be slight. and though it may seem unsatisfactory to the Supreme and district courts, the award made must stand, and in this connection a finding of the Commission may properly rest upon "probability," which is created when there is more evidence in favor of its existence than against it[3] (citing Words and Phrases. First and Second Series, Probability).

(For other cases. see Master and Servant. Dec. Dig. § 417[7].)

5. MASTER AND SERVANT—EVIDENCE HELD TO SHOW COMPENSABLE INJURY BY ELECTRIC SHOCK.

In a proceeding under Workmen's Compensation Act to obtain compensation for death of a servant, evidence *held* sufficient to sustain a finding of the Industrial Commission that death in the tunnel of a mine re-

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[1] Geo. A. Lowe Co. v. Ind. Com., 190 Pac. 934.

[2] Ind. Com. of Utah v. Evans, 52 Utah, 394, 174 Pac. 825; Garfield Smelting Co. v. Ind. Com. of Utah, 53 Utah, 133, 178 Pac. 57; Geo. A. Lowe Co. v. Ind. Com. of Utah, 190 Pac. 934; Ind. Com. of Utah v. State Road Com.. 190 Pac. 544; McVicar v. Ind. Com. of Utah, 191 Pac. 1089; Varoukas v. Ind. Com., 191 Pac. 1091; Utah Fuel Co. v. Ind. Com. of Utah, 194 Pac. 122; Littsos v. Ind. Com. of Utah, 194 Pac. 338.

[3] McVicar v. Ind. Com. of Utah, 191 Pac. 1089.

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sulted from coming in contact with a charged electric wire while deceased was at work in the course of his employment.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Appeal from District Court, Salt Lake County; P. C. Evans, Judge.

Proceeding by Mabel Allsop and others under the Workmen's Compensation Act to obtain compensation for the death of Samuel Francis Allsop, husband and father, opposed by the Bingham Mines Company and others. From an award of compensation, which was affirmed by the district court. the defendants appeal. Affirmed.

Straup, Nibley & Leatherwood, of Salt Lake City, for appellants.

Willard Hanson, of Salt Lake City, for respondents.

WEBER, J. On October 26, 1917, Samuel Francis Allsop died in a mine tunnel of the Bingham Mines Company, at Lark, Utah, while in the employ of that company. He left surviving him a wife and two minor children. Application was made to the Industrial Commission for compensation, claiming that Allsop was killed by an accident arising out of and in the course of his employment by the Bingham Mines Company. Upon a hearing the Commission found that Allsop came to his death by reason of an accident in the mine of the Bingham Mines Company, and compensation was awarded in the sum of $4,500. On writ of review the record was certified to the district court, and on such review the award was affirmed, the court finding from the evidence that had been adduced before the Commission that the death of deceased was caused by an electric shock accidentally received by him while at work in the mine in the course of his employment, and that the finding of the Commission that the deceased came to his death by reason of an accident arising out of and in the course of his employment was sustained by the evidence. From a judgment entered by the district court plaintiffs appeal.

The first assignment of error urged by appellants raised the question of whether the award can stand, since the Commission failed to make a finding as to the cause of death or what, if any, accident was sustained by the deceased, or, in other words, whether the mere conclusion stated by the Commission, that death was caused by reason of an accident arising out of and in the course of the employment, was sufficient to sustain the award.

[1] In Geo. A. Lowe Co. et al. v. Industrial Com.. 190 Pac. 934, this court held findings of fact by the Commission not legally essential to a valid award. That language was not intended as mere dictum. We have repeatedly suggested to the Commission that it is advisable to make findings of the ultimate facts in each case, but we have never held, and do not now hold, that such findings are essential to a valid award.

[2-4] Appellants insist that there is no competent, substantial evidence in the record that the deceased had sustained any personal injury by accident arising out of and in the course of his employment, and that there is no competent, substantial evidence that he came in contact with an electric wire in the tunnel and suffered death from an electric shock. As stated by appellants, the question whether there is any substantial evidence to support an award is a question of law and to ascertain whether there is some substantial evidence supporting the award is the only purpose of a review in this court. Ind. Com. of Utah v. Evans, 52 Utah, 394, 174 Pac. 825; Garfield Smelting Co. v. Ind. Com. of Utah, 53 Utah, 133, 178 Pac. 57; Geo. A. Lowe Co. v. Ind. Com. of Utah, 190 Pac. 934; Ind. Com. of Utah v. State Road Com., 190 Pac. 544; McVicar v. Ind. Com. of Utah, 191 Pac. 1089; Varoukas v. Ind. Com., 191 Pac. 1091; Utah Fuel Co. v. Ind. Com. of Utah, 194 Pac. 122; Littsos v. Ind. Com. of Utah, 194 Pac. 338. It was incumbent upon the beneficiaries to prove that the death resulted from an accident arising out of and in the course of

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deceased's employment. If, however, there is any substantial evidence sustaining the conclusion reached by the Commission, though it be slight and though it may seem unsatisfactory to us, the award made must stand. As stated in McVicar v. Ind. Com., supra, the Commission's conclusions are like the verdict of a jury, and will not be interfered with by this court when supported by some substantial evidence. The same rule is applicable in the district court upon its review of the evidence. Appellants insist that "a finding under the Workmen's Compensation Act [Comp. Laws 1917, §§ 3061–3165] cannot rest upon mere conjecture, probability, or possibility." With the elimination of the word "probability" the quoted statement is unobjectionable and meets with our approval. However, there can be no doubt about the proposition that a finding of the Commission may properly rest upon probabilities. The word "probable" is defined in Bouvier's Law Dictionary, vol. 3, page 2728, as, "having the appearance of truth; appearing to be founded in reason." Courts have defined "probable" as meaning, "Having more evidence for than against" (3 Words and Phrases, Second Series, 1223) and, "A probability of the existence of a thing is created when there is more evidence in favor of its existence than against it" (6 Words and Phrases, 5617).

[5] The concrete question in this case, therefore, is whether the evidence indicates that the deceasd probably came in contact with the electric wiring in a mine tunnel, and whether the resulting shock caused or contributed to his death. The deceased was a mine foreman. On the day of his death he went to work at about 8 o'clock in the morning, and did his work as usual. At 1.30 p. m. he ate his lunch. His death occurred at about 3 o'clock. At about that time he was in the tunnel and gave orders to one of the miners to attend to some duty, and from five to seven minutes after that he was found in a dying condition on the left-hand side of the mine tunnel. A live electric wire was on the right-hand side of the tunnel. The wire carried about 450 volts. Ore was being taken out of different raises, loaded into cars on a track in the tunnel. At the place where Allsop was found, and where he died, the tunnel was about 6 feet 5 inches wide, and about 6 feet 5 inches high. The track was laid about the center of the tunnel. The distance from the top of the rail to the electric wire was 6 feet 2 inches so that the deceased, who was 5 feet 9 inches in height, could not come in contact with it by accident unless he stood on something or unless he raised his hand or carried something in his hand which would extend above his head. Dr. Odell arrived at the scene of the accident a few minutes after Allsop's death. He had known deceased for three or four years, but had never treated him, in his office or elsewhere, and so far as he knew deceased had nver shown any symptoms or indication of inability to work. Dr. Odell testified that when he found the deceased his throat and mouth were filled with saliva and ejected food. He further testified as follows:

"If the current went through the respiratory organs it would cause a sort of strangulation. It would produce the very effect that I found in this man's throat and mouth. His throat and nose were full of blood. That condition may be accounted for by his having come in contact with the wire. That is not the only way, however, it could have been produced. It could have been produced by his receiving a blow on the back of his head. However, there was no evidence of his having received such a blow. If his head came in contact with the wire the condition in which I found him could have been produced as the result of the electric shock."

It having been suggested that the deceased died from overexertion, Dr. Odell testified:

"When a man dies from overexertion you would expect him before that to the failing somewhat. You would not expect him to be performing his usual work and to appear to be sound and rugged. You would expect him to be coming in occasionally to the mine doctor for treatment. This man had never interviewed me for anything. He appeared to be a

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sound, rugged man. I would not have expected him to die of overexertion, when he went into the mine."

When asked whether it was probable or possible that death could have been produced by coming in contact with an electric wire. Dr. Odell answered in the affirmative. After eliminating everything as the cause of death except electricity, Dr. Odell said that undoubtedly Allsop's death could have been caused by electricity.

Other testimony produced at the hearing tended to strengthen the probability of death from electric shock. On the thumb of the deceased was found a burn or mark described as a "small round dark-edged scar, one-eighth inch in diameter with white center on back of right thumb midway between first and second phalanx." Dr. Langenbacker said that in his opinion the scar or blister on the thumb did not describe an electric burn, while Dr. Anderson. referring to the above description of the mark on the thumb, pronounced it "a very apt description of an electric burn." He further said that a shock sufficient to cause death might only show a blister on the skin. Dr. Anderson also testified that such a description as that contained in the autopsy report with reference to the scar on the thumb would be a perfect description of a powder burn, and that powder burns and electric burns are very much alike in appearance. However, the record does not contain the slightest indication that Allsop had suffered a powder burn. It was not, however, necessary for the Commission, in order to arrive at the conclusion that death resulted from electric shock. to find that there was some external sign or mark. Dr. Odell testified that in this very tunnel he treated a young man for electric shock who had no mark upon him, and that the young man would have died had he not received prompt treatment. Of course, if he had died his body would not have had any marks or burns indicating the cause of death. Other physicians testified that they had read of cases in the books where death had been caused by electric shock without leaving any burns, blisters. or marks.

According to the evidence, viewed, as we must consider it, in the light most favorable to the applicants for compensation, Allsop did not die from overexertion, and did not die from any natural cause. What. then, was the probable cause of death? Is it a fair inference to say that death was caused by an external force, and if that be the only inference could that force have been anything save an electric shock? The dead body was found in the tunnel, and near it a dangerous and deadly instrumentality. Exclude all other causes than electricity. and such exclusion is clearly justified by the evidence. and what is probable? What could be, not what necessarily would be, a fair inference from the circumstantial evidence? In Wasson Coal Co. v. Ind. Com., 296 Ill. 217, 129 N. E. 786, the facts, in many respects, were similar to the facts in the instant case. In the Wasson Case a miner named Smith died suddenly in a mine entry in the vicinity of his working place. No one saw what caused his death. There was no burn on the body. Smith had been sick with the "flu," and shortly before his death complained of feeling bad and said he felt dizzy. In concluding the opinion. it was said by the court:

"No autopsy was held, and it may be admitted that the proof does not show with absolute certainty just what caused the death. The undisputed fact remains that Smith did suddenly die from some cause. There was at the place of his sudden death and within easy contact by him an electric wire carrying a current which is not disputed to have been of sufficient voltage to cause death. We have above stated the substance of the testimony relating to the effects of 'flu' and the possibility of sudden death resulting from it. To our minds that death resulted from that cause is much more remote and less probable than that it resulted from deceased's contact with the electric wire. We do not think it can be said the two views are equally compatible with the evidence. The cause of death need not be shown by positive and direct testimony, but it is sufficiently shown if the facts and circumstances proved are such that on the whole evidence

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the reasonable inference to be drawn is that it arose out of the employment. Smith-Lohr Coal Co. v. Industrial Co., 286 Ill. 34. It has been repeatedly held that we cannot weigh the evidence and determine upon which side it preponderates, but it seems to us to require more conjecture and speculation to say from the testimony that the death did not result from electrocution than to say it was so caused."

We cannot say that as a matter of law there was before the Commission no substantial evidence from which it could be fairly inferred that the death of Allsop was probably the result of an electric shock. The judgment is therefore approved and affirmed with costs.

Corfman, C. J., and Gideon, Thurman, and Frick, JJ., concur.

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PINYON QUEEN MINING CO. ET AL. v. INDUSTRIAL COMMISSION OF UTAH. (No. 3744.)

(Supreme Court of Utah. Jan. 28, 1922.)

204 Pacific Reporter, 323.

1. MASTER AND SERVANT — NOTICE OF APPLICATION FOR REHEARING IN COMPENSATION PROCEEDING UNNECESSARY.

Under the statute providing that the Industrial Commission shall not be bound by any technical or formal rules of procedure other than in the statute provided, notice of the hearing on a petition for rehearing is not required where notice of the second hearing is given in case the rehearing is granted.

(For other cases. see Master and Servant, Dec. Dig. § 414.)

2. MASTER AND SERVANT—FINDING ON EVIDENCE IN COMPENSATION PROCEEDINGS CONCLUSIVE.

Where there is any substantial evidence supporting an award under the Workmen's Compensation Act, the determination of questions of fact by the Industrial Commission is conclusive. and the Supreme Court on certiorari will not pass on the weight of the evidence.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

3. MASTER AND SERVANT—COMPENSATION RECOVERABLE FOR ENTIRE DISABILITY FROM DISEASE AGGRAVATED BY "PERSONAL INJURY."

Under Comp. Laws 1917, § 3112. as amended by Laws 1919, c. 63, providing that the words "personal injury by accident arising out of or in the course of employment" shall not include a disease except as it shall result from the injury, where a dormant disease was revived or accelerated by an accidental injury and disability resulted, the injured workman was entitled to compensation for the entire period of his disability, though prolonged because of the disease.

(For other cases. see Master and Servant. Dec. Dig. § 376[2].)

(For other definitions. see Words and Phrases, First and Second Series, Personal Injury.)

4. MASTER AND SERVANT — COMPENSATION CLAIMANT'S NEGLIGENCE IN NOT SEEKING MEDICAL TREATMENT FOR DISEASE REVIVED QUESTION OF FACT.

Where an injured workman and his employer's physician who treated him both knew that he had previously had syphilis. but the physician did not associate such disease with the injury until a test was applied, and the specific remedy for the disease was then administered and a cure effected. and it did not appear that the injured workman knew that the disease had been dormant in his system and that it was revived into activity by the injury or that a remedy had been discovered that would quickly cure it, whether he was guilty of willful neglect or culpable negligence in failing to sooner procure medical treatment was a question of fact for the Industrial Commission.

(For other cases, see Master and Servant, Dec. Dig. § 385[17].)

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Original certiorari proceeding by the Pinyon Queen Mining Company and another against the Industrial Commission to annul an award to Matt Finn of compensation for injuries. Award affirmed.

Bagley, Fabian, Clendenin & Judd, of Salt Lake City, for plaintiffs.

Herbert Van Dam. Jr., of Salt Lake City, for defendant and Matt Finn, applicant for compensation.

WEBER, J. Plaintiffs have instituted proceedings for certiorari in this court for the purpose of having annulled the award made by the Industrial Commission for compensation to one Matt Finn, who was injured on April 7, 1921. while in the employ of the Pinyon Queen Mining Company. After the award was made a rehearing was granted on application of the state insurance fund. Further evidence was thereupon taken at the second hearing. upon which the award was affirmed and the findings modified. Counsel for applicant now moves that the record and proceedings returned and certified by the Industrial Commission subsequent to the award made September 19, 1921, be stricken and disregarded for the reason that no notice of application for rehearing was ever served upon the applicant or his counsel, and no opportunity was ever given applicant to be heard respecting such motion. In support of this motion counsel say they cannot see where any harm could come to either employer or employee in requiring that each side of the controversy before the Commission be kept informed of proceedings before it, and that "employers would be quick to complain of hearings before the Commission on applications for compensation, on applications for rehearing, and on applications for lump sum payments, etc., if such hearings were held without notice to them or opportunity to be heard."

[1] So far as applications for rehearing are concerned, it would be a useless and cumbersome proceeding to have the parties brought up for a special hearing on the motion for rehearing. There is no formal hearing on a motion for rehearing, and when a petition for rehearing is pending it is properly disposed of ex parte. If denied, the adverse party has no cause for complaint, and, if granted, the parties are given notice of the rehearing, as was done in the instant case, by the Commission. The statute provides that the Industrial Commission shall not be bound by any technical or formal rules of procedure other than in the statute provided. Notice of the hearing on the petition for rehearing is not provided by the statute and no valid reason has been given why such notice should be required by the Commission. After the rehearing was granted, applicant was given notice of the second hearing, and thus all his rights were fully protected.

[2] An examination of the transcript of the evidence produced at both hearings shows that there is evidence tending to support the findings objected to and also evidence to the contrary. When there is any substantial evidence supporting an award the determination of questions of fact by the Industrial Commission is conclusive, and, as we have repeatedly held, this court will not in such cases pass upon the weight of the evidence. It is therefore unnecessary to review the testimony in this case. All the essential facts are stated in the findings of th Commission. Omitting what was found as to employment of the applicant by the mining company and the wages paid him, the Commission's findings were as follows:

"That on the 7th day of April, 1921. the engineer of the defendant sent a note into the mine. where the applicant was working, requesting him and his partner to come out of the mine and on top to assist in recovering a mine car that had gone over the top. A rope was tied to the mine car. the engineer and the applicant's partner were pulling on it, and the applicant was below pushing on the car, when his foot slipped, the

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car raised up, and the applicant fell back with the weight of the car on his right arm. and twisted it. The applicant indicated to his partner at the time of the accident that he had turned his right arm by saying, 'Wait a minute; I hurt my arm.' This happened about 9 o'clock p. m., and about 2½ hours after the applicant started to work. After the accident the applicant went back into the mine and worked about an hour, came up out of the mine, ate part of his supper, and noticed considerable swelling. in his right arm about the elbow, and suffered intense pain and was obliged to discontinue work. The next day he saw the foreman, who told him to see Dr. Bailey. However, the applicant went to see Dr. Laker at Eureka. While in Dr. Laker's office the applicant rolled up his sleeve and told the doctor that he had hurt his arm, and at that time his arm was badly swollen. For 3 years prior to the accident the applicant was able to perform his regular duties as a miner. and at no time for 3 years prior to the accident was applicant physically unable to do his daily work.

"That the applicant admits in his testimony that at the time of the accident, and for some time prior to the accident, he was afflicted with an organic disease known as syphilis. but that his syphilitic condition never interfered in any way with his employment; that he worked for the defendant satisfactorily prior to the accident and was physically able to perform his duties as a miner for the defendant; that the character and extent of the injury so received by the applicant was such that, if unaccompanied by said disease, applicant would have recovered therefrom within 6 weeks at the outside; that, if the applicant had received prompt and proper treatment, the effect thereof on said injury and the combined effect of the two would not have resulted in a total disability in excess of the 10 weeks for which applicant had already received compensation; that both the applicant and the attending physician previously had known that applicant was infected with such disease, but was not given treatment for said disease, but thereafter, on or about July 1st. applicant for the first time commenced receiving treatment for the disease, and his arm trouble cleared up within 60 days, so that applicant was able to and did resume work on September 1, 1921."

As part of its conclusions, the Commission found:

"In view of the foregoing findings, the Commission concludes that on the 7th day of April, 1921, the applicant had 'a pre-existing constitutional disease known as syphilis. which, being dormant, left his ability to perform the arduous work of a miner for which he was hired, unimpaired, and that, because of the nature of the accident being sufficiently severe to accelerate this condition, the applicant was deprived of his usual capacity for work.' While we find in finding No. 3 that the injury was such that, if unaccompanied by said disease, the applicant would have recovered therefrom within six weeks at the outside, the Commission concludes that the employer takes a man as he is, and therefore should pay compensation for the full period of disability suffered by reason of the accident sustained on the 7th day of April, 1921, without considering the syphilitic condition which no doubt prolonged his disability period. * * *"

[3] Plaintiffs contend that the conclusion of the Commission awarding applicant full compensation for the period of disability suffered by reason of the accident, without considering the syphilitic condition, is erroneous.

The question involved here may be stated as being:

"If an existing disease is aggravated by accidental injury, must compensation be paid for the resulting incapacity?"

What courts have held with uniformity is stated in Kaiser's (Corpus Juris) pamphlet on Workmen's Compensation Acts, at page 69, § 58, as follows:

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"Acceleration of a diseased bodily condition may constitute a personal injury, and an injury may be by accident, although it would not have been sustained by a perfectly healthy individual. So death may be regarded as having been caused by an injury, although there was a diseased condition prior to the injury without which death would not have ensued, and partial or total incapacity may spring from, and be attributable to, the injury, where undeveloped and dangerous physical conditions are set in motion producing such a result as well as where there is a disclocation or dismemberment, or an internal organic change capable of being exactly located." (Numerous cases are cited by the author fully sustaining the above text.)

The opinion generally expressed by the courts is that stated in Crowley's Case, 223 Mass. 288, 111 N. E. 786, as follows:

"The material evidence before the arbitration committee, submitted without the introduction of further testimonyy to the Industrial Accident Board upon review, warranted the findings that the employee had 'a pre-existing constitutional disease, known as syphilis,' which, being dormant, left his ability to perform the arduous work for which he was hired unimpaired, and that, because of the nature of the accident arising out of and in the course of employment, his nervous system suffered a shock sufficiently severe to aggravate and accelerate this condition, until general paralysis or insanity resulted depriving him of all capacity for work in the future. The statute prescribes no standard of fitness to which the employee must conform, and compensation is not based on any implied warranty of perfect health or of immunity from latent and unknown tendencies to diseases which may develop into positive ailments if incited to activity through any cause originating in the performance of the work for which he is hired. What the Legislature might have said is one thing; what it has said is quite another thing; and in the application of the statute the cause of partial or total incapacity may spring from and be attributable to the injury just as much where undeveloped and dangerous physical conditions are set in motion producing such result, as where it follows directly from dislocations or dismemberments or from internal organic changes capable of being exactly located."

For other cases see notations to L. R. A. 1916A, pp. 33 and 231; L. R. A. 1917D, 109; L. R. A. 1918F, 869; Bradbury's Work, Comp. Cases (3d Ed.) 566. See, also, annotations beginning at page 319 of Ann. Cas. 1918B, and, for English cases, page 322, Id.

The only state in which a different rule has been adopted is California. where it has been held by the Industrial Accident Commission that compensation should be awarded only for the longest period of disability for which a normal person sustaining accidental injury would reasonably be disabled. However, this ruling is the result of and is compelled by a statute which provides:

"The term 'injury.' as used in this act, shall include any injury or disease arising out of the employment. In case of aggravation of any disease existing prior to such injury. the compensation shall be allowed only for such proportion of the disability due to the aggravation of such prior disease as may reasonably be attributed to the injury." St. Cal. 1917. c. 586, § 3.

Plaintiffs state that but few workmen's compensation laws contain the provision found in the Utah statute, and therefore the decisions from the commissions and courts of other states allowing compensation in cases of accidents which aggravate an existing disease are neither binding nor helpful to this court in arriving at a proper construction or interpretation of the provision of our statute which reads;

"The words 'personal injury by accident arising out of or in the course of employment' shall include an injury caused by the willful act of a third person directed against an employee because of his employment.

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They shall not include a disease except as it shall result from the injury." Comp. Laws Utah 1917, § 3112, as amended by chapter 63, Laws of Utah, 1919.

In Indiana the statutory definition of "personal injury" as used in the Workmen's Compensation Law of that state is in substance that of Utah, and reads as follows:

"'Injury' and 'personal injury' shall mean only injury by accident arising out of and in the course of the employment and shall not include a disease in any form except as it shall result from the injury." Acts 1915, c. 106, pt. 5, § 76(d), p. 416.

This statute has been construed by the Appellate Court of Indiana, and it has been repeatedly held that, when a disease is vivified or accelerated by accidental injury, and disability results, the injured workman is entitled to compensation for the entire period during which he is disabled, though the period of disability is prolonged because of the disease.

In Re Bowers, 65 Ind. App. 128, 133, 116 N. E. 842, 843, the court says:

"Where one is injured through the negligence of another, and the former is afflicted with or predisposed to some disease, and the injury materially aggravates or incites the disease and accelerates it to the stage of disability or to a fatal termination, and the forces which contribute, each materially, to produce such disability or death, are the disease and its aggravation or acceleration by the injury, the victim or his representative has his remedy in cases governed by the common law. [Citing many cases.]

"Likewise the courts, consistent with the theory of workmen's compensation acts, hold with practical uniformity that, where an employee's afflicted with disease receives a personal injury under such circumstances as that he might have have appealed to the act for relief on account of the injury had there been no disease involved, but the disease as it in fact exists is by the injury materially aggravated or accelerated, resulting in disability or death earlier than would have otherwise occurred, and the disability or death does not result from the disease alone progressing naturally as it would have done under ordinary conditions, but the injury, aggravating and accelerating its progress, materially contributes to hasten its culmination in disability or death, there may be an award under the compensation acts. See the following. In re Madden, 222 Mass. 487, 111 N. E. 379, L. R. A. 1916D, 1000; In re Brightman, 220 Mass. 17, 107 N. E. 527, L. R. A. 1916A, 321, and note at page 293; In re Fisher, 220 Mass. 581, 108 N. E. 361; Crowley v. City, 223 Mass. 288, 111 N. E. 786; Ramlow v. Moon Lake Ice Co. (Mich.) 158 N. W. 1027, L. R. A. 1916F, 955; Hills v. Oval Dish Co. (Mich.) 158 N. W. 214; City of Milwaukee v. Industrial Comm., 160 Wis. 238, 151 N. W. 247; Hartz v. Hartford, etc., Co., 90 Conn. 539, 97 Atl. 1020; Robbins v. Original, etc., Co. (Mich.) 157 N. W. 437; Grove v. Michigan, etc., Co., 184 Mich. 449, 151 N. W. 554; Hurley Selden-Breck Co. (Mich.) 159 N. W. 311; Winter v. Alkinson, etc., Co., 88 N. J. Law, 401, 96 Atl. 360; Mazzarisi v. Ward, 170 App. Div. 868, 156 N. Y. Supp. 964; Sullivan v. Industrial. etc., Co., 173 App. Div. 65, 158 N. Y. Supp. 970; Bradbury. Workmen's Compensation Law, p. 386."

In Indianapolis Abattoir Co. v. Coleman, 65 Ind. App. 369, 117 N. E. 502, it was contended that Coleman was afflicted with syphilis at the time he sustained an injury by accident. After referring to the evidence, which was conflicting, the court says:

"Again the court may have found that he was so afflicted at the time of such accident, but that such disease was latent and that such accident accelerated it to the stage of disability. Under such facts, the existence of such disease would not of itself prevent a recovery."

Again, it is further said in the course of the opinion:

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"Appellant finally contends that the doctrine to be applied under the facts of this case is one of degree: (1) Degree of disability prior to the injury; (2) degree of disability caused entirely by the injury; (3) degree of disability caused entirely by the disease; (4) degree of disability which might have resulted from the disease alone. We cannot concur in this contention. There is no provision for the application of such a doctrine in the Workmen's Compensation Act * * of this state, and the courts of other jurisdictions have refused to recognize it under similar acts"—citing cases.

Other Indiana cases upon this subject are:: I. C. C. & M. Co. v. Calvert et al., 68 Ind. App. 474, 119 N. E. 519, 120 N. E. 709; Retmier v. Cruse. 67 Ind. App. 192, 119 N. E. 32; Puritan Bed Springs Co. v. Wolfe, 68 Ind. App. 330, 120 N. E. 417; Miller v. Beil (Ind. App.) 129 N. E. 493; Republic I. & S. Co. v. Markiowicz (Ind. App.) 129 N. E. 710; Utilities Co. v. Herr (Ind. App.) 132 N. E. 262.

The statute of Iowa relating to the subject under consideration is substantially that of Utah, although in that state the employee is entitled to compensation for personal injury arising out of and in the course of his employment, a more comprehensive term than "personal injury by accident." Referring to the words "injury" and "personal injury," the Iowa statute (Code Supp. 1913, § 2477m16) says:

"They shall not include a disease except as it shall result from the injury."

In Hanson v. Dickinson, 188 Iowa, 728, 176 N. W. 823. Hanson. the employee, had his knee injured, and the injury "lighted up" or accelerated gonorrhea, which had been dormant in his system for six years. The court held that the manifest design of the General Assembly in providing that the term "personal injuries" should not include a disease was to eliminate occupational diseases. Such obviously was also the purpose of the Legislature of this state when disease was excluded in the definition of injury by accident. In Hanson v. Dickinson, supra, the court aptly expressed a thought which is here applicable:

'The claim is not based on the disease, but on what the bruise did to the disease."

In substance the same as that of Utah is the statute of Louisiana (Act No. 20 of 1914. § 39) which provides:

"That the terms 'injury' and 'personal injuries' shall include only injuries by violence to the physical structure of the body and such diseases or infections as naturally result therefrom. The said terms shall in no case be construed to include any other form of disease or derangement. howsoever caused or contracted."

As shown by the syllabus in Behan v. Honor, 143 La. 348, 78 South. 589, L. R. A. 1918F, p. 862, the Supreme Court of Louisiana held:

"The fact that an employee, injured in performing service arising out of and incidental to his employment in the course of his employer's occupation, was already afflicted with a dormant disease that might some day have produced physical disability is no reason why the employee should not be allowed compensation, under the employers' liability statute, for the injury which added to the disease. superinduced physical disability."

And in the opinion it is said:

"The proof goes no further, in support of the defense of this suit, than to show that the plaintiff might, and perhaps would, at some time, have become disabled by the disease that was lurking in his system, even if the accident complained of had not happened. * * * The evidence leaves no doubt that the plaintiff's physical disability resulting from the accident is worse than it would be if he had not been diseased at the time of the accident. But the accident was, none the less, the proximate cause of the present disability."

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The syllabus above set out and the quotation from the text of the opinion are quoted and approved in Fox v. U. C. & O. P. Co., 147 La. 866. 86 South. 311.

Plaintiffs rely on Borgsted v. Shults Bread Co., 180 App. Div. 229, 167 N. Y. Supp. 647. In that case plaintiff was the driver of a bakery wagon, and accidentally slipped in getting off his wagon and fell to the ground, sustaining a fracture of the right tibia, the healing of which was prolonged by reason of his pre-existing syphilitic condition which, aggravated by the accident, resulted in the loss of sight. The court held that, while entitled to compensation for the fracture, though the injury may have been prolonged in results because of degeneracy due to syphilis, still he was not entitled to compensation for permanent disability due to the loss of his eyesight, which loss was the result of syphilis, but had no causal connection with the accident.

The Borgsted Case is thus distinguishable from other New York cases, but in so far as it departs from the general doctrine of the cases that we have cited it is isolated and finds no support in the decisions of the courts of New York or those of any other state.

In Van Keuren v. Dwight, etc., Co., 179 App. Div. 509, 165 N. Y. Supp. 1049, affirmed in 222 N. Y. 648, 119 N. E. 1083, it is held that, if an employee has a disease, and, having the same, receives an injury arising out of and in the course of his employment, which injury accelerates the disease and causes his death, such death results from such injury, and the right to compensation is secured even though the disease itself may not have resulted from the injury.

In Finkelday v. Heide, 193 App. Div. 338, 183 N. Y. Supp. 912, affirmed in 230 N. Y. 598, 130 N. E. 909, the claimant sustained a fracture of his wrist. At the time of the accident he was infected with syphilis, and shortly thereafter developed general paresis. It was claimed that the award should be modified so as to eliminate compensation for the disease of paresis. It was held that the fact that claimant would at a later period have been afflicted with the disease of paresis as the result of syphilis did not militate against the award.

It is not necessary "to this claim to argue that the disease or infection from which the claimant suffers did not naturally and unavoidably result from the injury. It is sufficient if the disease existed at the time of the injury and was thereby accelerated to such an extent as to impair the earning capacity."

It is argued by plaintiffs that, if the law be held to be that the acceleration or aggravation or prolongation of a disease by accidental injury sustained in the course of or arising out of the employment is compensable under the Workmen's Compensation Law, the result would inevitably be that the industries generally would soon insist that all applicants for work should pass a rigid physical examination, and that needy workmen suffering from any form of ailment or disease would thus be deprived of full and equal opportunity of obtaining employment. An answer to this argument is found in Madden's Case, 222 Mass. 487–496, 111 N. E. 379, L. R. A. 1916D, 1000:

"It is argued that grave economic consequences of far-reaching effect may follow from the act as thus construed. It is said that persons not in good health may be altogether excluded from employment to their severe hardship, while the cost of conducting commercial and industrial enterprises may become prohibitively large, all to the detriment of the general welfare and of the financial resources of the commonwealth. These considerations are of great public moment. But these factors relate to legislative questions and arguments founded on them are distinctly legislative arguments. They may be entitled to attention and deliberation at the hands of the legislative department of the government. In the present forum they cannot have decisive significance, even it it were plain that the enumerated consequences were inevitable. The function of the judicial department of the government is simply to determine whether an act is

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within the power vested by the Constitution in the Legislature, and then to enforce it according to its true meaning in cases as they arise."

Another answer is that in all those states where rulings such as those by the Industrial Commission in the present case have been upheld by the courts the predictions of dire disaster to workmen have not eventuated. Industries in those states are still employing men as they present themselves for work, and those with dormant diseases. with unsound lungs. weak hearts, and impure blood are still working by the side of those without disease or physical weakness of any kind.

[4] The third proposition advanced by plaintiffs is that for such prolongation or extension of his disability as is due to applicant's failure to seek prompt medical aid for a known syphilitic condition from which he was still suffering, and which yielded so quickly to proper treatment, the applicant. and not the industry, must bear the consequences. Counsel cite Lesh v. Ill. Steel Co., 163 Wis. 124, 157 N. W. 539, L. R. A. 1916E. 105, and quote therefrom as follows:

"The proposition that an applicant, under the provisions of this humane law, may create, continue, or even increase his disability by his willful, unreasonable. and negligent conduct, claim compensation from his employer for his disability so caused. and thereby cast the burden of his wrongful act upon society in general, is not only utterly repugnant to all principles of law, but is abhorrent to that sense of justice common to all mankind."

No doubt the workman who is injured by accident in the course of his employment may not demand compensation for disability prolonged by his willful neglect. Was there willful neglect or culpable negligence in this case? A company physician had treated the applicant in 1917 for syphilis, but the same physician was called to treat the applicant's injury, and this doctor did not associate the syphilitic condition known to him with the alleged injury. It was only later, when the Wasserman test was applied, that applicant's reviving syphilitic condition was noticed or considered. The specific remedy for the disease was then administered and a cure effected. It is not shown that the applicant knew that syphilis had been dormant for three years in his system, that he knew that it was revived into activity by the injury to his arm, or that he knew that a remedy had been discovered that would quickly cure the dread disease. Can it be said as a matter of law that the prolongation of the disease was due to the willful unreasonable, and negligent conduct of the applicant? We think not. Whether there was such willful neglect or culpable negligence on his part that the applicant should be deemed blamable for the prolongation of his injury was an issue of fact for the Commission to determine, and having by its award decided that applicant is not chargeable with willful neglect and unreasonable conduct in failing sooner to procure medical treatment, the Commission's decision on that issue must be held to be final and conclusive.

The award is affirmed.

Corfman, C. J., and Gideon and Thurman, JJ., concur.

FRICK, J. I concur. I desire to state, however, that I do so only in deference to the authorities cited by Mr. Justice Weber. Where it not for those decisions, in which statutes similar to ours are passed on. I should feel constrained to hold that in view of the language of our statute that the "personal injury" for which the employee shall be compensated "shall not include a disease in any form except as it shall result from the injury," necessarily excludes every disease except that one which is the direct result of the injury complained of. To my mind there is no escape from the conclusion that the disease in this case did not "result from the injury." and is therefore necessarily excluded. To hold otherwise necessarily results in ignoring the explicit language of the statute and leaves the matter to be determined under the law applicable to in-

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juries which were caused through the negligence of the employer. Where that was the case, however, the employee could recover nothing if his own negligence either caused or directly contributed to the injury. The employer was thus compelled to compensate for the consequences of his own negligence only, while under the decision as it stands he may be compelled not only to compensate the employee for the consequences of his own negligence, but also for the consequences of any disease which may have aggravated the injury and the consequences of which continue indefinitely. In view that under the Industrial Act contributory negligence is not a defense, the Legislature, it seems to me. intended to prevent a recovery for the consequences of any disease which manifestly did not "result from the injury." I concede. however, that the matter of adjusting and fixing compensation under the Industrial Act is not always free from difficulty, and therefore I cheerfully yield to the judgment of my Associates.

Notwithstanding the suggestion of Mr. Justice Weber to the contrary. I am, nevertheless, strongly of the opinion that the construction given the statute, if adhered to, will eventually result in compelling applicants for employment to submit to physical examination and will thus exclude those who can least afford it because they cannot pass the examinations. While the industries of the state will compensate the employees for loss through accidental injuries, they, in my judgment, as a matter of self-protection, will refuse to make compensation to those who suffer loss resulting from diseases.

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ORANGE ICE, LIGHT & WATER CO. ET AL. v. TEXAS COMPENSATION INS. CO. (No. 3762.)

(United States Circuit Court of Appeals, Fifth Circuit. January 25, 1922.)

278 Federal Reporter, 8.

2. MASTER AND SERVANT — CAUSE OF ACTION AGAINST WRONGDOER FOR COMPENSABLE INJURIES WITHIN TEXAS STATUTE NOT ABATED BY EMPLOYEE'S DEATH.

Texas Workmen's Compensation Act (Vernon's Ann. Civ. St. Supp. 1918, art. 5246—35), providing that the cause of action survives "in all cases of injuries resulting in death" of employee, does not refer to suits against an employer who has taken out insurance; the right of action against such employer being taken away by part 1, section 3 (art. 5246—3) of the act, but is intended to preserve causes of action arising from those accidents to which the employer's insurance is applicable; i. e., injuries to employees for which third persons are liable under article 5246—47 to the subrogated insurer, and to prevent such causes of action against third persons not insured from abatement by death.

(For other cases, see Master and Servant, Dec. Dig. § 394½, New, vol. 5A Key-No. Series.)

3. MASTER AND SERVANT — EMPLOYEE SUSTAINING COMPENSABLE INJURY ENTITLED TO SUE WRONGDOER.

Where telephone company's employee sustained a compensable injury by being thrown from a telephone pole through coming in contact with guy wire of paper mill company, charged with electricity from defectively insulated high-tension wires of a light company, if he had a cause of action against the telephone company for failure to furnish him a safe place to work, he none the less had a good cause of action against the light company and paper mill for causing the place to be unsafe, as their fault preceded and caused the fault, if any, of the telephone company.

(For other cases, see Master and Servant, Dec. Dig. § 354.)

In Error to the District Court of the United States for the Eastern District of Texas; W. L. Estes, Judge.

Action by the Texas Compensation Insurance Company against the Orange Ice, Light & Water Company and another. Judgment for plaintiff, and defendants bring error. Affirmed.

George E. Holland, of Orange, Tex., for plaintiffs in error.

George D. Anderson, of Beaumont, Tex., Joseph D. Frank, of Dallas, Tex., and James A. Harrison, of Beaumont, Tex., for defendants in error.

Before Walker, Bryan, and King, Circuit Judges.

KING, C. J. The Texas Compensation Insurance Company, a corporation (hereinafter styled plaintiff), a citizen of Delaware, brought suit against the Orange Ice, Light & Water Company (hereinafter styled Light company) and Yellow Pine Paper Mill Company (hereinafter styled paper mill), two corporations, each a citizen of Texas, as defendants, to recover for injuries inflicted on Jesse L. Dowdell, and for his death, resulting therefrom, under the provisions of the Texas Workmen's Compensation Law. Vernon's Complete Texas Statutes. art. 5246, subsections 1-91, inclusive.

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Dowdell was employed by the Southwestern Telephone & Telegraph Company (hereinafter styled telephone company), which carried insurance with the plaintiff, and is what is styled a subscriber under said Texas Workmen's Compensation Act. Dowdell suffered injuries from being thrown from a pole of the telephone company through coming in contact with a guy wire of the paper mill fastened to a pole erected by said mill a few feet from the telephone company's pole which guy wire passed within 4 inches of said telephone pole. The guy wire extended about 150 feet from the telephone pole, just under the high-tension wires of the light company which carried 2,300 volts of electricity. These high-tension wires were permitted to become slack and to rest on the guy wire for so long a time that the insulation was worn and the guy wires charged. The guy wire had no circuit breakers, or any other device to prevent it becoming highly charged. Dowdell had no knowledge of the presence of electricity on the guy wire. His foot came in contact with the guy wire, and he was so shocked that he was thrown from the telephone pole, was badly injured, and after some months died from the effects of his injuries.

The Texas workmen's compensation statute provides:

"Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than the subscriber to pay damages in respect thereof, the employee may, at his option proceed either at law against that person to recover damages or against the association for compensation under this act, but not against both, and if he elects to proceed at law against the person other than the subscriber, then he shall not be entitled to compensation under the provisions of this act; if compensation be claimed under this act by the injured employee or his legal beneficiaries, then the association shall be subrogated to the rights of the injured employee in so far as may be necessary and may enforce in the name of the injured employee or of his legal beneficiaries or in its own name and for the joint use and benefit of said employee or beneficiaries and the association the liability of said other person, and in case the association recovers a sum greater than that paid or assumed by the association to the employee or his legal beneficiaries, together with a reasonable cost of enforcing such liability, which shall be determined by the court trying the case, then out of the sum so recovered the association shall reimburse itself and pay said cost and the excess so recoverd shall be paid to the injured employee or his beneficiaries." Vernon's Complete Texas Statutes, art. 5246–47.

Said Dowdell during his lifetime elected to receive compensation from the plaintiff association and after his death his widow claimed compensation from it which was adjusted and paid. During Dowdell's lifetime the plaintiff association brought suit against the light company and the paper mill in the United States District Court for the Eastern District of Texas, in its own name, to recover damages for the joint use of itself and said Dowdell. After his death and the payment made to his widow, plaintiff filed an amended petition alleging said Dowdell's death on March 23, 1919, leaving his widow, Ina Dowdell, as his sole beneficiary, that plaintiff had settled with his widow for her claims under its policy of insurance, that the cause of action of Jesse L. Dowdell for pain and suffering survived to said widow, and that she had her cause of action for his death, that under the said compensation statute plaintiff was subrogated to said causes of action and filed this amended petition seeking to recover $10,000 for said pain and suffering and $40,000 for said death of said Dowdell, for the use of itself and said Ina Dowdell, who was then a citizen of Mississippi, from which recovery plaintiff should reimburse itself the sums it had paid to said Jesse L. Dowdell and Ina Dowdell and its reasonable attorney's fees. It averred it had contracted to pay a contingent fee of one third of the recovery, which was reasonable, the balance recovered, if any, to be for the benefit of Ina Dowdell.

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The trial resulted in a verdict for the plaintiff against both defendants for $5,000 for the pain and suffering, and $7,000 for the death, of said Dowdell. The defendants seek to reverse a judgment on such verdict, authorizing the plaintiff to reimburse itself by retaining the sum of $331.94 paid to Jesse Dowdell, $2,614.92 doctor's bills and other expenses in his care until his death, and $3,564.17 paid by it to Mrs. Dowdell, and $4,000 as attorney's fees to its attorneys, and the balance to go to Mrs. Dowdell.

[1] 1. The first point urged is that the United States court was without jurisdiction because, while the plaintiff is a citizen of Delaware and defendants citizens of Texas, Jesse L. Dowdell and Mrs. Ina Dowdell are to be considered for the purpose of jurisdiction as joint plaintiffs, and that at the time the original suit was filed they were citizens of Texas. We do not think this point is well taken. Here the plaintiff, because of payment made and contracts entered into, had become pecuniarily interested in this cause of action. The statute of Texas had deprived the employee and his representatives, who elected to hold the insurance association of all right to institute an action against a wrongdoer. The right to institute suit was by the statute lodged in the association. It was subrogated to all rights of the employee and his representatives, is authorized to sue in its own name, with the right to reimburse itself all sums it had paid and its reasonable attorney's fee, as fixed by the court, and was accountable only for any surplus then left to the legal beneficiary. The entire legal title to the cause of action was under this statute vested in the association primarily for its own security. This made it the sole party plaintiff on whose citizenship the jurisdiction depended. As has been said by the Supreme Court of the United States:

"Subrogation is not assignment. The most that can be said is that the subrogated creditor by operation of law represents the person to whose right he is subrogated. But we have repeatedly held that representatives may stand upon their own citizenship in the federal courts irrespectively of the citizenship of the persons whom they represent, such as executors, administrators, guardians, trustees, receivers, etc. The evil which the law was intended to obviate was the voluntary creation of federal jurisdiction by simulated assignments. But assignments by operation of law, creating legal representatives, are not within the mischief or reason of the law. Persons subrogated to the rights of others by the rules of equity are within this principle. When, however, the state, or the governor of a state, is a mere figurehead, or nominal party, in a suit on a sheriff's or administrator's bond, the rule does not apply." New Orleans v. Gaines' Administrator, 138 U. S. 595, 606, 11 Sup. Ct. 428, 431 (34 L. Ed. 1102).

Though other persons may be interested in the recovery and named in the complaint as usees, they are not parties to the action and their citizenship is not to be considered in determining jurisdiction, where the legal title is vested in a party with a substantial interest.

Where a statute of Texas and decisions of her highest court gave to a general guardian of a minor the legal right to bring a suit in the state courts in his own name to recover for personal injuries sustained by the minor, it is held that such guardian, a citizen and resident of Texas, appointed by the proper court of Texas, can bring such suit against a corporation of another state in the United States courts, although the minor and his parents were residents and citizens of another state, and therefore could not bring such suit in said United States court, and although such minor could sue in the state courts in his own name by next friend. The court said:

"If in the state of the forum the general guardian has the right to bring suit in his own name as such guardian, and does so, he is to be treated as the party plaintiff so far as federal jurisdiction is concerned, even though suit might have been instituted in the name of the ward by guardian ad litem or next friend. He is liable for costs in the event of

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failure to recover and for attorney's fees to those he employs to bring the suit, and in the event of success, the amount recovered must be held for disposal according to law, and if he does not pay the same over to the parties entitled, he would be liable therefor on his official bond." Mexican Central Ry. Co. v. Eckman, 187 U. S. 429, 434, 23 Sup. Ct. 211, 213 (47 L. Ed. 245).

See, also, Hess v. Reynolds, 113 U. S. 73, 5 Sup. Ct. 377, 28 L. Ed. 927; Dodge v. Tulleys. 144 U. S. 451, 455, 12 Sup. Ct. 728, 36 L. Ed. 501.

[2] 2. The cause of action of Jesse L. Dowdell for pain and suffering and other damages up to the time of his death was not abated by such death but was expressly preserved by the Sixteenth section of said Compensation Act. Vernon's Complete Texas Statutes, art. 5246—35. This is evident by a comparison of the language of this section with the statute previously governing abatement by death of causes of action for injuries.

Prior to the Act of May 4, 1895 (Vernon's Complete Texas Statutes, art. 5686), the common-law rule seems to have prevailed in Texas, and actions for personal injuries were abated by the plaintiff's death. (Fitzgerald v. Western Union Telegraph Co., 15 Tex. Civ. App. 143, 40 S. W. 421; City of Marshall v. McAllister, 18 Tex. Civ. App. 159, 43 S. W. 1043). By said statute the Legislature provided that "causes of action * * * for personal injuries other than those resulting in death * * * shall not abate by reason of * * * death" of either party but shall survive, etc.

This act was construed as confining survivorship to causes of action, where deceased's death was not caused by the injury. Ellyson v. I. & G. N. R. R. Co., 33 Tex. Civ. App. 1, 75 S. W. 868; Black v. Texas & Pacific Ry. Co. (Tex. Civ. App.) 161 S. W. 1077. In the light of these decisions it would seem that this section of the Workmen's Compensation Act had been passed to extend the preservation of causes of action for personal injuries sustained in course of employment, to those which resulted fatally. Its language is:

"In all cases of injuries resulting in death, where such injury was sustained in course of employment, cause of action shall survive." Act 1917, § 16, Vernon's Complete Texas Statutes, art. 5246—35.

Said section 16 of the act of 1917 does not refer to suits brought against the employer. The act gives no right of recovery against the employer who has taken out the insurance. Such right of action is taken away by section 3 of part 1 of said act. It would be inconsistent with every idea of insurance and subrogation. Mobile & Montgomery R. Co. v. Jurey, 111 U. S. 584, 594, 4 Sup. Ct. 566, 28 L. Ed. 527.

The language is intended to preserve causes of action arising from those accidents to which the insurance is applicable—i. e., injuries sustained in course of employment, for which third parties are liable—and to prevent such causes of action against third persons not insured, from abatement by death. The surviving cause of action could not properly be the right of the widow to sue for the value of the life of the deceased. Such cause of action never arose until the death of her husband. It is true it exists only by virtue of statute, and not at common law; that fact but emphasizes the statement that no cause of action existed in her prior to her husband's death, and there was no cause previously existing in her to be abated by such death.

The statute, in respect to this preservation of the cause of action of the deceased for injuries inflicted on him prior to and up to the date of his death, is very like the federal Employers' Liability Act (35 Stat. 65, c. 149; 36 Stat. 291, c. 143, (U. S. Comp. St. §§ 8657–8665). That act at first contained no provision providing that the employee's right of action should survive his death, and his death was held to abate it, leaving only the right of the dependent relatives to recover their pecuniary loss oc-

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casioned by his death. 35 Stat. 65, c. 149. The act, however, was amended, as follows:

"Sec. 9. That any right of action given by this Act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury." 36 Stat. 291, c. 143 (U. S. Comp. St. § 8665).

Passing on this amendment, the United States Supreme Court holds:

"No change was made in section 1. Taylor v. Taylor, 232 U. S. 363, 370, It continues, as before, to provide for two distinct rights of action: One in the injured person for his personal loss and suffering where the injuries are not immediately fatal, and the other in his personal representative for the pecuniary loss sustained by designated relatives where the injuries immediately or ultimately result in death. Without abrogating or curtailing either right, the new section provides in exact words that the right given to the injured person 'shall survive' to his personal representative 'for the benefit of' the same relatives in whose behalf the other right is given. Brought into the act by way of amendment, this provision expresses the deliberate will of Congress. Its terms are direct, evidently carefully chosen, and should be given effect accordingly. * * * And when this provision and section 1 are read together the conclusion is unavoidable that the personal representative is to recover on behalf of the designated beneficiaries, not only such damages as will compensate them for their own pecuniary loss, but also such damages as will be reasonably compensatory for the loss and suffering of the injured person while he lived. Although originating in the same wrongful act or neglect, the two claims are quite distinct, no part of either being embraced in the other. One is for the wrong to the injured person and is confined to his personal loss and suffering before he died, while the other is for the wrong to the beneficiaries and is confined to their pecuniary loss through his death. One begins where the other ends, and recovery upon both in the same action is not a double recovery for a single wrong but a single recovery for a double wrong." St. Louis & Iron Mtn. Ry. v. Craft, 237 U. S. 648, 657, 658, 35 Sup. Ct. 704, 706 (59 L. Ed. 1160).

[3] 3. If Dowdell might have sued the telephone company, had there been no insurance this does not render the light company and paper mill any the less liable. If he had a cause of action against the telephone company for failure to furnish him a safe place in which to work, he and his widow certainly had a good cause of action against the light company and paper mill for causing the place to be unsafe. Their fault preceded, and caused the fault, if any, which may have existed on the part of the telephone company.

4. Whether the deceased, Dowdell, was guilty of any contributory negligence, was a question for the jury, and the issue was properly submitted to them by the court.

5. The cause was fairly submitted to the jury, under a charge which properly presented every issue. The charges requested, where not given, were either fully covered by the charge given, or were properlyy refused.

The evidence was sufficient to warrant the verdict of the jury, and the judgment of the District Court is affirmed.

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WEBER v. CHICAGO & N. W. RY. CO. (No. 2861.)

(United States District Court, D. Wyoming. January 17, 1922.)

278 Federal Reporter, 258.

MASTER AND SERVANT — COMPENSATION FOR INJURIES HELD BAR TO RECOVERY AGAINST WRONGDOER.

The Workmen's Compensation Act of Wyoming (Comp. St. Wyo. 1920, § 4317) makes the remedy thereby given exclusive as between employer and employee, and section 4323 provides that, where an employee is injured under circumstances creating a liability for damages in some third party, and there is no legal liability attaching to the employer, the employee shall be left to his remedy at law against such third party, and no compensation shall be payable under the act. *Held*, that the widow of an employee, killed while in an employment within the act, who was awarded and accepted compensation thereunder, could not retain it and also maintain an action for the death against a third party.

(For other cases, see Master and Servant, Dec. Dig. § 354.)

At Law. Action by May L. Weber, administratrix, against the Chicago & Northwestern Railway Company. On demurrer to affirmative defense pleaded in answer. Demurrer overruled, and petition dismissed without prejudice.

John Dillon and G. J. Christie, both of Lander, Wyo., for plaintiff.

P. B. Coolidge, of Lander, Wyo., Wymer Dressler and Robert D. Neely, both of Omaha, Neb., and Paul S. Topping, of Nebraska City, Neb., for defendant.

KENNEDY, D. J. This is an action in which plaintiff, as administratrix of the estate of Arthur P. Weber, deceased, sues the defendant for damages on account of the alleged negligence of the defendant in causing the death of plaintiff's intestate at a railroad crossing in the town of Lander, in this state and district.

The answer filed by defendant is in the form of a general denial and a special affirmative defense, by which it appears that plaintiff's intestate, when he met his death, was in the employ of a feed and auto company in the town aforesaid, which employment was governed by the Workmen's Compensation Act of Wyoming; that this employer reported the accident under the act as required; that the state court under the provisions of the Compensation Act, thereafter upon a hearing before it adjudicated the award to the plaintiff herein, as the surviving widow of the deceased, in the sum of $2,000, as well as an award of $300 to her as guardian of the minor son of the plaintiff and the deceased employee; that thereafter the plaintiff was paid the said sums out of the fund created and held under the department of the state of Wyoming having charge of the Workmen's Compensation Act, which compensation the plaintiff accepted and received for her use and benefit; that by reason of the aforesaid facts the plaintiff is barred and precluded from maintaining this action against the defendant.

To this affirmative defense set forth in the answer the plaintiff demurred, and the hearing upon the demurrer brings up the point here under discussion, as to whether or not the defense interposed by defendant constitutes on its face a bar to the recovery sought by plaintiff. The decision of the court requires a construction of portions of the so-called Workmen's Compensation Act of this state. Three sections appear to the court to be the only portion of the act necessary

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for review here. Briefly stated, without quoting the sections verbatim, they provide as follows:

Section 4316 of the Wyoming Compiled Statutes of 1920 provides for the payment of compensation to persons injured in extrahazardous employments as defined by the act, or the dependent families of such as may die as the result of injuries, except where the injury is due solely to the culpable negligence of the injured employee. Section 4317 by its provisions makes the act exclusive, compulsory, and obligatory upon all employers and employees coming within its provisions. Section 4323 provides that, where the employee coming under the provisions of the act receives an injury under circumstances creating a liability in some third party to pay the damages, and there is no legal liability attaching to the employer, in such a case the employee shall be left to his remedy at law against such third party and no compensation shall be payable under the act.

The point in the case is: Considering the fact that the plaintiff has moved under the Compensation Act to receive benefits thereunder and has received those benefits, can she in addition thereto prosecute in the courts an action against the third party alleged to have negligently caused the death of the deceased? It is earnestly contended by counsel for the plaintiff that the Compensation Act is a form of insurance established by law to cover injuries to employees sustained in the course of their employment, regulating by certain set rules the relationship and responsibility as between employer and employee touching such injuries, and is independent of or in addition to any legal rights against third parties. It is contended by the defendant that under the act, if compensation be accepted, it relieves any third party from any liability growing out of the injury or death of the employee.

Modern legislation in most of the states has brought about laws of the character under discussion, but upon this particular point they are greatly at variance, not only in their provisions, but as well in their conconstruction by the several state courts. The Supreme Court of the state of Wyoming has passed upon the law once, in which its constitutionality was sustained in Zancanelli v. Coal & Coke Co., 25 Wyo. 542, 173 Pac. 981, but that court has not been called upon for a construction of any of the particular sections of the act.

The original English act, from which we adopted the idea, as well as practically the form, of this class of legislation, provided that the injured party or his legal representative might in a case of this character have the alternative right to proceed under the act or against the third party. In some states, notably West Virginia, the use of the act, even where no third party is involved, is optional. In Kentucky it would seem that the court has adopted a rather liberal construction of the law, holding that, in the event the party has proceeded under the Compensation Act and also under a suit against the third party, the adjusment of the damages and awards will be taken care of by the courts. In the state of Washington, it has been held by the Supreme Court of that state, and affirmed by the United States Supreme Court, that the act of that state is exclusive (except in certain incidents not affecting the point here) in settling the rights between employer and employee in case of injury or death, which consideration automatically relieves third parties from liability. A discussion of these various rules may be found in copious notes or the opinions found in the following books: L. R. A. 1916A, 100; Id. 29; Merrill v. Marietta Torpedo Co., 79 W. Va. 669, 92 S. E. 112, L. R. A. 1917F, 1048; L. R. A. 1917D, 100; Book v. City of Henderson, 176 Ky. 785, 197 S. W. 449; Bohan v. Milwaukee, L. S. & W. Ry. Co., 58 Wis. 30, 15 N. W. 803; Northern Pac. Ry. Co. v. Meese, 239 U. S. 614, 36 Sup. Ct. 223, 60 L. Ed. 467.

I do not find, however, that any of these acts upon the point involved contain the exact provisions of the Wyoming act. It is true that the Wyoming act makes its provisions the exclusive remedy as

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between employer and employee coming within the classes covered. It does not, however, provide an alternative right in so many words. In Nebraska the act of that state has been construed so as to entitle the employer to be subrogated in the event of payment of compensation to the rights of the injured employee or his personal representatives, against the third party. Otis Elevator Co. v. Miller, 240 Fed. 376, 156 C. C. A. 302.

In this case the pleadings show upon their face that the plaintiff's intestate was an employee of an auto company at the time of the accident, performing his duty as such employee, and the employment was within the scope of the act as covering an extrahazardous occupation, as therein enumerated. In the opinion of the court, therefore, the adjudication of the compensation by the state court under the act was entirely proper, and in any event was such an adjudication as would bind this court. It appears, however, that the exception in the case of the injury or death being caused by the negligence of a third party, as set forth in section 4323 of the statute, is peculiarly limited. Two clauses of this section particularly affect the rights of the plaintiff in this case, to wit: First, where there is a legal liability in some third person, and there is no legal liability attaching to the employer, which element of no legal liability of employer in this case may be assumed by the court as proven, in that there is no affirmative showing of the employer's liability, and it may therefore be disregarded; and, second, that the employee shall be left to his remedy at law against the third party, and compensation shall not be payable under the provisions of the act. The last clause appears to this court to be the deciding point in the case. If the plaintiff has a legal remedy at law against the third party, she cannot receive compensation under the act.

But the fact affirmatively appears that she has received this compensation. While it may not be conversely true that she, by accepting compensation under the act, has foreclosed her right to prosecute her claim against the third party, it must be true that, in the event she recovered damages against the third party, she could not retain the compensation under the act; else the provision that she could not receive such compensation would be held for naught, which was manifestly not the intention of the Legislature in adopting the particular phraseology. In other words, she cannot receive both damages and compensation. She is within the act as to compensation if she desires to be, and in this case has brought herself within its provisions; but she cannot retain this compensation and also receive damages from the third party. It might be that in the event a suit were instituted against the third party, and it were decided by the courts that the third party was not legally liable, the plaintiff would still have her remedy under the act for compensation. If she cannot, however, receive compensation under the act and also receive damages against a third party, the only reasonable rule which this court can figure out to cover a case with this point involved would be that the party injured, or his legal representatives, must first have adjudicated the rights accruing upon the legal liability of the third party, which adjudication, by the recovery of damages against the third party, would foreclose her against any compensation under the act. If that adjudication were adverse, and no damages were recovered, she would still have her rights under the Compensation Act. If the holding were otherwise, and in the event the plaintiff were successful in this suit, and recovered damage, which damage was less than the compensation received under the act, and the plaintiff could not be afterward compelled to return the compensation to the state on account of financial irresponsibility, she would be receiving compensation not allowed by the act.

Under these circumstances, I feel that the demurrer must be overruled, which allows the affirmative defense of the defendant to stand as a bar to the action of plaintiff in this case, and the petition must therefore be dismissed, at plaintiff's costs. It may be, provided, however,

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in the order, that such dismissal is without prejudice, so as not to penalize plaintiff unduly in any right which she may be advised that she has, as set out in her petition here, so that, in the event she returns the compensation received under the act to the state department from which it came, and makes a sufficient showing to the effect that she was not sufficiently advised as to her rights in the premises when she accepted compensation under the act, that she may again file her action for damages against the defendant.

As to whether or not in the event she were unsuccessful in her new action against the defendant in being awarded damages on account of its legal liability, she could then pursue her remedy for compensation, having already once pursued it and returned the award, is not necessary for this court to decide, as it would involve a matter to be passed upon by the State Court in again awarding or refusing to award such compensation.

STEAGALL v. SLOSS-SHEFFIELD STEEL & IRON CO. (6 Div. 259.)

(Supreme Court of Alabama. Oct. 20, 1921.)

90 Southern Reporter, 871.

1. MASTER AND SERVANT—COMPENSATION JUDGMENT REVIEWABLE ON CERTIORARI.

A party to a proceeding under the Workmen's Compensation Act cannot appeal from a judgment of the circuit court; the sole remedy being by certiorari.

(For other cases, see Master and Servant, Dec. Dig. § 412.)

Appeal from Circuit Court, Jefferson County; J. C. B. Gwin, Judge.

Application by Sallie Steagall for compensation under the Workmen's Compensation Act, for the death of her husband, Alpha Steagall, while in the employ of the Sloss-Sheffield Steel & Iron Company. From the amount awarded, and judgment thereon rendered, Sallie Steagall appeals. Appeal dismissed.

See, also, 205 Ala. 100, 87 South. 787.

Mathews & Mathews, of Bessemer, for appellant.

Tillman, Bradley & Baldwin, of Birmingham, for appellee.

This appeal was submitted under rule 46 of Supreme Court Practice (65 South. vii), and the opinion of the court delivered by

THOMAS, J. [1] A primary question presented is: Can a party to a proceeding under the Workmen's Compensation Act (Gen. Acts 1919, p. 206 et seq.) appeal from a judgment rendered by the circuit court, or is the sole revisory remedy by certiorari?

[2] The rulings sought to be presented in this court for review by appeal, rather than by certiorari, will not be considered, on the authority of Woodward Iron Co. v. Bradford, 90 South. —. A question of jurisdiction being presented, and which may not be waived by consent, the appeal will be dismissed ex mero motu.

Appeal dismissed.

Anderson, C. J., and McClellan and Somerville, JJ., concur.

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WOODWARD IRON CO. v. BRADFORD. (6 Div. 458.)

(Supreme Court of Alabama. Oct. 13, 1921.)

90 Southern Reporter, 803.

2. MASTER AND SERVANT—JUDGMENT UNDER COMPENSATION ACT REVIEWABLE ON COMMON-LAW CERTIORARI.

To review a judgment of the circuit court, under the Workmen's Compensation Act, sections 21 and 28 of which provide for appeal by certiorari, the aggrieved party must within the 30 days allowed apply for a common-law writ of certiorari, which application must set forth the questions of law sought to be reviewed, which must be apparent upon the record, and the appellate court will consider questions of law so presented, but will not review conclusions of the judge supported by any of the evidence as set out or in the application of the law to disputed facts or objections to evidence.

(For other cases, see Master and Servant, Dec. Dig. § 412.)

5. MASTER AND SERVANT—ATTORNEY'S FEES LIMITED BY COMPENSATION ACT.

Where the employee and the employer elect to adopt the Workmen's Compensation Act, section 7 of which provides that attorney's fees shall not be more than 10 per cent. of the amount recovered, they are bound by its provisions and allowance of 20 per cent. is unauthorized.

(For other cases, see Master and Servant, Dec. Dig. § 420.)

6. MASTER AND SERVANT—ATTORNEY'S FEES PAYABLE IN SOLIDO NOT ALLOWABLE ON COMPENSATION PAYABLE IN INSTALLMENTS.

Under the Workmen's Compensation Act, section 7 of which provides that the court may fix attorney's fees not to exceed 10 per cent. and the "manner of its payment," the court may not make the fees payable in solido contrary to the wishes of the employer where the compensation for death is paid in installments, notwithstanding its power under section 23 to direct a commutation or lump sum settlement with consent of the parties.

(For other cases, see Master and Servant, Dec. Dig. § 420.)

7. MASTER AND SERVANT — ALLOWANCE OF ATTORNEY'S FEES TO GUARDIAN AD LITEM FOR MINOR COMPENSATION CLAIMANT AUTHORIZED.

Where a minor claimant is brought in at the suggestion of the defendant in a suit for death under the Workmen's Compensation Act, the court is authorized to appoint a guardian ad litem to represent him, and may allow the guardian attorney's fees within the limitation fixed by section 7.

(For other cases, see Master and Servant, Dec. Dig. § 420.)

9. MASTER AND SERVANT — COMMON-LAW "MARRIAGE" WITHIN COMPENSATION ACT.

The Workmen's Compensation Act in the use of the words "husband and wife" as well as "marriage" includes common-law marriages.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

(For other definitions, see Words and Phrases, First and Second Series, Marriage.)

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10. MASTER AND SERVANT — FINDING OF DECEASED EMPLOYEE'S DIVORCE JUSTIFIED BY EVIDENCE IN COMPENSATION CASE.

In the absence of evidence that deceased employee ever had but one wife before he married compensation claimant, the variance between the given name of his first wife described as "Leona" by the witnesses and "Lorana" in a decree of divorce did not preclude the court from deciding that the witnesses and decree referred to the same woman, and that deceased had been lawfully divorced.

(For other cases, see Master and Servant, Dec. Dig. § 405[5].)

Appeal from Circuit Court, Jefferson County; J. C. B. Gwynn, Judge.

Petition by the Woodward Iron Company for common-law certiorari to review and revise the decisions and findings in proceedings by Irene Bradford under the Workmen's Compensation Act against the Woodward Iron Company, in which James Bradford was made a party claimant, or, in the alternative, an appeal from the decision. Appeal dismissed. Certiorari awarded, and cause reversed and remanded.

Huey & Welch, of Bessemer, for appellant.

Beddow & Oberdorfer, of Birmingham, for appellee.

ANDERSON, C. J. This is a proceeding to review a judgment, order, or decree of the circuit court upon a claim which arose under the "Workmen's Compensation Act" (Acts 1919, pp. 206 to 239). Said Review is sought both upon an appeal and by a petition for certiorari, in the event an appeal does not lie. All that we find in the act with reference to an appeal or review is the following expression in section 21.

"That the decision of the judge hearing the same shall be conclusive and binding between the parties, subject to the right of appeal in this act provided for."

The only other provisions providing for a review or an appeal are expressions appearing later on in section 21 and in section 28, which will be later quoted and discussed. The last expression in section 21 is:

"From such decree any party aggrieved may by certiorari within thirty days thereafter appeal to the Supreme Court of Alabama."

Had the right of appeal been given without saying that it should be done by certiorari, there could be little doubt as to what the Legislature meant, and the judgments and decrees under this act would be appealable like other judgments and decrees of the circuit court. But, as the act requires that it must be done by certiorari and within 30 days, and as the right to a common-law certiorari and an appeal are inconsistent, the former not being usually granted where there is a right of appeal, the legislative intent was evidently to provide or preserve a right to review exclusively by certiorari, and not by the unnatural and inharmonious proceeding of appealing by certiorari. This view is confirmed by the further expression in section 28 as follows:

"Provided that nothing herein contained shall be construed as limiting the jurisdiction of the Supreme Court or Court of Appeals to review questions of law by certiorari"

—also by the further fact that, knowing that, if the judgment or decree was appealable, the question would be reviewable by bill of exceptions only, other than the record, they required, by section 28, that the determination of the court shall be filed in writing with the clerk, and shall contain a statement of the facts and conclusions as determined by said judge, thus extending the scope of the record to the inclusion of said written statement of the court so as to make it a part of the record for the review of legal questions apparent upon same. It is also manifest that the Legislature did not mean an ordinary appeal, or one by the statu-

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tory certiorari as now used to sometimes remove causes from a justice of the peace court to the circuit court as these methods contemplate a general review and include questions which must be reserved and presented to this court by a bill of exceptions. The Legislature limits the time to 30 days and makes no provision for a bill of exceptions within that time, and, under the general law, the aggrieved party has 90 days for presenting a bill of exceptions, and the trial judge has 90 days after the presentation of same for signing. It thus appears that the Legislature did not have in mind the review of questions which could be properly presented only by a bill of exceptions, and in the use of the word "appeal" in this statute intended the word "review," and that it should be done by the common-law writ of certiorari, the purpose and extent of which had been frequently defined and set forth by the existing decisions of this court and with which the Legislature must be presumed to have been familiar.

Alabama was among the last states to adopt a Workmen's Compensation Law, which is in the nature of an insurance against injury, not self-inflicted, or due to drunkenness or willful misconduct of the employee. The compensation is fixed and uniform, and but few questions of law or disputed facts should arise in the administration of same, and the circuit judges who see and hear the witnesses were supposed to be better triers of the facts than the appellate courts. It was also contemplated that this law would be administered without the needless expense or delay usually accompanying personal injury suits under the Employers' Liability Act (Code 1907, § 3910), as a very simple mode of procedure is provided in case of a dispute, and, unlike most of the states placing the administration and enforcement of same in the hands of an industrial board or commission, composed generally of laymen, we have placed the administration of ours with the circuit judges of the state, who are not only presumed to be learned in the law, but experienced triers of facts, but as a safeguard against an erroneous interpretation of this law by them the Legislature intended to merely reserve to this court its right under section 140 of the Constitution to superintend and control the judgments of inferior courts and to extend, by statute, the same right to the Court of Appeals as to all cases under this act which come within its jurisdiction as to amount. Again, the Legislature provided for the administration of this law by the circuit judges without the aid of a jury, except in the sole event that willful misconduct is set up as provided in section 21, and realized that there would be no juries to be influenced or prejudiced by the technical errors of accepting and rejecting certain portions of the evidence, and that the judges would probably consider only the material evidence going to the substance of the claim or defense, and did not anticipate a necessity for a review of these questions by providing the ordinary appeal with a bill of exceptions.

[8] It has been repeatedly held by this court that—

"The supervisory power of a superior over an inferior legal tribunal by mean of a common-law writ of certiorari extends only to questions touching the jurisdiction of the subordinate tribunal and the legality of its proceedings. The appropriate office of the writ is to correct errors of law apparent on the face of the record. Conclusions of fact cannot be reviewed, unless specially authorized by statute." Birmingham v. Sou. Bell Tel. Co., 203 Ala. 251, 82 South. 519; Postal Tel. Co. v. Minderhout, 195 Ala. 420, 71 South. 91, and cases there cited; Ex parte Dickens, 162 Ala. 272, 50 South. 218; Camden v. Block, 65 Ala. 239; Independent Pub. Co. v. American Press, 102 Ala. 475, 15 South. 947.

[2] We therefore hold that, in order to review a judgment or decree of the circuit court under the Workmen's Compensation Act, the aggrieved party must within 30 days after the rendition of same apply to this court, or the Court of Appeals, as the case may be, for a common-law writ of certiorari, which application shall set forth the questions of law sought to be reviewed, and which must be apparent upon the record—

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that is, the pleading or the filed conclusion and statement of the judge as required by section 28 of the act—and the appellate court will consider what it deems questions of law as thus presented, and will not review the conclusion of the circuit judge when the same is supported by any of the evidence as set out by the judge or the reasonable tendencies of same, or in the application of the law to disputed facts. We will not, however, review the trial court as to objections to evidence, as these rulings do not pertain or belong to the record, as there is no provision for setting out same in the written statement or finding of the judge as required by section 28 of the act. Of course, cases may arise in the future when the line between what is a question of law and fact may be shadowy, and with which we will deal as the questions arise, but in order to review the same it must be a question of law apparent upon the record. This court also reserves unto itself and the justices thereof the inherent right to impose such reasonable terms or conditions as may be necessary to protect the successful party against a delay incident to the determination of the petition, as a condition precedent to an order of stay or suspension of the judgment of the trial court pending a consideration of the petition for certiorari.

[3, 4] An appeal to the Supreme Court or Court of Appeals is a part of the remedy subject to legislative control, and is not a vested right. Theo. Poull Co. v. Foy-Hays Co., 159 Ala. 458, 48 South. 785. It would therefore seem that the Legislature can limit, restrict, or abolish the right of appeal so long as it does not attempt to restrict the right of this court to exercise its superintendence and control over inferior tribunals under section 140 of the Constitution. Ex parte L. & N. R. R., 176 Ala. 631, 58 South. 315; Ex parte Candee, 48 Ala. 412; Ex parte Croom and May, 19 Ala. 566. The cases of Ex parte Haughton, 38 Ala. 570, and Tims v. State, 26 Ala. 165, dealt with statutes depriving parties of the right to appeal from the judgment of a justice of the peace, and which said right is expressly reserved by section 168 of the Constitution and its predecessors. Moreover, this defendant employer had the option of avoiding the Compensation Act, but, having elected to accept the same, is bound by its provisions and waived the right to invoke constitutional objections to same. Authorities infra.

[5] The record discloses that the trial court allowed counsel for the widow, Irene Bradford, 20 per cent., which was in the teeth of section 7 of the Workmen's Compensation Act, which limits the amounts of attorney's fees to 10 per cent., and this ruling can find neither excuse or justification unless this provision of the statute is declared invalid. We find some suggestion in the brief of appellee's counsel that said section violates certain provisions of the Constitution, but counsel, as well as the trial court, evidently overlooked the elective feature of the act both as to employer and employee and the well-established salutary rule that, having elected to operate under and abide by the act, the parties waived the right to raise constitutional objections to same. Sayles v. Foley, 38 R. I. 484, 96 Atl. 340, and cases there cited; Mathison v. Minneapolis R. R., 126 Minn. 286, 148 N. W. 71, L. R. A. 1916D, 412; Sexton v. Newark Tel. Co., 84 N. J. Law, 85, 86 Atl. 451; Borgnis v. Falk, 147 Wis. 327, 133 N. W. 209, 37 L. R. A. (N. S.) 489; Deibeikis v. Link-Belt Co., 261 Ill. 454, 104 N. E. 211, Ann. Cas. 1915A, 241; State v. Creamer, 85 Ohio St. 349, 97 N. E. 602, 39 L. R. A. (N. S.) 694; In re Opinion of Justices, 209 Mass. 607, 96 N. E. 308. Indeed, laws similar to this one have been attacked upon every conceivable ground as invading constitutional provisions, federal and state, and have been upheld by the courts. Honnold's Workmen's Compensation, pp. 58 to 89; Arizona's Employers' Liability Cases, 250 U. S. 400, 39 Sup. Ct. 553, 63 L. Ed. 1058, 6 A. L. R. 1537; Middleton v. Texas Power Co., 249 U. S. 152, 39 Sup. Ct. 227, 63 L. Ed. 527; Mountain Timber Co. v. Washington, 243 U. S. 219, 37 Sup. Ct. 260, 61 L. Ed. 685, Ann. Cas. 1917D, 642. Moreover, we do not mean to hold, if this act was mandatory instead of elective that the state

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would not have the right, under its police power, to regulate the attorney's fees under same. Boone v. State, 170 Ala. 57, 54 South. 109, Ann. Cas. 1912C, 1065, and cases there cited. See, also, Senior v. State, 205 Ala. 337, 87 South. 592, and cases there cited. It may be conceded that in some cases the attorney's fee allowed by this act may be inadequate, and especially in the instant case, in view of the vigor, skill, and ability displayed by defendant's counsel to defeat the claim of the appellee both in this as well as the trial court and the energy, skill, and ability shown by appellee's counsel in the prosecution of the claim, but this is a question to be addressed to the legislative branch of the government, and the courts cannot, and should not, for this or any other reason, brush aside a plain and unambiguous statutory provision, which is in no wise repugnant to the constitution.

[6] We also question the authority of the trial court in requiring this defendant to pay the attorney's fees in solido by advancing the same and looking to the last periodical payments plus 6 per cent. interest for reimbursement. It must be observed that, while section 7 of the act authorizes the judge to fix the fee not to exceed 10 per cent. and the "manner of its payment," this does not justify what was done in the instant case, but simply means that upon a bulk sum settlement or commutation he can direct the payment of the attorney's fees in full, or under the periodical payments the same may be applied in whole or in part to the said fees until extinguished. These words do not authorize the judge to make the employer, in effect, an insurer against the death or remarriage of a dependent widow before the maturity of the last payment, or the death or termination of the dependency of the child before the maturity of said last payments, and which would be the result by requiring the employer to pay these fees in advance and look to the last periodical payments for reimbursement. Nor was the trial court justified in directing the payment of the fees in this manner, under its power given by the act to direct a commutation or lump sum settlement or payment "in whole or in part." Section 23 of the act governs lump sum payments either upon settlement between the parties and approved by the court or of judgments procured by suit, in the event the parties did not agree upon a settlement, and authorizes a commutation to one or more lump sum payments by agreement of the parties, except as to claims for death, for permanent disability, or permanent or partial disability, for total loss of earnings, or for the loss of an arm or a hand or a foot or a leg or an eye, or of more than one of such members. As to the foregoing excepted claims, "these may be commuted only with the consent of the court," meaning that as to all claims other than the above-excepted class the payments may be commuted by agreement of the parties without the consent of the court, and that the excepted class may be commuted by agreement of the parties with the consent of the circuit court. State v. District Court, 134 Minn. 16, 158 N. W. 713, L. R. A. 1916F, 957. This being a death claim, it could not be commuted, in whole or in part, by the trial court without the consent of the parties, which includes the employer as well as the dependents. Sections 24 and 25 have no application to the question here involved; as section 24 applies to a modification of settlements made by agreement, and section 25 gives the right to the defendant or employer to make a lump sum settlement by depositing the amount, etc.

[7] The minor, James Bradford, was not a party plaintiff to the original suit or petition, but was brought in as a claimant to a part of the fund upon the suggestion of the defendant, and we think, and so hold, that the trial court was authorized to appoint a guardian ad litem to represent him, though he should have been represented by next friend had he been an original plaintiff or petitioner, and in such event the court could have authorized the attorney's fees as provided by section 7 of the act, and we think that the spirit of the law authorizes the fee allowed the guardian ad litem, and which as to amount seems to be within the limita-

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tion fixed by said section 7. The order of payment, however, contains the same vice as the one providing for the payment of the attorneys of Irene Bradford, and must, to this extent, be corrected.

The appeal is dismissed, but the writ of certiorari is awarded, and the judgment or decree of the circuit court as to the fixation of the amount of attorney's fees to counsel for Irene Bradford, as well as the manner of the payment of same, in which they also, as the guardian ad litem's fees, are to be paid, is reversed, and the cause is remanded to the circuit court in order that the fees may be fixed and the order of payment directed so as to conform with this opinion. The cost of the procedure in this court, including the transcripts, both upon appeal and certiorari, is to be paid 50 per cent. by the appellant or petitioner $33^1/_3$ per cent. by Irene Bradford, and $16^2/_3$ per cent. by James Bradford.

[8] As this is the pioneer case presenting the right, scope, and extent of reviewing judgments or decrees under the Workmen's Compensation Act, and as we have decided the only questions of law properly presented for review under the interpretation given the statute we could here conclude this opinion. But, out of deference to counsel, and which may be of some little consolation to them, we have examined and considered the other questions pressed and argued, and find no reversible error among them, even if an appeal would lie or the scope of review exceeded the limits fixed in this opinion. We agree with counsel for the petitioner that, as the decree of divorce to Jim Bradford from his first wife was not rendered until after his marriage under a license to Irene, said statutory marriage with Irene was void. But there was an abundance of evidence justifying the trial court in holding that there was a common-law marriage existing between Irene and Jim at the time of his death. They continued to live together as man and wife after the divorce, and so held themselves out for years, and the trial court could have found at least an implied contract of marriage between them.

[9, 10] We are also of the opinion that the Workmen's Compensation Act, in the use of the words "husband and wife," as well as "marriage," included common-law marriages as well as statutory ones, as such marriages have for all times been recognized in this state. Nor did the variance between the given name of the first wife, described as "Leona" by the witnesses, and as "Lorana" in the decree, preclude the trial court from holding that the deceased had been lawfully divorced from the woman with whom he formerly lived as his wife and described by the witnesses as "Leona." The trial court could have inferred from the evidence that the witnesses and decree referred to the same woman, and that the witnesses knew her as "Leona," and that her real name was "Lorana" as described in the divorce proceedings, especially in the absence of proof that deceased ever had but one wife before he married Irene or ever lived with, as man and wife, two separate women, "Leona" and "Lorana."

There was also sufficient evidence to justify the trial court in finding that the minor, James Bradford, was the lawful son of the deceased employee. Moreover, it may be questionable if this defendant, after suggesting said minor as a claimant, can complain of the ruling of the trial court in an adjudication between him and rival claimants to the fund.

The rulings of the trial court upon the admission and rejection of evidence was either without error or free from prejudice results, if error was committed.

Since the Legislature has confined the right of review to questions of law apparent upon the record, trial courts cannot be too cautious in considering and determining cases arising under this act, and should literally comply with section 28 of the same as to filing with the clerk their determination, containing a statement of the law and facts in order that an aggrieved party may be afforded the proper means of such a review as is contemplated by the statute.

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Appeal dismissed. Writ of certiorari awarded and reversed and remanded.

Sayre, Gardner, and Miller, JJ., concur.

Ex parte W. T. SMITH LUMBER CO. (3 Div. 507.)

(Supreme Court of Alabama. Oct. 20, 1921.)

90 Southern Reporter, 807.

1. MASTER AND SERVANT—COMPENSATION JUDGMENT REVIEWABLE ON RECORD ON CERTIORARI WITHOUT BILL OF EXCEPTIONS.

On a petition to review a judgment by a common-law writ of certiorari as provided by Workmen's Compensation Act of 1919, §§ 21, 28, review is confined to questions of law apparent upon the record, which includes the written statement of the trial judge, and the reviewing court may not look to a bill of exceptions which accompanies the petition.

(For other cases, see Master and Servant, Dec. Dig. § 412.)

2. MASTER AND SERVANT—PIECEWORKER CUTTING TREES HELD AN "EMPLOYEE" ENTITLED TO DISABILITY COMPENSATION BASED ON "WAGES" AND "WEEKLY EARNINGS."

One employed by a lumber company to saw down trees and cut them into logs suitable for manufacture of lumber and paid for his labor at the rate of 10 to 20 cents per tree according to size, amounting to $18 to $20 per week, included in the company's biweekly pay roll, *held* an "employee" within the statutory definition of the term and the terms "wages" and "weekly earnings" in Workmen's Compensation Act of 1919, § 36, regardless of the question of control and supervision of the work.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

(For other definitions, see Words and Phrases, First and Second Series, Employee; Wages.)

Appeal from Circuit Court, Butler County; A. E. Gamble, Judge.

Petition by the W. T. Smith Lumber Company for a common-law writ of certiorari to review the action of the circuit court of Butler county in a proceeding by H. H. Burkett to recover from said Lumber Company under the Workmen's Compensation Act for damages for the death of plaintiff's son. Writ denied.

The facts as stated by the court are that J. Lewis Burkett was a minor under 21 years of age and unmarried, and that he left surviving him only parent, his father, who is the plaintiff in this case; that he was employed by the W. T. Smith Lumber Company in the fall of 1919, and it was his duty, with another sawyer, to saw down the pine trees suitable for lumber on the lands of the defendant and to cut them into logs suitable for manufacture into lumber, and that, while engaged in this employment, the said J. L. Burkett sawed down a pine tree. which in falling caught upon another tree and from there fell, striking and injuring J. L. Burkett so that he died within a short time. For such labor he was paid from 10 to 20 cents per tree according to its size, and received from $18 to $20 per week, and of this amount he contributed to his father from $14 to $16 a week; that defendant was a corporation engaged in the manu-

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facture of lumber, employed a large number of men, operated railroads into the forest, had trees sawn and cut and conveyed by rail to its mills, and defendant had a regular pay roll and paid off regularly every two weeks.

Steiner, Crum & Weil, of Montgomery, and Lane & Lane, of Greenville, for appellant.

Powell & Hamilton and H. H. Burkett, all of Greenville, for appellee.

ANDERSON, C. J. [1] This petitioner seeks to review the judgment of the circuit court by the common-law writ of certiorari as provided by sections 21 and 28 of the Workmen's Compensation Act of 1919, pp. 206 to 239.

The only question argued and insisted upon as error is the conclusion of the trial court to the effect that the deceased was an employee or workman within the terms of said act. While the petition is accompanied by a bill of exceptions, this court cannot look to same, as the right of review is confined by the statute to a common-law writ of certiorari, and under which we can only consider questions of law apparent upon the record, but which said record includes the written statement of the trial judge as required by section 28. Woodward Co. v. Bradford, 90 South. 803.

[2] As to who did or did not constitute an employee under the Employers' Liability Act (Code 1907, § 3910), as construed by our former decisions, may not now be a material factor as the present act defines both an employer and employee. It says (section 36):

"The term 'employer' as used herein shall mean every person not excluded by section 8, who employs another to perform a service for hire and to whom the 'employer' directly pays wages. * * * The term 'employee' and 'workman' are used interchangeably and have the same meaning throughout this act, and shall be construed to mean * * * (2) Every person not excluded by section 8, in the service of another under any contract of hire, express or implied, oral or written, including aliens, and also including minors who are legally permitted to work under the laws of the state."

This act was largely borrowed from the state of Minnesota, and in the case of State ex rel. Virginia Co. v. District Court of St. Louis Co., 128 Minn. 43, 150 N. W. 211, decided prior to the adoption of the present act, while the Minnesota court deemed it unnecessary to construe the above-quoted provision, it did hold that the same was not intended to confine the relation of employer and employee within narrower limits than the rule heretofore existing. It was also held that, notwithstanding there was no evidence that the defendant reserved no control or supervision over the workmen except the inference arising from the character of the work, the question was one for the jury unless it appeared conclusively that the right to control and supervise the work was not reserved. We therefore hold that the facts as set forth by the trial judge are sufficient to justify his finding that the deceased was an employee of the defendant even under the old rule as to control and supervision over him and the work.

On the other hand, if we give the above-quoted provision a broader construction and hold that an employee under the act includes all persons not excluded by section 8 who is employed by another to perform service for hire and to whom wages are directly paid this deceased would doubtless come within the influence of the act regardless of the question of control and supervision.

"The terms 'wages,' 'weekly earnings,' and such expressions shall in all cases, unless the context clearly indicates a different meaning, be construed to mean 'average weekly earnings.'" The trial court did not err in holding that the deceased was an employee, or workman, within the Workmen's Compensation Act, and the writ must be denied.

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While we have based our opinion upon the record and followed the rule as set forth in the case of Woodward Iron Co. v. Bradford, supra, the bill of exceptions has been examined, and, it is sufficient to suggest, abounds with evidence sufficient to justify a finding by a jury or the conclusion of a judge without a jury that the defendant exercised such control and supervision over the deceased and the work as to render him an employee both under the old rule as well as the present statute.

Writ denied.

Sayre, Gardner, and Miller, JJ., concur.

McLAIN v. LLEWELLYN IRON WORKS. (Civ. 3731.)

(District Court of Appeal, Second District, Division 1, California. Jan. 6, 1922. Rehearing Denied Feb. 3, 1922. Hearing Denied by Supreme Court March 6, 1922.)

204 Pacific Reporter, 869.

1. MASTER AND SERVANT—DEPENDENT CANNOT SUE FOR DAMAGES FOR GROSS NEGLIGENCE UNDER COMPENSATION ACT.

A dependent of a servant killed in the course of his employment cannot bring action for damages for gross negligence under Workmen's Compensation Act, § 12 (b), as amended by St. 1915, p. 1079.

(For other cases, see Master and Servant, Dec. Dig. § 352.)

3. MASTER AND SERVANT—COMPENSATION ACT CONTROLS PARENT'S RECOVERY FOR DEATH OF CHILD.

A mother has no right of action under Code Civ. Proc. § 376, for death of her minor son acting as a servant unless he was employed casually under the Workmen's Compensation Act or in the excepted classes of labor.

(For other cases, see Master and Servant, Dec. Dig. § 355.)

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Agnes McLain against the Llewellyn Iron Works. Judgment for plaintiff, and defendant appeals. Reversed.

Haas & Dunnigan and J. J. Wilson, all of Los Angeles, for appellant.

Goodwin & Morgrage and L. E. Thompson,, all of Los Angeles, for respondent..

PER CURIAM. The sole question involved herein is the sufficiency of the complaint, to which the court overruled a general demurrer interposed by defendant. No answer was filed within the time allowed therefor; whereupon judgment was entered in favor of plaintiff, from which defendant has appealed.

It appears from the amended complaint:

That at all the times mentioned therein the defendant was a corporation owning and operating certain machinery for the construction and manufacture of structural iron and divers other steel and iron products; that on August 24, 1917. plaintiff was the mother of Walter McLain, who was 17 years and 10 months old. and upon whom, by reason of her husband's desertion of his family, she was dependent for her living and sup-

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port; that on said date "the said Walter McLain was in the employ of the defendant corporation at Torrance, and was then and there actually employed in performing certain work and in rendering certain services allotted to him under the instruction and supervision of a foreman and agent of the said defendant corporation, and while performing said services and work and incidental to his employment he occupied a position and place where he was directed to perform and was performing said services as an employee of the said defendant under an electric crane built of steel and iron, and of great weight, and operated in such a manner and over such a structure and in such an unsafe and dangerous manner and position and in such a negligent and reckless manner that, without any fault on the part of said plaintiff's son, said electric crane left the rails or support upon which it was operated and fell upon said plaintiff's son in such manner that the weight thereof crushed him and injured him, and in consequence of such injury so received by him the said plaintiff's son died;" "that plaintiff is informed and believes, and upon such information and belief alleges the fact to be, that the defendant, its elective officers, its foreman, and all of its employees in charge of the operation of said electric crane, knew the same was placed in an unsafe and dangerous position and was then operated in such a manner that it was liable to leave the structure supporting the same, and was liable to fall therefrom to and upon the body and person of said plaintiff's son at the place where he was directed to perform such services; that said crane fell upon and killed the said son of plaintiff on August 24, 1917, because of the gross negligence of defendant and its officers and agents in the operation of said crane on said day"
—followed by an allegation that, in consequence of the death of her said son, plaintiff has lost his companionship and support, to her damage in the sum of $25,000.

The contention of appellant is that upon the facts alleged plaintiff's sole and exclusive right to recover compensation is under and pursuant to the provisions of Workmen's Compensation Act (St. 1913, p. 283) § 12, as amended in 1915 (Stats. 1915, p. 1079).

The portions of the act pertinent to a consideration of the case as argued by counsel are the following:

Section 12 of the act provides that—

"Liability for the compensation provided by this act, in lieu of any other liability whatsoever to any person, shall, without regard to negligence, exist against an employer for any personal injury sustained by his employees arising out of and in the course of the employment and for the death of any such employee if the injury shall proximately cause death, in those cases where the following conditions of compensation concur.

"(1) Where, at the time of the injury, both the employer and employee are subject to the compensation provisions of this act.

"(2) Where, at the time of the injury, the employee is performing service growing out of and incidental to his employment and is acting within the course of his employment as such.

"(3) Where the injury is proximately caused by the employment, either with or without negligence and is not so caused by the intoxication or the willful misconduct of the injured employee.

"(b) Where such conditions of compensation exist, the right to recover such compensation pursuant to the provisions of this act, shall be the exclusive remedy against the employer for the injury or death, except that when the injury was caused by the employer's gross negligence or willful misconduct and such act or failure to act causing such injury was the personal act or failure to act on the part of the employer himself, or if the employer be a partnership on the part of one of the partners, or if a corporation, on the part of an elective officer or officers thereof, and such act or failure to act indicated a willful disregard of

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the life, limb, or bodily safety of employees, any such injured employee may, at his option, either claim compensation under this act or maintain an action at law for damages."

Section 13 provides that—

"The term 'employer' as used in sections twelve to thirty-five, inclusive, of this act shall be construed to mean," among others, any corporation which "has any person in service under any appointment or contract of hire, or apprenticeship, express or implied, oral or written, and the legal representatives of any deceased employer."

Section 14, as amended by St. 1915, p. 913, provides:

"The term 'employee' as used in sections twelve or thirty-five, inclusive of this act shall be construed to mean: every person in the service of an employer as defined by section thirteen hereof under any appointment or contract of hire or apprenticeship, express or implied, oral or written, including aliens and also including minors, but excluding any person whose employment is both casual and not in the usual course of the trade, business, profession or occupation of his employer, and also excluding any employee engaged in farm, dairy, agricultural, viticultural or horticultural labor, in stock or poultry raising or in household domestic service," and also excluding "any person holding an appointment as deputy clerk, deputy sheriff or deputy constable appointed for the convenience of such appointee and who receives no compensation from the county or municipal corporation or from the citizens thereof for services as such deputy."

[1] It is apparent that the pleader in preparing the complaint sought to allege facts bringing the case within the exception contained in subdivision (b) of section 12, which gives to an employee who survives his injuries the right, at his option, to sue for damages where the injury is the result of gross negligence on the part of a corporation, due to the act or omission of its elective officers, and where such act or failure to act indicates a willful disregard of the life and safety of its employee. The first briefs filed by counsel for the respective parties are devoted entirely to a discussion of the sufficiency of the complaint when measured by the language of the exception embodied in subdivision (b) so referred to. We may concede the allegations of the complaint bring the case within the exception which would have entitled the deceased, had he survived his injuries, to have maintained an action for damages. Plaintiff, however, while the dependent mother of deceased, was clearly not an injured employee, to whom alone is the option given to bring an action for damages in lieu of claiming compensation under the act which in express terms restricts the right of action to "such injured employee."

Assuming this to be true, counsel for respondent, in a second brief filed contends that such authority is found in section 376 of the Code of Civil Procedure, which provides:

"A father, or in case of his death or desertion of his family, the mother may maintain an action for the injury or death of a minor child, * * * when such injury or death is caused by the wrongful act or neglect of another"

—and insists that under this section the complaint states a cause of action in plaintiff.

His argument is that, conceding the complaint shows that the relation of employer and employee existed between defendant and deceased and a concurrence of the conditions of compensation as prescribed in subdivisions 1, 2, and 3 of section 12 of the Workmen's Compensation Act, and conceding that, where such conditions exist, the right to recover compensation pursuant to the provisions of the act shall, as declared in subdivision (b) thereof, be deemed the exclusive remedy against an employer for the death of an employee, and while section 14 provides that the term "employee" shall be construed to mean every person in the serv-

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ice of an employer as defined in section 13, nevertheless it in express terms excepts therefrom those persons whose employment is both casual and not in the ordinary course of the business of the employer and those injured in farm, dairy, and other specified callings; hence it is claimed that, since the contrary is not alleged, we must, in support of the judgment rendered by a court of general jurisdiction, indulge in the presumption that deceased was engaged in labor the nature of which excluded him from the operation of the provisions of the Compensation Act, citing Cockrill v. Clyma, 98 Cal. 123, 32 Pac. 888.

[2-5] The argument is ingenious, though not convincing. The right to recover in such cases did not exist at common law.. Kramer v. Market St. R. R. Co., 25 Cal. 435.. It is purely statutory, and, while counsel for respondent concedes that except for the statute plaintiff has no right to maintain the action, he insists the right is given by section 376, Code of Civil Procedure. This section, however, must be read and construed in the light of subsequent legislation embodied in the Workmen's Compensation Act, section 12 of which provides that recovery pursuant to the provisions of the act shall be the exclusive remedy against an employer for the death of an employee in those cases where the conditions of compensation specified therein exist. In our opinion, the allegations of the complaint are sufficient to show the concurrence of these conditions of compensation, namely, the existence of the relation of employer and employee; that at the time of the injury the deceased was performing service growing out of and incidental to the employment, and which was the proximate cause of the injury resulting in death. Dominguez v. Pendoia, 188 Pac. 1025. Hence plaintiff's right to recover is under and by virtue of the provisions of the act, which, save as to employees engaged in the excepted classes of labor, superseded the provisions of section 376, Code of Civil Procedure. Therefore the section in so far as applicable to the instant case, must be read as though it restricted the right of action for damages to those cases only in which the deceased employee was engaged casually or in the capacity of a dairyman, horticulturist, et cetera. Unless so engaged, plaintiff's remedy is clearly under and pursuant to the Workmen's Compensation Act. Under section 376, Code of Civil Procedure, no cause of action is vested in the mother, if married, except upon a showing that her husband had abandoned his family. To constitute a cause of action in her favor, such fact must be alleged; it cannot be assumed. And since in the instant case no right of action for the death of her son was vested in the mother, unless he was employed casually or in the excepted classes of labor, such facts, since her right depended thereon, cannot be assumed, but must likewise be alleged. It is a well-settled principle of law that in statutory actions the party suing must bring himself strictly within the statutory requirements necessary to confer the right, and this must appear in his complaint; otherwise no cause of action is stated. Dye v. Dye, 11 Cal. 163; Rhoda v. Alameda County, 52 Cal. 350; Barker v. Railroad Co., 91 Mo. 86, 14 S. W. 280.

[6] Our conclusions are: First, that in no event has plaintiff any right of action under the provisions of the Workmen's Compensation Act for the death of her son; and, second, that where the conditions of compensation prescribed by subdivisions 1, 2, and 3 of section 12 of the act are, as in the instant case, shown to exist, no cause of action is stated by a complaint, in the absence of allegations showing the employment to have been within the excepted classes of labor mentioned in section 14 of the act, and that in the absence of such showing we cannot presume the existence of such facts in support of the judgment. In our opinion, the demurrer should have been sustained.

The judgment is reversed.

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PETERSON ET AL. v. INDUSTRIAL ACCIDENT COMMISSION ET AL. (S. F. 9927.)

(Supreme Court of California. Jan. 28, 1922. Rehearing Denied Feb. 27, 1922.

204 Pacific Reporter, 390.

MASTER AND SERVANT — COMPENSATION AS "TOTAL DEPENDENTS" JUSTIFIED; "PARTIAL DEPENDENTS."

Where deceased employee maintained a home for his sister and her minor son, and made regular contributions, averaging between $40 and $50 per month, and additional sums when necessary, for their support in his home as good-faith members of his household within Workmen's Compensation Act, § 14(c), and they had no means or income except small sums earned at uncertain and irregular employment during a few summer months they were entitled to compensation as total dependents within section 9(c)1 of the act and not as partial dependents within section 9(c)2.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

In Bank.

Proceeding by Berta E. Griffin and Edward Griffin, a minor by Berta E. Griffin, his guardian ad litem, for an award under the Workmen's Compensation Law for the death of Adolphus N. Gibson, opposed by A. E. Peterson and the Employers' Liability Assurance Corporation, Limited, of London, England. From an award of the Industrial Accident Commission, the employer and insurer bring certiorari. Award affirmed.

R. P. Wisecarver and Redman & Alexander, all of San Francisco, for petitioners.

A. E. Graupner, of San Francisco, for respondents.

LENNON, J. Petitioners in this proceeding seek by certiorari to annul a death benefit award of the Industrial Accident Commission in the sum of $4,900, made to Berta E. Griffin and Edward Griffin, a minor, the sister and nephew, respectively, of Adolphus N. Gibson, who died as the result of an injury received while in the employ as an electrical engineer of the petitioner, A. E. Peterson.

The Commission found that the sister and nephew were totally dependent upon Gibson (hereinafter referred to as the deceased employee), and directed that the sum awarded as a death benefit be paid to the sister, who appeared in the proceeding before the Commission as the guardian ad litem of the minor nephew.

The sole question presented here for determination is as to the sufficiency of the evidence to warrant the finding of the Commission that the sister and nephew (hereinafter referred to as the applicants) were totally dependent for their support upon the deceased employee. It is conceded that if the applicants were, as found by the Commission, totally dependent, they were entitled to the award made, which was well within the limitation of three times the annual earnings of the deceased employee provided by the Workmen's Compensation Act in the case of total dependence. Workmen's Comp. Act of 1917 (St. 1917. p. 839) § 9 (c) 1.

It is contended, however, that the evidence adduced before the Commission shows that the applicants were in fact no more than partial dependents of the deceased employee, and therefore, in keeping with the provisions of section 9 (c) 2 of the Workmen's Compensation Act, were entitled to a death benefit award no greater in amount than the sum annually contributed to their support by the deceased employee, which, it is conceded, would not have exceeded the sum of $1,800.

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The evidence shows that in 1913 the applicants came to California at the request of the deceased employee, and up to the time of his death he provided a home for them and the means to operate and maintain it. He made this home his home during all of said time, save and except during 1919, when he was attending night school in San Francisco. During this time, however, he invariably spent the week-ends at his home in Palo Alto.

During all of this time the deceased employee contributed regularly to the support and maintenance of the family as thus constituted, such contributions averaging between $40 and $50 per month. With the money thus received, the applicant, Mrs. Griffin, paid household bills and bought clothing for herself and her son. Whenever necessary for the support of the family, the deceased employee furnished additional sums, and frequently brought home groceries and other foodstuffs, as well as articles of clothing for the applicants. In short, it is apparent from a consideration of the evidence adduced upon the entire case that the deceased employee at all times contemplated the maintenance and support of the applicants in his home as members of his household. It is not disputed but that under the circumstances the applicants were in good faith members of the deceased employee's family and household, within the meaning of the Workmen's Compensation Act, and came specifically within the relationship defined in that act. Workmen's Comp. Act of 1917, § 14 (c).

The claim of partial dependency is made and based on that portion of the evidence adduced before the Commission which shows that one of the applicants, Mrs. Griffin, at irregular periods during the summer months of 1919 and 1920, was employed in taking charge and care of the children of neighbors at a fixed rate of 25 cents per hour, and earning thereby, during the times stated, an average of between $10 and $15 per month. The other applicant, the nephew of the deceased employee, so the evidence shows, also worked for three or four months during the year 1919 delivering a daily paper, for which service he received an amount approximating $5 a month during that period. Until that summer of 1919, applicant Mrs. Griffin had not done any work other than that of caring for the deceased employee's household. Her health generally had been poor, and she had not worked for three or four months prior to the time of the deceased employee's injury. Such small amounts as she had earned had been paid into the general family fund, and her son was allowed to keep for his own amusement and pleasure the $5 a month he had earned, amounting in all to not more than $15 or $20.

The fact of the applicants' employment in the manner and at the times above stated, which concededly was uncertain and irregular, and at best continued only through a few months of a designated period, did not tend, in our opinion, in and of itself, to fix and limit their status as partial dependents of the deceased employee at the time of the latter's injury.

The Workmen's Compensation Act of this state, after specifying who shall be conclusively presumed to be wholly dependent for support on a deceased employee—and the applicants here do not come within the classification of that specification—provides that—

"In all other cases, questions of entire or partial dependency * * * shall be determined in accordance with the fact, as the fact may be at the time of the injury of the employee." Stats. 1917, sec. 14(b), p. 844.

There is nothing in the act requiring that a person must be physically or mentally incapable of supporting himself in order to be adjudged a dependent. It is but a truism to say that total dependency exists where the applicants subsist entirely on the earnings of the deceased employee, but in applying this rule courts will not deprive applicants of the rights accorded total dependents, when otherwise entitled thereto, merely because of minor considerations or benefits which do not substantially affect or modify the status of the applicants toward the deceased employee.

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Bloomington-Bedford Stone Co. v. Phillips, 65 Ind. App. 189, 116 N. E. 850.

The case of In re Lanman, 65 Ind. App. 636, 117 N. E. 671, is not, in its facts, unlike the instant case. In that case Lanman, the deceased employee, was unmarried at the time of his death, and he, at that time and for a number of years prior thereto, had been the owner of residence properly in which he and his mother and two sisters lived together until about six years before his death, during which time he provided the home and furnished it and supplied food and clothing for his mother and sisters. One of the sisters. Alice Lanman, died about five years prior to his death. Upon the death of his mother—about six years before his own death—the deceased advised the other sister, Luella Graee Lanman, the applicant in that case, not to worry, that he would furnish her a home and provide for her so long as he was able. They thereupon entered into an arrangement whereby he was to furnish the home and provide for applicant, and she, in return, was to act as his housekeeper, which arrangement was carried out and continued in effect up to the time of his death, except for a period of three weeks, during which time she worked at her profession as a stenographer, but was compelled to give up the work on account of her health. The court held that the sister was a total, rather than a partial, dependent, saying in this behalf that—

"If she was a dependent of her deceased brother in any degree, she was a total dependent. This would be true, although she may have been able to work for others, and thereby earn wages with which to support herself."

Inasmuch as the deceased employee in the instant case died in the month of January, 1920, the applicants' subsequent employment during the summer of 1920 can have no bearing upon the state of their dependency "at the time of the injury of the employee," but must be regarded only as the performance of an act of necessity to enable them to live.

The cases cited by petitioners in support of the writ are to be distinguished from the situation presented here in this, that in all of those cases it appeared that the applicants were held to be partial dependents because of the fact that, as shown in evidence, they were possessed of an income, more or less substantial and permanent, from outside sources or investments.

It appearing that at the time of the deceased employee's injury the applicants were dependent upon his earnings and contributions for shelter, food, and clothing, and had no independent means of their own, it must be held that they were total dependents.

Award affirmed.

We concur: Waste, J.; Lawlor, J.; Wilbur, J.; Shurtleff, J.; Sloane, J.

SHAW, C. J. (concurring). It appears that Berta E. Griffin, sister of the deceased, earned about $60 during the year preceding her brother's death, and by fair inference that she could continue to earn that much or more. The brother contributed to the support of himself, his sister and nephew about $720 a year, besides house rent and clothing, the cost of which was not proven. She cannot be said to have been "wholly" dependent, unless the case comes within the rule that the law disregards trifles. No rule can be laid down that will in all circumstances determine what constitutes a "trifle." The compensation law is an innovation upon rights of property in the interest of the general welfare, and it cannot be stretched to fit all cases merely for the purpose of showing liberality. One cannot be liberal in the use of the money of others. I am willing to allow this case to go on the judgment of the Commission, but I do not think the Commission should go much farther. For these reasons, I concur.

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VAN ZANDT v. SWEET. (Civ. 3569.)

(District Court of Appeal, Second District, Division 2, California. Jan. 13, 1922.)

204 Pacific Reporter 860.

1. MASTER AND SERVANT—RIGHT OF ACTION AGAINST WRONGDOER NOT DEFEATED BY COMPENSATION.

An injured employee has a right of action under Workmen's Compensation Law, § 26, as amended in 1919, against a third party causing injury, though he has received compensation from his employer's insurance carrier.

(For other cases, see Insurance, Dec. Dig. § 354.)

2. MASTER AND SERVANT—NOTICE TO COMPENSATION INSURER NOT CONDITION PRECEDENT TO EMPLOYEE'S ACTION AGAINST WRONGDOER.

The notice of action to the employer or to his insurance carrier required of the employee by Workmen's Compensation Law, § 26, is not an essential ingredient of the employee's cause of action against a negligent third person, nor a condition precedent to the employee's right to bring the action, and through failure to give notice to the employer or to his insurance carrier, subrogated to the employer's rights by section 30, subd. "f" may be ground for continuance, it is not ground for nonsuit or a verdict for defendant, if a nonsuit is the proper procedure.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by John I. Van Zandt against E. W. Sweet. Judgment for plaintiff, and defendant appeals. Affirmed.

W. I. Gilbert, of Los Angeles, for appellant.

Chas. J. Kelly, of Los Angeles, D. A. Stuart, I. B. Benjamin, A. L. Abrahams, and P. B. D'Orr, all of Los Angeles, for respondent.

FINLAYSON, P. J. This is an action for damages for personal injuries sustained by plaintiff in a collision with an automobile driven by defendant. The jury returned a verdict in plaintiff's favor, and from a judgment entered thereon the defendant appeals.

At the time of the accident, August 28, 1919, plaintiff was in the the service of an employer who had been insured by the state compensation insurance fund against liability for compensation to an employee. During plaintiff's cross-examination the fact was brought out that he had made application to the Industrial Accident Commission for compensation under the Workmen's Compensation Law (St. 1917, p. 831), and that he had been paid such compensation by his employer's insurance carrier, the state compensation insurance fund. Thereupon defendant moved the court for a nonsuit on the ground that plaintiff had received compensation under the Workmen's Compensation Law. The motion was denied. Later, and after both parties had introduced their evidence and rested, defendant requested the court to peremptorily instruct the jury to return a verdict for defendant. The requested instruction was denied. This request for a peremptory instruction was made for the same reason that the motion for a nonsuit was made, namely, for the reason that, on his own showing plaintiff had received compensation under the Workmen's Compensation Law. The sole point made on this appeal is that the

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trial court erred in denying defendant's motion for a nonsuit, and likewise in denying his request for such peremptory instruction.

[1] Without doubt, plaintiff, under the Workmen's Compensation Law in force at the time of the accident—the act of 1917, as amended by the act of 1919 (St. 1919, p. 910)—had a right of action against this defendant for damages arising out of his injuries, notwithstanding the receipt of compensation from his employer's insurance carrier. Such right of action is expressly recognized by section 26 of the act, which, so far as it is applicable to this particular point, reads:

"The claim of an employee for compensation [under the Workmen's Compensation Law] shall not affect his right of action for damages arising out of injury * * * against any person other than the employer."

Such right of action against a third party causing the injury was possessed by the injured employee under the original Workmen's Compensation Law, the act of 1913 (St. 1913, p. 279). Stackpole v. Pacific Gas & Electric Co., 181 Cal. 700, 186 Pac. 354; Bassot v. United Railroads of San Francisco, 39 Cal. App. 60, 177 Pac. 884; Hall v. Southern Pacific Co., 40 Cal. App. 39, 180 Pac. 20. If such right existed under the act of 1913, there is much stronger reason for holding that it exists under the present act, the act in force when this accident occurred; for as we have shown, the right is expressly recognized by the latter act.

[2] The gravamen of appellant's argument in this court appears to be grounded upon the assumption that plaintiff did not comply with that provision of the act which requires the employee to give notice of the action to his employer or to the latter's insurance carrier. Section 26 of the present act, after stating that the claim of an employee for compensation under the act shall not affect his right of action for damages against a person other than his employer, and after providing that if the employer has paid or become obligated to pay compensation under the act he likewise may bring an action against such third person to recover the damages, proceeds as follows:

"If either such employee or such employer shall bring such action against such third person, he shall forthwith notify the other in writing, by personal service or registered mail, of such fact and of the name of the court in which such suit is brought, filing proof thereof in such action, and, if the action be brought by either, the other may, at any time before trial on the facts, join as party plaintiff or must consolidate his action, if brought independently."

The act also provides (section 30, subd. "f") that if an insurance carrier shall have paid any compensation for which the employer is liable, such insurance carrier shall be subrogated to all the rights of the employer, and may enforce any such rights in its own name.

In no part of the record to which our attention has been called by the briefs on file does it appear that plaintiff, the employee, failed to give to his employer, or to the latter's insurance carrier, the notice required of plaintiff by the above-quoted provision of the act. We do not concede that a failure so to notify the employer or his insurance carrier would constitute a ground for a nonsuit or justify a peremptory instruction to the jury to return a verdict for the defendant. On the contrary, it would seem that, while a failure to give the prescribed notice would be ground for a continuance of the case until such time as the notice should be given, a nonsuit or a verdict for the defendant would not be warranted by such failure to notify the employer or his insurance carrier. The notice to the employer, or to his insurance carrier, is not an essential ingredient of the employee's cause of action against the negligent third party. It is not something to be done as a condition precedent to the employee's right to bring the action. However, without deciding whether a nonsuit or a peremptory instruction to find for the defendant is the proper procedure where the plaintiff has failed to give the prescribed notice, suffice it to say that, since every intendment is in favor

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of the regularity of the proceedings in the court below, we must assume, in the absence of some affirmative showing to the contrary, that plaintiff did notify his employer's insurance carrier, in writing, by personal service or by registered mail, of the fact that he had brought the action in the superior court for Los Angeles county.

[3] The appeal is so manifestly destitute of merit that we are unable to perceive any reason for it, other than a desire for vexation and delay. It is therefore a proper case for the imposition of a penalty.

The judgment is affirmed, and it is ordered that respondent recover of appellant the sum of $100 as damages on account of the appeal and his costs.

We concur: Works, J.; Craig, J.

STONG, State Treasurer, v. INDUSTRIAL COMMISSION OF STATE OF COLORADO. (No. 10236.)

(Supreme Court of Colorado. Feb. 20, 1922.)

204 Pacific Reporter, 892.

3. MASTER AND SERVANT—STATE TREASURER MUST OBEY DIRECTIONS TO INVEST COMPENSATION FUND.

Under Workmen's Compensation Act, § 141, authorizing the Industrial Commission to direct the state treasurer to invest the state compensation insurance fund, the treasurer is required to obey the Commission's directions.

(For other cases, see Master and Servant, Dec. Dig. § 383.)

5. MASTER AND SERVANT — COMPENSATION ACT PROVISION FOR INVESTMENT OF COMPENSATION FUND CONSTITUTIONAL.

Workmen's Compensation Act, § 141, authorizing the Industrial Commission to direct the state treasurer to invest the compensation insurance fund, is not in violation of Const. art. 10, § 12, and article 5, § 33, as taking away the treasurer's constitutional power over the state money, because the fund is not the general property of the state and its custody is no part of the constitutional duty of the treasurer, but he is made custodian of the fund which is not in the treasury of the state within Laws 1913, pp. 580, 582, §§ 1, 4.

(For other cases, see Master and Servant, Dec. Dig. § 347.)

En Banc.

Error to District Court, City and County of Denver; Charles C. Butler, Judge.

Mandamus by the Industrial Commission of the State of Colorado to require Arthur M. Stong, State Treasurer, to invest a portion of the state compensation insurance fund in United States bonds. From an order granting a peremptory writ, the treasurer brings error. Affirmed.

Victor E. Keyes, Atty. Gen., Charles Roach, Deputy Atty. Gen., B. M. McMullen, Asst. Atty. Gen., A. M. Stevenson, and George A. Carlson, all of Denver, for plaintiff in error.

H. E. Curran, W. F. Mowry, and Charles H. Small, all of Denver, for defendant in error.

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DENISON, J. The district court, upon the relation of the Industrial Commission, granted a peremptory mandamus, requiring Stong, state treasurer, to invest $200,000 of the state compensation insurance fund in United States bonds. He brings error.

The statute (S. L. 1919, c. 210), contains the following:

"Sec. 123. The Commission is hereby vested with full power, authority and jurisdiction over the state compensation insurance fund and may do and perform any and all things, whether herein specifically designated or in addition thereto, which are necessary or convenient in the exercise of any power, authority or jurisdiction over said fund in the administration thereof under the provisions of this act, as fully and completely as the governing body of a private insurance company might or could do, subject, however, to all the provisions of this act."

"Sec. 140. The state treasurer shall be the custodian of the state compensation insurance fund and all disbursements therefrom shall be paid by him upon warrants of the state auditor upon vouchers issued by the Commission and the state auditor is hereby authorized and directed to draw warrants upon the state compensation insurance fund for payment thereof, upon order of the Commission.

"Sec. 141. The Commission shall in writing authorize and direct the state treasurer to invest any portion of the state compensation insurance fund which in the judgment of the Commission is not needed for immediate use. Said fund, including its surplus and reserves or any portion thereof, may be invested in any warrants or bonds of the state of Colorado or of the United States of America at market price, as may be determined by the Commission. * * * Upon the direction of the Commission, with the approval of the state auditing board, the state treasurer shall sell or dispose of such portion of the investments of said fund at market price, as may be directed."

The Commission directed the treasurer to invest in United States bonds, but he disobeyed and invested in state warrants.

In this court the plaintiff in error makes four points:

[1] 1. He says that the petition neither alleges nor shows that the relator had no remedy at law.

The brief suggests an action for damages could be brought on the bond of the treasurer as custodian of the fund, and so mandamus will not lie. The conclusion necessitates the premise that no public officer who has given a bond can be compelled to do his duty. Such is not the law. Bell v. Thomas, 49 Colo. 76, 111 Pac. 76, 31 L. R. A. (N. S.) 664.

[2] 2. Plaintiff in error says:

"It affirmatively appears from the petition that the plaintiff in error is not directed by law to perform the act complained of."

[3] It is immaterial what the petition shows the law to be. We look to the statute for that. In support of this second proposition, however, it is urged that section 141 merely gives the Commission power to direct and does not require the treasurer to obey. We think such an argument requires no answer.

[4] 3. It is said that the act required involves the exercise of skill, judgment, and discretion and is not a ministerial act.. We cannot agree to this proposition.

The language is plain and incapable of two constructions. Full control of the fund is given to the Commission; the custodian is authorized to do nothing with it except upon their order, and his investment of it is restricted to "warrants or bonds of the state of Colorado, or of the United States of America at market price, as may be determined by the Commission." The custodian is as much under the control of the words "as may be determined by the Commission" as by what precedes them. Nothing is required of the treasurer by the statute but to obey the Commission and invest as directed at the market price.. It is enough here to

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cite Kendall v. U. S., 12 Pet. 524, 9 L. Ed. 1181, and People v. Higgins, 69 Colo. 79, 84, 85, 168 Pac. 740.

[5] 4. It is claimed that section 141, if construed as above, violates article 10, § 12, and article 5, § 33, of the Constitution.

The argument is that the power of the treasurer over the state money is constitutional and so cannot be taken from him by the General Assembly. This, without decision, may be conceded; and we also pass over the power given to the Legislature by said section 12 to regulate "the safe-keeping and management of the public funds in the hands of the treasurer"; yet the Constitution is not violated, because the fund in question is not the general property of the state, and its custody is no part of the treasurer's constitutional duty, but is conferred on him by statute only. The fund is not "creditable to the general revenue of the state" and is "designated for purposes other than such general revenue," and so is not in the treasury of the state. S. L. 1913, p. 580, § 1, and page 582, § 4. The treasurer, eo nomine, is made custodian of it, but gives a special bond, and anybody else, e. g., the Industrial Commission itself might have been and many hereafter be made such custodian and when the Legislature sees fit.

Judgment affirmed.

Scott C. J., not participating.

FRASCA v. CITY COAL CO. ET AL.

(Supreme Court of Errors of Connecticut. Feb. 21, 1922.)

116 Atlantic Reporter, 189.

1. MASTER AND SERVANT—ALIEN "EMPLOYEE" WITHIN COMPENSATION ACT.

An alien of any nationality is an "employee" within the Workmen's Compensation Act (Gen. St. 1918, § 5388).

(For other cases, see Master and Servant, Dec. Dig. § 361.)

(For other definitions, see Words and Phrases, First and Second Series, Employee.)

2. MASTER AND SERVANT—COMPENSATION ACT ELECTIVE.

No person is compelled to submit to the provisions of the Workmen's Compensation Act, and may indicate his refusal by written stipulation or by notice prescribed by Gen. St. 1918, § 5342.

(For other cases, see Master and Servant, Dec. Dig. § 351.)

3. MASTER AND SERVANT—COMPENSATION ACT PART OF CONTRACT OF EMPLOMENT.

Provisions of the Workmen's Compensation Act become a part of the contract of employment, and the parties are bound by them, under Gen. St. 1918, § 5342.

(For other cases, see Master and Servant, Dec. Dig. § 346.)

5. MASTER AND SERVANT—TREATIES—WORKMEN'S COMPENSATION ACT HELD NOT TO VIOLATE TREATY WITH ITALY.

The provision of the Workmen's Compensation Act (Gen. St. 1918, § 5350) which limits the compensation to be paid to alien dependents to

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half the amounts indicated in the act, unless such dependents are residents of the United States, or its dependencies, or Canada, is applicable to a resident and citizen of Italy, and does not conflict with the terms of the treaty between the United States and Italy made in 1871, and amendment thereof proclaimed July 3, 1913, providing that citizens of the respective countries shall be protected for injuries or death caused by negligence, etc.

(For other cases, see Master and Servant, Dec. Dig. § 347; Treaties, Dec. Dig. § 8.)

Case reserved from Superior Court, Hartford County; Christopher L. Avery, Judge.

Proceeding by Belma Antonina Frasca under the Workmen's Compensation Act, to obtain compensation for the death of her husband, opposed by the City Coal Company, the employer, and others. There was an award of compensation, and the applicant appealed to the superior court, which reserves the case for advice. Award affirmed.

The Compensation Commissioner found that on June 28, 1921, both the paintiff's husband and the defendant were subject to the provisions of part B of the Compensation Act; that on that day, and for more than 26 weeks prior thereto, a contract of employment existed between the plaintiff's husband and the defendant; that the plaintiff was totally dependent upon her husband within the meaning of the act; that on June 28, 1921, her husband died from an injury, which arose out of and in the course of his employment by the defendant; that his average weekly wage, computed in accordance with the terms of the act, was $27.71; and that the plaintiff was a resident and citizen of the kingdom of Italy.

The plaintiff claimed that, under the terms of a treaty between the United States and Italy made in 1871 (17 U. S. Stats. 845) and an amendment thereof proclaimed July 3, 1913 (38 U. S. Stas. 1669), the provision of section 5350 of the General Statutes of this state, which limits the compensation to be paid to alien dependents to half the amounts indicated in the act unless such dependents are residents of the United States or its dependencies or Canada, is not applicable to her, because she is a resident and citizen of Italy, and claimed that, because of her nationality, she should be paid compensation at the rate of one-half of her husband's average weekly earnings. These claims the Commissioner overruled, and awarded to her only one-half of one-half of the average weekly earnings of the deceased. From this award the plaintiff appealed to the superior court, which reserved the cause for the advice of this court.

Ralph O. Wells, of Hartford, for plaintiff.

A. Storrs Campbell, of Hartford, for defendants.

BURPEE, J. (after stating the facts as above). [1, 2] The Workmen's Compensation Act of this state defines an "employee" as "any person who has entered into or works under any contract of service or apprenticeship with an employer," not including an outworker, a casual worker, or a member of the employer's family dwelling in his house. General Statutes, § 5388. This definition plainly includes every alien of any nationality. No person is compelled to submit to the provisions of this act. Powers v. Hotel Bond Co., 89 Conn. 143, 147, 93 Atl. 245. But all contracts of employment, except those including less than five employees, "shall be conclusively presumed to include a mutual agreement between employer and employee to accept part B" of the act, "and become bound thereby," unless either party shall indicate his refusal to accept by written stipulation in the contract or by notice prescribed by the statute. General Statutes § 5342. When the employer and employee shall have accepted part B o the act, the employer shall be liable to pay, on account of injury or deat

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resulting from injury sustained by an employee arising out of and in the course of his emloyment, only compensation in accordance with a scale provided in the act, and the employer and employee mutually renounce and waive all other rights and claims not given and included in the scale. General Statutes, § 5341. In that scale it is prescribed that there shall be paid on account of death, to those wholly dependent upon the deceased employee at the time of his injury, a weekly compensation equal to half of the average weekly earnings of the deceased at the time of his injury. General Statutes, § 5349. Among "those wholly dependent" is conclusively presumed to be a wife living with her husband at the time of his injury or regularly receiving support from him; but only half the compensation indicated for dependents shall be paid to "alien "dependents" unless they are residents of the United States or its dependencies or of Canada. General Statutes, § 5350.

[3] These were the provisions of our Compensation Act in effect when the plaintiff's husband and the defendant entered into their contract of employment. They became a part of the contract, and the parties were bound by them. Powers v. Hotel Bond Co., 89 Conn. 143, 147, 93 Atl. 245; Kennerson v. Thames Towboat Co., 89 Conn. 367, 371, 94 Atl. 372, L. R. A .1916A, 436; General Statutes, § 5342. To them must be given the same force and effect that would be given to the same provisions if they had been specifically written into a contract specially prepared, accepted. and signed by the parties without reference to the act.

[4, 5] We understand that the plaintiff concedes that this is true respecting the rights and claims which her husband might have had and made upon his employer if he had survived his injury; but she contends that the compensation to be paid to her as his dependent widow cannot be limited to one-half the amount that she would receive if she were a resident of the United States or Canada. This contention is urged in spite of, and indeed because of, the fact that she is a citizen and resident of Italy. It rests upon her interpretation of the meaning and effect of the treaty between that kingdom and the United States as amended in 1913. Hence we are called on to determine what is the true meaning and effect of this treaty as it stands so far as it bears upon our Compensation Act. For this purpose it is unnecessary to consider the treaty-making power of the United States government, or the obligations of treaties when made. They are a part of "the supreme law of the land; and the judges in every state shall be boundy thereby." Const. U. S. art. 6. But their construction and application, whenever necessary, are, as with any other law, to be considered and determined by the courts. To these questions we first give our attention in the present case.

This treaty was made in 1871. Its object is indicated in its title, "Treaty of Commerce and Navigation." The material articles are as follows:

Article 2. "The citizens of each of the high contracting parties shall have liberty to travel in the states and territories of the other, to carry on trade, * * * and generally to do anything incident to or necessary for trade, uon the same terms as the navies of the country, submitting themselves to the laws there established."

Article 3. "The citizens of each of the high contracting parties shall receive, in the states and territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives, on their submitting themselves to the conditions imposed upon the natives."

The United States Supreme Court has held that, by fair construction, these articles did not confer upon relatives of a deceased employee who are aliens resident in Italy a right of action for his death, although such a right is given by a statute of a state to native resident relatives. Maio-

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rano v. Baltimore & Ohio R. Co., 213 U. S. 268, 29 Sup. Ct. 424, 53 L. Ed. 792. It is said on page 274, of 213 U. S., on page 426 of 29 Sup. Ct. (53 L. Ed. 792):

"Articles 2 and 3 deal with the rights of the citizens of one party sojourning in the territory of the other. There seems to be nothing pertinent to the case in article 2. But special stress is laid upon article 3, which stipulates for the citizens of each, in the territory of the other, equality with the natives of rights and privileges in respect of protection and security of person and property. It cannot be contended that protection and security for the person or property of the plaintiff herself have been withheld from her in the territory of the United States, because neither she nor her property has ever been within that territory. She herself, therefore, is entirely outside the scope of the article."

This decision was handed down April 5, 1909. Apparently because of the construction thus given to the terms of the treaty of 1871, its high contracting parties, expressly stating that they desired "to define more accurately the rights of their respective citizens in the territories of the other," agreed that article 3 of that treaty should be replaced by the following provision:

"The citizens of each of the high contracting parties shall receive in the states and territories of the other the most constant security and protection for their persons and property and for their rights, including that form of protection granted by any state or national law which establishes a civil responsibility for injuries or for death caused by negligence or fault and gives to relatives or heirs of the injured party a right of action, which right shall not be restricted on account of the nationality of said relatives or heirs; and shall enjoy in this respect the same rights and privilges as are or shall be granted to nationals, provided that they submit themselves to the conditions imposed on the latter" 38 U. S. Stats. 1669.

This substituted provision, expressly intended "to define more accurately the rights" of Italian citizens in the territory of the United States, does not mention or refer to Italian citizens in Italy. By the original treaty an Italian sojourning in the United States should receive all the direct protection for person and property secured by our laws to our own people, including all rights of action for himself or his personal representatives. Among these, of course, was the right of action granted by our laws to a workman for injuries caused by negligence or fault of his employer. In the article substituted in 1913, the same right was extended in case of the death of the injured person to his relatives or heirs, and this is the right referred to in this new article by the words "which right shall not be restricted on account of the nationality of said relatives or heirs." This prohibition does not mention any restriction on account of nonresidence. Nor are dependents included in its terms; for relatives and heirs are not necessarily dependents, and the use of the former words indicates plainly that the parties to the amendment of 1913 had in mind the connection of kinship rather than of dependency. The title of the original treaty and the language used in article 1, which have not been changed, and the expressed purpose and the terms of the amendment of 1913, seem to indicate clearly that the later provision does not, and was not intended to, affect the rights of Italian subjects not residing in this country. And we find nothing in the terms of the original treaty or of the substituted provision which applies to the privileges or rights granted to an alien dependent of a deceased Italian workman by the Workmen's Compensation Act.

We concede that these treaties should be as broadly construed as they reasonably may be construed. But, if we could admit that their provisions are applicable to the amount of compensation to be paid to this nonresident Italian claimant, it would not follow that she should receive the same amount as a resident of the United States or Canada. At most she may enjoy only the same rights and privileges as are granted to our dependent

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nationals. Exactly those rights and privileges are granted to her by the clause of our act which is in question. It limits the compensation to be paid to "alien dependents" unless they are also residents—that is, to dependents who themselves are nonresident aliens. Whether the workman on whom they were dependent was an alien or a citizen does not concern this limitation. If he was a citizen his nonresident alien dependents may be awarded only one-half the compensation indicated in the act for his resident dependents; if he was an alien, his nonresident alien dependents will be treated in the same manner. The restriction affects the alien dependents of nationals and Italians alike. There is no discrimination unfavorable to the subjects of Italy or of any foreign country because of nationality. The resident alien dependents of any nationality are not affected. The alien dependent who resides in a foreign country might reasonably be regarded by the Legislature less favorably than the alien who lives in our country, subject to our laws and conditions of living, and dependent for protection, and perhaps upon our institutions and our peoples.

A state has a right to debar aliens from holding shares in her corporations, or to admit them to that privilege only on such terms as she may prescribe. State v. Travelers' Ins. Co., 70 Conn. 590, 600, 40 Atl. 465, 66 Am. St. Rep. 138. So, too, it is within its power to withhold any compensation from aliens.

"The power of the Legislature * * * to declare to whom and in what amount compensation shall be made, cannot be doubted." Gregutis v. Waclark Wire Works, 86 N. J. Law, 610, 615, 92 Atl. 354, 356; Victor Chemical Works v. Industrial Board, 274 Ill. 11, 19, 113 N. E. 173, Ann. Cas. 1918B. 627.

Such a restriction was not in conflict with the treaty of 1871 between the United States and Italy. Di Biasi v. Normandie Water Co. (D. C.) 228 Fed. 234; Bjolstad v. Pacific Coast S. S. Co. (D. C.) 244 Fed. 634; Casella v. McCormick, 180 App. Div. 94. 167 N. Y. Supp. 564. The amendment made in 1913 with the declared and specific purpose "to define more accurately the rights of their respective citizens in the territories of the other," expressly included the formerly withheld right of action for death caused by negligence or fault which is granted by our laws to the relatives or heirs of the injured person, and declared that that right shall not be restricted on account of their nationality. It did not affect other rights of Italian subjects. They remain the same as those which have been or shall be granted to our nationals. Relatives and heirs as such are not mentioned in our Compensation Act; but whenever relatives or heirs are also dependents, their rights and privileges as dependents have not been restricted by that act on account of their nationality, nor affected in any way differently from those of our native citizens. In this connection it is worthy of consideration that this provision is peculiar to our act, which was passed May 29, 1913, and that the treaty with Italy had previously been prepared and concluded on February 25, 1913. Therefore it would seem to be reasonable to assume that this provision was not in the minds and purpose of the high contracting parties or included in the meaning and terms of the treaty.

Counsel have been able to point to but one decision concerning this subject made by a court of last resort in this country. Vietti v. Mackie Fuel Co., 109 Kan. 179, 197 Pac. 881. This decision is not applicable to our Compensation Act or to the facts in this case. The Kansas statute provides:

"That if the workman does not leave any dependent citizen of or residing at the time of the accident and injury, in the United States, or the Dominion of Canada, the amount of compensation shall not exceed in any case the sum of $750."

The Kansas Supreme Court held that the Legislature "made a clear discrimination on grounds of nationality and residence," and for that rea-

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son the statute was repugnant to the letter and intent of the treaty with Italy as amended in 1913. Moreover, the dependents in that case, while natives of Italy, were unnaturalized residents of Kansas. In view of these conditions, the court said:

"It will be observed that the treaty plainly purports to place citizens of the two nations upon an equality in respect to their persons and property rights where citizens of one country are domiciled in the other, and there is also a stipulation that the relatives and heirs of an injured party shall be given a right of action which shall not be restricted on account of the nationality of such relatives or heirs. and there is the further added condition that aliens, who submit themselves to the conditions imposed on nationals, shall enjoy the same rights and privileges as nationals. Under these provisions, the citizens of Italy who may be in this country, and who are not enemies of the country, are entitled to the same rights and privileges in respect to their persons and property as are enjoyed by our own citizens."

These conclusions are certainly not inconsistent with those we have reached.

The superior court is advised that there was no error in the award of the Compensation Commissioner.

The other Judges concurred.

BENTON COAL CO. v. INDUSTRIAL COMMISSION ET AL.
(No. 14327.)

(Supreme Court of Illinois. Feb. 22, 1922.)

134 Northeastern Reporter, 37.

1. MASTER AND SERVANT—EVIDENCE HELD TO SHOW INCREASED DISABILITY AFTER FIRST AWARD OF COMPENSATION.

Evidence of the nature of an employee's injuries at the time of the first hearing before the arbitrator, at which he was allowed compensation for temporary disability, and of his condition at a second hearing before the arbitrator and before the Commission, after which he was allowed compensation for total permanent disability, *held* to sustain the finding of the Commission that the disability had increased after the first award was made, so that a second award was justified.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

2. MASTER AND SERVANT — LEGITIMATE INFERENCE BY COMPENSATION COMMISSION FROM FACTS IS NOT CONJECTURE.

While the finding of the Industrial Commission must be based on legitimate conclusion from facts proved by competent evidence. if there is a legitimate inference from such facts it is not invalid as guess or conjecture.

(For other cases, see Master and Servant, Dec. Dig. § 405[1].)

3. MASTER AND SERVANT—EVIDENCE HELD NOT TO SUSTAIN COMPENSATION FOR PERMANENT DISABILITY.

Evidence at a second hearing before the arbitrator and before the Industrial Commission, showing that the employee was still unable to do any lifting. with a letter from the Commission's physician that he should

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do only light work until ligaments in his back was restored, *held* not to sustain the finding of the Commission that the employee's disability was permanent.

(For other cases, see Master and Servant, Dec. Dig. § 405[6].)

Error to Circuit Court. Franklin County; C. H. Miller, Judge.

Proceeding under the Workmen's Compensation Act by Mike Pazro, to recover compensation for personal injuries, opposed by the Benton Coal Company. A second award, allowing compensation for total permanent disability, was affirmed by the Circuit Court, and writ of certiorari quashed, and the employer brings error. Reversed and remanded with directions.

W. H. Hart and W. W. Hart, both of Benton, for plaintiff in error.

W. P. Seeber and Layman & Johnson, all of Benton, for defendant in error.

CARTER, J. An application for adjustment of claim was filed January 2, 1919, by Mike Pazro, 34 years old. alleging that on October 2, 1918, while he was "trapping" in plaintiff in error's mine, a coal car knocked a prop so that it fell upon him, injuring his back and hip, which affected him in walking and in bending over. The matter was heard before an arbitrator, and an award was entered May 13, 1919, in Pazro's favor. There being no appeal from the arbitrator's award, it became the finding of the Industrial Commission under the statute. On August 28, 1919, Pazro filed a petition with the Industrial Commission alleging that his disability had increased, and praying for additional compensation. Thereafter, on a hearing before the Industrial Commission on May 5, 1920, the Commission entered an award allowing Pazro compensation at the rate of $15 per week for 266⅔ weeks, and thereafter a pension for life equal to 8 per cent. of $4,000 annually, payable in monthly installments of $26.66, holding that the accidental injuries had resulted in permanent total disability. On review before the circuit court in June, 1921, that court affirmed the decision of the Industrial Commission, and quashed the writ. From the order of the circuit court the proceeding has been brought here by writ of error for further review.

It was stipulated between the parties on the original hearing before the arbitrator that the parties were operating under and subject to the Workmen's Compensation Act (Hurd's Rev. St. 1919, c. 48, §§ 126–152i), that the injury arose out of and in the course of the employment; that plaintiff in error had notice of the accident within 30 days from the date of the injury, and demand for compensation was made within the time required by law; that Pazro had two children under the age of 16, and that he returned to work for plaintiff in error November 18, 1918.

On the hearing before the arbitrator Dr. Buntin, a witness for plaintiff in error, examined the X-ray plates taken of Pazro's injury, and testified that they showed no abnormalities, and that an examination of Pazro on the date of the hearing convinced him that the applicant had sustained no permanent injury; that there may have been a little rheumatic disorder, but that, in his opinion, the applicant thought he was in worse condition than he really was, and for that reason avoided using the parts affected by the injury; that the applicant could do any kind of work, and it would be better for him, physically, if he did work.

The applicant testified on the hearing before the arbitrator that he had never had an injury before in his life, and never had been under a doctor's care until he was injured by being hit by this prop; that at the time he testified he was sick and could not work; that his back was sore and weak when he bent down; that when he stood straight it did not bother him; that he could load coal, but could not pick it up; that his left hip hurt him; that when he walked or stood a good deal he was in

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pain; that he could not load coal for more than 10 minutes before he had to straighten up, because he could not continue to bend down for a long time; that before he was hurt he loaded coal all the time; that the injury to his hip affected his walking and going up stairs. He testified on cross-examination that he returned to work after the injury and worked all the time up to the hearing before the arbitrator; that he did not use a cane or crutch when he walked; that he felt pretty well during the day, but not so well in the morning; that he had been treated by a St. Louis doctor, who told him that he would be all right in 6 months; that the X-ray pictures were taken in St. Louis; that at the time he testified he was working about 3 days a week.

When applicant applied for an increase because of the recurrence of the disability, by stipulation between the parties plaintiff in error agreed to advance $100 as temporary compensation, and applicant went to the medical director of the Industrial Commission for an examination. Thereafter, on January 26, 1920, the medical director ,Dr. Magnuson, wrote a letter to the arbitrator, which was admitted in evidence by agreement of the parties as if he had so testified, in which he stated that Pazro had been under his observation and care from October 31, 1919, to the date of the letter; that he had entirely recovered so far as pain in his back was concerned when standing in an upright position, but the ligaments of his back were still weak; that the writer had given the claimant positive instructions not to do any work which would involve stooping or lifting; that he would be able to return to light work, such as trapping, about February 15, and that not until 6 months from the time he returned to light work should he be asked or allowed to do anything in the way of lifting; that if he did any lifting before the ligaments were strong the conditions which had laid him up to that time would recur, and there would be another disability which would be more serious than the last; that in justice to both the man and the company it would seem that he ought to have the kind of work that would strengthen and not overtax the overstrained ligaments of his back. After this letter was admitted in evidence Pazro himself testified before the Industrial Commission, stating he had quit working for plaintiff in error on July 3, 1919, and had not worked since that time; that his back hurt and was sore; that he could not lift anything now; that he could just stoop down to his shoes, but could not stoop down and raise anything; that he could not draw a bucket of water from the well; that he could not bend either side; that his side and back hurt him; that he could not lie down on one side nor on his back, and could not sleep; that he was not as strong as when his case was first heard before the arbitrator; that some days his back was better than on other days. The evidence also tends to show that he suffered more than when he testified before the arbitrator; that he could not do any work at the time of the hearing before the Industrial Commission.

[1] It is insisted by counsel for plaintiff in error that there is no competent evidence in the record that shows that the injury had recurred or increased since the original hearing before the arbitrator, and that there was no competent evidence before the Industrial Commission that he was permanently totally incapacitated for work. It is obvious from the testimony of the applicant taken before the arbitrator and that taken on the hearing before the Indusrial Commission on the petition asserting that the injury had recurred and increased that the two descriptions of his injury were clearly different, and we think the letter of Dr. Magnuson describing his condition is very different as to the permanent nature of the injury from the testimony of Dr. Buntin on the hearing before the arbitrator. On the hearing before the Industrial Commission on the petition for recurrence of the injury, applicant testified that he could not work or sleep, could not lie on his back or side, and could not lift, whereas his testimony plainly showed that he could do light work at the time of the original hearing before the arbitrator. There is nothing in

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this record to indicate that the applicant is unworthy of belief, or that his testimony should not be considered competent or that the Industrial Commission was not justified in accepting it as true. In our judgment there was ample evidence that the disability had increased.

[2] While the finding of the Industrial Commission must be based upon a legitimate conclusion from the facts proved by competent evidence (Carson-Payson Co. v. Industrial Com., 285 Ill. 635, 121 N. E. 264). if it is a legitimate inference it is not guessing or conjecture (Peoria Railway Terminal Co. v. Industrial Board, 279 Ill. 352, 116 N. E. 651; Squire-Dingee Co. v. Industrial Board, 281 Ill. 359, 117 N. E. 1031).

[3] A more serious question raised by the argument of counsel for plaintiff in error is that there is no competent evidence in the record of the permanent total disability of the applicant. The testimony of Dr. Magnuson does not clearly indicate that there is a permanent disability, but shows that there might be if applicant did not take care of himself, or if he strained himself in doing improper work. There is nothing in the testimony of the applicant given on either hearing that seems to us to justify the conclusion that he is permanently totally disabled. There are different characters of disability as well as degrees of disability—some in which the permanency of the disability is more apparent than in another case. If one has lost a hand or a foot that loss can clearly be accepted as permanent. If one is confined to bed from a complication of causes and results the permanency or temporary character of the disability may be less apparent than is the loss of the hand or foot. But a person may be no less permanently disabled because the permanent character of the injury can only be determined from a full knowledge of the facts regarding the injury. and possibly basing the reasoning upon objective and subjective tests or symptoms. The injured person may be entirely unable to analyze his condition, and. possibly, through ignorance or lack of knowledge of the English language. be unable to tell many of the symptoms accompanying his disability. He may be able to tell whether he can lift without its hurting him. or whether he can lift as much at one time as at another. or whether he can sleep, or whether he is as strong as he was. In many cases it is difficult to tell wether a disability is permanent, and the victim of an accident may be correct in his judgment or he may be mistaken as to the character of the disability, or whether he is permanently injured, and the physicians also may be mistaken as to the permanent character of the injury. It is well known that instances are numerous where physicians disagree as to whether an injury is permanent or only temporary, and the Industrial Commission necessarily must act on the testimony before it in order to find whether an injury is temporary or permanent. Beyond question, the evidence on which it bases its conclusion should not be a mere guess, or based upon conjecture or surmise, but should be a legitimate conclusion from the competent evidence heard before it. Under this rule the evidence does not support the finding that there was a permanent injury.

For that reason the judgment of the circuit court is reversed, and the cause remanded to that court, with directions to set aside the finding of the Industrial Commission, and for such further proceedings as may be provided by statute.

Reversed and remanded, with directions.

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BOARD OF EDUCATION OF HIGH SCHOOL DIST. NO. 502 v. INDUSTRIAL COMMISSION ET AL. (No. 14112.)

(Supreme Court of Illinois. Feb. 22, 1922.)

134 Northeastern Reporter, 70.

1. MASTER AND SERVANT—INJURY TO MANUAL TRAINING TEACHER OF DISTRICT HIGH SCHOOL HELD COMPENSABLE, AS WITHIN STATUTORY PROVISIONS FOR EMPLOYEES IN AN "ENTERPRISE" AND "WORKSHOP."

A manual training teacher, employed by a high school district in its manual training department, conducted in a building separate from school building and containing tools for all kinds of woodwork, including a planing machine, a circular saw, a ripsaw and a handsaw, was entitled to compensation, under the Workmen's Compensation Act, for injuries from contact with the circular saw, which was unguarded, since the district was an employer and the teacher an employee, under sections 4 and 5, and the conducting of the manual training school was an "enterprise," and the manual training room was a "workshop," within section 3, subd. 8, in view of Laws 1915, p. 418. § 1, notwithstanding section 29, defining term "workshop."

(For other cases, see Master and Servant, Dec. Dig. § 364.)

(For other definitions, see Words and Phrases, First and Second Series, Enterprise; Workshop.)

Error to Circuit Court, Bureau County; Joe A. Davis, Judge.

Proceeding under the Workmen's Compensation Act by William A. Hemmer for compensation for injuries, opposed by the Board of Education of High School District No. 502, employer. Award for claimant by arbitrator was set aside by the Industrial Commission, and claimant sued out a writ of certiorari, and claimant brings error. Reversed and remanded, with directions.

J. L. Murphy, of Spring Valley, for plaintiff in error.

John J. Sherlock, of Chicago, and McDougall, Chapman & Bayne, of Ottawa, for defendant in error.

DUNN, J. William A. Hemmer was a manual training teacher, employed by the board of education of high school district No. 502 of Bureau county. He was accidently injured on March 5, 1915, while engaged in the course of his employment in instructing a pupil in the use of a circular saw in making a drawer. His left hand was drawn in contact with the saw, and the first three fingers were injured. He applied for compensation under the Workmen's Compensation Act (Laws 1913, p. 335), and upon a hearing before an arbitrator an award was made to him. Upon the petition of the board of education the award was reviewed by the Industrial Commission, and was set aside for the reason that the school district was not engaged in any business, occupation, or enterprise that would automatically place it within the jurisdiction of the commission. The claimant sued out a writ of certiorari from the circuit court, but that court quashed the writ, and upon the petition of the claimant a writ of error was awarded to review the proceedings.

Under sections 4 and 5 of the Workmen's Compensation Act the school district was an employer and the plaintiff in error was an employee. The only question in dispute is whether the district was subject to the provisions of the Workmen's Compensation Act. On the part of the plaintiff in error it is contended that the provisions of the act apply automatically to the school district because, it is engaged in an enterprise

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in which statutory regulations are imposed for the regulating, guarding, use. or placing of machinery or appliances for the protection and safeguarding of the employees or the public therein, under subdivision 8 of section 3 of the Workmen's Compensation Act.

The defendant in error is a township high school district which maintains a manual training department conducted in a building separate from the regular school building, It is a two-story building, 60 by 100 feet, containing the heating plant for both buildings, as well as the manual training department of the school. About 60 pupils were receiving instruction in manual training. In the department were tools for all kinds of woodwork, including a planing machine, a circular saw, a rip saw, and a hand saw. The planing machine and the circular and rip saws were operated by electrical power. The circular saw by which the plaintiff in error was injured. was not guarded or protected, though there were proper guards for it in the building.

[1] It is contended that the respondent is brought within the provisions of subdivision 8 by reason of the statutory requirement contained in section 1 of the act of June 29, 1915, which provides:

"That all power-driven machinery, including all saws, planers, wood-shapers, * * * in any factory, mercantile establishment, mill or workshop, shall be so located wherever possible, as not to be dangerous to employees or shall be properly enclosed, fenced or otherwise protected. All dangerous places in or about mercantile establishments, factories, mills or workshops, near to which any employee is obliged to pass, or to be employed shall, where practicable, be properly inclosed, fenced or otherwise guarded. No machine in any factory, mercantile establishment, mill or workshop, shall be used when the same is known to be dangerously defective, and no repairs shall be made to the active mechanism or operative part of any machine when the machine is in motion." Laws of 1915, p. 418.

The manual training room in which these machines and tools were used and operated was a workshop within the ordinary meaning of the term, which is a building or room where any work is carried on, especially a handicraft. The defendant in error contends that the conducting of a manual training school is not an enterprise within the meaning of subdivision 8 of section 3 of the Workmen's Compensation Act, and it quotes from Uphoff v. Industrial Board, 271 Ill. 312, 111 N. E. 128. L. R. A. 1916E, 329, Ann. Cas. 1917D. 1, that–

"It is plain from the use of the word 'enterprise' in other subdivisions of said paragraph (b) that it was intended to mean a work of some importance that might properly be considered arduous or hazardous."

[2] It argues that it would be contrary to common knowledge of the kind of instruction given in such an institution to regard a manual training school as an enterprise of this character. The business in which the school district was engaged was the conducting of a high school, including among others, a manual training department. It is not unreasonable to regard such an enterprise as a work of some importance, which might even be regarded as arduous. When in the conduct of that enterprise the employees are required to engage in the handling and operation of machinery so dangerous that the statute requires, for the protection of employees, that it shall be so guarded and located as not to injure them, it may also be regarded as attended with some degree of hazard. It is a matter of common knowledge and general remark that a buzz saw is a dangerous thing to deal with.

The defendant in error contends that the statutory regulation does not apply to the manual training department of this school because it is neither a factory, a mercantile establishment, a mill nor a workshop. It has been stated that the room comes within the ordinary meaning of workshop, but it is contended that the statute itself defines workshop, in section 29, which provides that–

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'The term 'mill or workshop' shall include any premises, room or apartment not being a factory as above defined, wherein any labor is exercised by way of trade or for the purpose of gain in or incidental to any process of making, altering, preparing, cleaning. repairing, ornamenting, finishing or adopting for sale any article or part of any article, and to which or over which building, premises, room or apartment, the employer of the person employed or working therein has the right of access or control."

It is urged that. in order to constitute a workshop, the labor must be exercised by way of trade or for the purpose of gain, or as incidental to a process of making certain products for gain. The plaintiff in error was working with the saw for gain. That was a part of his duty, for which he was paid. The article which he was making was not, perhaps, intended for sale. What he was doing was in the course of his duty for the instruction of the pupil. He was doing what he was employed to do for pay, whether it was gainful to his employer or not. The place in which that kind of work was done was a workshop. Section 29, a part of which has been quoted, does not purport to give an exclusive definition of a mill or workshop. It begins with the statement:

"The following terms used in this act shall have the following meaning: The term 'factory' means," etc.

It does not purport to define mill and workshop separately. but states that the term "mill or workshop" shall include as quoted above. This language does not exclude from the definition of the word "mill" or the definition of the word "workshop" the meanings which they possessed before the enactment of the statute, but, in effect, extends the meaning of the words, so as to make them more inclusive than before, instead of less inclusive, and by a proviso added to the section excludes a private house or private room in which labor is performed by a family dwelling therein, or by any of them, for the exclusive use of members of the family.

The circuit court erred in quashing the writ of certiorari. Its judgment will be reversed, and the cause will be remanded. with directions to the circuit court to set aside the decision of the Industrial Commission and remand the cause to the commission, with directions to hear it on the merits.

Reversed and remanded, with directions.

KINNAN v. CHAS. B. HURST CO. (No. 13958.)

(Supreme Court of Illinois. Feb. 22, 1922.)

134 Northeastern Reporter, 72.

MASTER AND SERVANT—DECLARATION FOR COMMON-LAW DAMAGES HELD SUFFICIENT UNDER COMPENSATION ACT.

Under Workmen's Compensation Act of 1911, in an employee's common-law action for negligence against the employer, engaged in a business subject to the provisions of the act, it was necessary to allege in the declaration that the employer was not bound by the act; by reason of the proviso for notice to the employee it was unnecessary to allege that he was not bound and had not accepted the provisions of the act, and if the employer desired to make the defense that the employee was subject to its provisions, and therefore the common-law cause of action was

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not available. as section 3 provides, it was incumbent on the employer to allege and prove the fact.

(For other cases, see Master and Servant, Dec. Dig. § 401.)

Error to Appellate Court, First District, on error to Circuit Court, Cook County; Anton T. Zeman, Judge.

Action by John Kinnan against the Chas. B. Hurst Company. From a judgment of the Appellate Court (220 Ill. App. 651), affirming a judgment for plaintiff, defendant brings certiorari. Affirmed.

John Early, of Chicago. for plaintiff in error.

S. P. Douthart, of Chicago, for defendant in error.

DUNN, J. John Kinnan recovered a judgment for $12,625 against the Chas. B. Hurst Company, the Appellate Court affirmed the judgment, and the record has been brought here for review by certiorari.

The suit was begun in the municipal court of Chicago on August 13, 1913, for personal injuries received on September 4. 1912, by the plaintiff, who was a mason employed by the defendant in the construction of a silo near Polo, Ill. The cause was transferred to the circuit court of Cook county, and an amended declaration of two counts in trespass on the case was filed, the first of which alleged negligence of the employer in the erection, construction, and maintenance of a scaffold upon which the plaintiff was required to go in the course of his work. by reason of the insufficiency of which it broke, and the plaintiff fell and was injured. This count alleged the willful negligence of the defendant contrary to the statute providing for the protection and safety of persons in and about the construction, repairing, alteration. or removal of buildings, bridges, viaducts, and other structures, approved June 3. 1907. Laws 1907, p. 312. The other count alleged, generally, the negligence of the defendant in the construction of the scaffold.

The proceedings on the trial have not been preserved, and no bill of exceptions appears in the record. which consists of the declaration, plea of the general issue, the order of the court overruling the defendant's motions for a new trial and in arrest of judgment, and entering judgment on the verdict. The question presented is as to the sufficiency of the declaration to sustain the judgment.

At the time of the accident to the plaintiff the Workmen's Compensation Act of 1911 was in force. Laws 1911, p. 315. This act provided that any employer covered by its provisions might elect to provide and pay compensation for injuries sustained by any employee arising out of and in the course of the employment according to the provisions of the act, and thereby relieve himself from any liability for recovery of damages, except as in the act provided, and that every employer within the provisions of the act, failing to file notice in writing of his election to the contrary, should be bound by the provisions of the act, and in the event of an employer's electing to provide and pay compensation as provided in the act. then every employee of such employer should be deemed to have accepted all the provisions of the act as a part of his contract of hiring unless within 30 days after such hiring. and after the taking effect of the act, he should file notice to the contrary with the secretary of the state bureau of labor statistics: Provided that, before any such employee should be bound by the provisions of the act, his employer should either furnish to such employee personally at the time of his hiring, or post in a conspicuous place at the plant, or in the room or place where such employee was to be employed, a legible statement of the compensation provisions of the act. The act by its terms applied to employers in the business in which the defendant was engaged, and provided that no common-law or statutory right to recover damages for injury or death sustained by any employee while engaged in the line of his duty as

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such employee, other than the compensation provided in the act should be available to any employee who had accepted the provisions of the act: Provided that when the injury to the employee was caused by the intentional omission of the employer to comply with statutory safety regulations, nothing in the act should affect the civil liability of the employer.

In Beveridge v. Illinois Fuel Co., 283 Ill. 31, 119 N. E. 46, it was held that in an action on the case for personal injuries against an employer engaged in a business subject to the provisions of the Workmen's Compensation Act it was necessary to allege in the declaration facts showing that the defendant was not subject to the provisions of the act, and this allegation must be proved by the plaintiff. This rule was declared, also, in Barnes v. Illinois Fuel Co., 283 Ill. 173, 119 N. E. 48. Davis v. St. Paul Coal Co., 286 Ill. 64, 121 N. E. 181, Reynolds v. Chicago City Railway Co., 287 Ill. 124, 122 N. E. 371, and Bishop v. Chicago Railways Co., 290 Ill. 194. 124 N. E. 837. The cases in which these decisions were made all arose under the act of 1913 (Laws 1913, p. 337), in which the proviso in the act of 1911 concerning the furnishing to the employee at the time of hiring, or posting in a conspicuous place at the plant, a legible statement of the compensation provisions of the act, is omitted, and it is therefore insisted that the decisions are not applicable to the act of 1911. The cases of Zukas v. Appleton Mfg. Co., 279 Ill. 171, 116 N. E. 610, and Curran v. Wells Bros. Co., 281 Ill. 615, 117 N. E. 984, are relied on as holding that a declaration charging negligence and making no reference to the Workmen's Compensation Act stated a cause of action; that the defendant by failing to plead or attempting to prove under the general issue that it was operating under the Workmen's Compensation Act waived that defense; and that the defendant was bound to allege and prove the posting of the notices of the compensation provisions of the act. These cases do not decide any question of pleading. In the first it was decided that the defendant by its course of action on the trial had waived the right to insist upon the defect in the declaration in not pleading the election of the defendant not to be bound by the Workmen's Compensation Act or the want of proof on that question. In the other, the issue was made by plea and replication as to the defendant's having furnished to the employee or posted the notices required by the proviso, and the evidence on that question was properly heard on the issue thus made.

Before the passage of any Workmen's Compensation Act the liability of a master for injuries received by his servant through the neglect of the master was recognized. The Workmen's Compensation Act changed the law in this respect so that the negligence of the master ceased to be a factor in his liability in cases coming within the provisions of the act and liability was imposed upon him for injuries received by any employee arising out of and in the course of his employment, without regard to any fault on the part of the master. Since an employer in the business in which the plaintiff in error was engaged was presumed to have elected to provide and pay compensation according to the provisions of the act, it became necessary, as was held in the cases cited, for an employee of such an employer, in order to maintain an action for negligence at common law against his employer, to allege and prove that the employer was not bound by the provisions of the act. The presumption in the case of the employee was the reverse of that in the case of the employer, for while the statute enacted that every employee of any employer who had elected to provide and pay compensation provided in the act should, as a part of his contract of hiring, be deemed to have accepted all the provisions of the act and to be bound thereby unless he gave notice to the contrary, still, in the very clause which created this presumption was a proviso, a part of the enactment itself, that—

"Before any such employee shall be bound by the provisions of this act, his employer shall either furnish to such employee personally at the time of his hiring, or post in a conspicuous place at the plant or in the

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room or place where such employee is to be employed, a legible statement of the compensation provisions of this act."

Section 3 provided that no common-law or statutory right to recover damages for injury or death sustained by any employee, other than the compensation provided, should be available to any employee who had accepted the provisions of the act. Whether or not the employer had elected to provide and pay compensation in accordance with the provisions of the act, the employee was not barred by its provisions from his common-law action for neglect unless he also was bound by the provisions of the act. It was therefore unnecessary to the statement of a cause of action that the declaration should allege that the employee was not bound by the act, for the presumption was that he was not so bound. The relation of master and servant and their respective obligations continue the same as before the passage of the Workmen's Compensation Act, except as they are changed by the act, and when it is claimed that the obligation of either is changed by the act the facts must be averred which show the changed relation. The act established certain presumptions, and these must be given effect. What the statute says shall be presumed it is unnecessary to allege. The contrary averment must be made if the fact is to be put in issue. Beveridge v. Illinois Fuel Co., supra.

If the cause of action depends upon either the master or the servant or both, being bound by the provisions of the Workmen's Compensation Act, the facts must be alleged showing that they are so bound, or the one is bound whose being bound is essential to the cause of action. In this case the presumption is that the employer was bound by the act, for the statute so declares. The presumption is that the employee was not bound, for the express provision of the enacting clause of the statute was that before personal notice was given to the employee, or notice posted in his place of employment, of a statement of the compensation provisions of the act, no employee should be bound by such provisions. There was no presumption of such personal notice or posting and no presumption that the employee had accepted the provisions of the act, and therefore it was not necessary to allege that he had not done so. It was only employees who had accepted the provisions of the act to whom the common-law right to recover damages was not available. The facts averred in the declaration and the presumptions created by the statute established that the plaintiff in error was covered by the terms of the act, but that its provisions had not been accepted by the defendant in error. If the plaintiff in error desired to make the defense that the defendant in error was subject to the provisions of the act, and therefore the common-law cause of action was not available to him, it was incumbent on it to allege and prove this fact.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

OLD BEN COAL CORPORATION v. INDUSTRIAL COMMISSION ET AL. (No. 14325.)

(Supreme Court of Illinois. Feb. 22, 1922.)

134 Northeastern Reporter, 74.

2. MASTER AND SERVANT—TOTAL PERMANENT INCAPACITY WITHIN COMPENSATION ACT HELD NOT SHOWN.

In a proceeding under the Workmen's Compensation Act, *held* that there was no competent evidence upon which to base a finding of total permanent incapacity for work.

(For other cases, see Master and Servant, Dec. Dig. § 405[5].)

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Error to Circuit Court, Franklin County; C. H. Miller, Judge.

Proceeding by Vincent Jelovica under the Workmen's Compensation Act to obtain compensation for personal injuries, opposed by the Old Ben Coal Corporation, the employer. There was an award of compensation, which was affirmed by the circuit court, and the employer brings error. Reversed and remanded, with directions.

W. H. Hart and W. W. Hart, both of Benton, for plaintiff in error.

W. P. Seeber, of Benton, for defendant in error.

CARTWRIGHT, J. On November 14, 1919, the defendant in error, Vincent Jelovica, applied to the Industrial Commission for adjustment of his claim against the plaintiff in error the Old Ben Coal Corporation, for compensation on account of an injury suffered by him in the mine of the plaintiff in error on August 23, 1919. The Industrial Commission designated an arbitrator, who heard the evidence and made a finding that the applicant was injured as alleged, that first aid, medical, surgical and hospital services had been furnished by the plaintiff in error, and that $288.10 had been paid to the defendant in error as compensation. He made an award of $14.84 per week for 23 weeks and 2 days, against which the $288.10 already paid was to be credited. The applicant petitioned for review by the Industrial Commission, and upon a hearing before the Commission he testified to his condition as it then was. The Commission set aside the award and found that as a result of the injury the applicant was totally and permanently incapacitated for work, that first aid, medical, surgical, and hospital services had been furnished by plaintiff in error, and that $288.10 had been paid as compensation. Based on these findings the Commission made an award of $14.84 for 239 weeks, $8.04 for one week, and thereafter a pension of $26.66 per month during life, giving credit to the plaintiff in error for the compensation which had been paid. Upon a writ of certiorari sued out of the circuit court of Franklin county the writ was quashed and the award of the Industrial Commission confirmed.

[1] Counsel for plaintiff in error have presented to the court an argument that the judgment should be reversed because the Workmen's Compensation Act (Hurd's Rev. St. 1919. c. 48, §§ 126–152i), under which the award was made and which the judgment confirmed, was void because in conflict with the due process clause of the Fourteenth Amendment to the Federal Constitution, and counsel for defendant in error has submitted an argument in reply on that question. This court reviews the judgment of the court to which the writ of error was directed, and, the constitutionality of the act not having been raised or passed upon by that court, a review of the judgment does not involve the question. Odin Coal Co. v. Industrial Com., 297 Ill. 392, 130 N. E. 704.

[2] The applicant testified that before the accident he was a strong, able-bodied man, able to lift as much as 300 pounds; that while working in the mine as a loader a crossbar struck him on the left side and knocked him down, injuring his ribs and back, and when he fell down a rock fell on him, which he took off; that since the accident he had some pain in his left side and between his shoulders when he stooped over; that he could not sleep or lie down on his left side; that before the injury he could lift three times more than he could afterward; that he can carry a bucket of coal weighing 30 or 40 pounds into the house, and might be able to do some job in the mine where he could just stand up and would not have to bend very much; that he had to stay in bed sometimes in the daytime and could not walk very far, and was getting a little better, but not much; that Dr. Sheerer treated him for his injury and Dr. Moore examined him on January 8 and each of them took X-ray pictures of him. Dr. Sheerer, who treated the applicant for his injury, testified and produced X-ray pictures taken by him, and said that on October 15, when he

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was discharged, he was able to return to work. On cross-examination he said there was a little scoliosis of the backbone. which is commonly called curvature of the spine, but he did not associate it with the injury and did not think it lessened the strength of the applicant. Dr. Moore, who made the examination on January 8, testified that he found nothing abnormal or defective as the result of the injury, and the X-ray picture taken by him did not show anything of that kind. On the hearing before the Industrial Commission the applicant testified that he could not perform work and was not getting any better. Ignoring the testimony of the doctors as to their examinations and opinions so far as they conflicted in any way with the testimony of the applicant, it is apparent from his testimony and the results shown by the X-ray pictures that, while the ability of the applicant to work had been much reduced, there was no competent evidence upon which to base a finding of total permanent incapacity for work. For that reason the judgment of the circuit court will be reversed, and the cause remanded to that court. with directions to again refer the claim to the Industrial Commission for further consideration upon the record and any further evidence the parties may choose to present.

The judgment is reversed, and the cause remanded to the circuit court for further proceedings in harmony with this opinion.

Reversed and remanded, with directions.

OLD BEN COAL CORPORATION v. INDUSTRIAL COMMISSION ET AL. (No. 14326.)

(Supreme Court of Illinois. Feb. 22, 1922.)

134 Northeastern Reporter, 76.

1. MASTER AND SERVANT—LOSS OF VISION WITHIN COMPENSATION ACT SHOWN.

In proceeding under the Workmen's Compensation Act, *held*, that there was competent evidence authorizing a finding of loss of vision as the result of accident.

(For other cases, see Master and Servant, Dec. Dig. § 405[6].)

2. MASTER AND SERVANT—FINDING OF FACT CONCLUSIVE UNDER COMPENSATION ACT BEFORE AMENDMENT.

Where the judgment of the circuit court affirming the award under Workmen's Compensation Act was rendered before the amendment in 1921 (Laws 1921. p. 455), giving court authority to weigh conflicting evidence, the Supreme Court on writ of error must affirm the judgment of affirmance if there was any competent evidence to support the award, in the absence of fraud.

(For other cases, see Master and Servant, Dec. Dig. § 418[6].)

Error to Circuit Court, Franklin County; C. H. Miller, Judge.

Proceeding by Pete Ponzi under the Workmen's Compensation Act to obtain compensation for personal injuries, opposed by the Old Ben Coal Corporation, the employer. There was an award of compensation, which was affirmed by the circuit court. and the employer brings error. Affirmed.

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W. H. Hart and W. W. Hart, both of Benton, for plaintiff in error.
W. P. Seeber, of Benton, for defendant in error.

FARMER, J. Pete Ponzi was employed in its mine by the Old Ben Coal Corporation. While loading coal on May 7, 1918, he was struck in the right eye by a piece of coal and so injured that he was temporarily hindered from work. First aid, medical and surgical, was furnished by the employer and a small amount of compensation paid. The employee returned to work, and in January, 1919, filed his application for an award under the Workmen's Compensation Act (Hurd's Rev. St. 1919, c. 48, §§ 126–152i). It was heard before an arbitrator in April, 1919, and an award made in favor of the applicant of $12 per week for 5 $^{5}/_{7}$ weeks for temporary total incapacity and the further sum of $12 per week for a period of 25 weeks for 25 per cent. loss of vision of the right eye. The Industrial Commission on review approved the award in August, 1919, and the circuit court affirmed it in June, 1921. On the petition of the Old Ben Coal Corporation this writ of error was allowed.

The only point in dispute is whether there was any loss of vision of the right eye as a result of the accident. The applicant estified that before his injury his right eye was as good as his left, but since his injury everything looked foggy before that eye all the time; that he could see better with glasses than without them, but after 2 months there was no change in the vision of his right eye. It was agreed at the hearing before the arbitrator that Dr. Edmundson, an eye specialist of Mt. Vernon, Ill., who had treated the applicant, should make a written report which would be considered as evidence, and that plaintiff in error would send the applicant, at its expense, to Chicago for examination by Dr. Allport, the consulting oculist of the Industrial Commission and that his written report should be considered as evidence. Both doctors reported that the vision of the eye was slightly below normal, but that the condition was not the result of any impairment by the accident. Dr. Edmundson said the vision was the same in both eyes.

[1, 2] It will be seen from the date of the injury and the proceedings resulting in the affirmance of the award that judgment was rendered before the amendment in 1921 (Laws 1921, p. 455) giving a court authority to weigh conflicting evidence and determine on which side was the preponderance. Where the Commission had jurisdiction and there was an absence of fraud, we held that, where there was any competent evidence to support the award, this court could not reverse the judgment because it was contrary to the weight of the testimony. Parker-Washington Co. v. Industrial Board, 274 Ill. 498, 113 N. E. 976; Big Muddy Coal Co. v. Industrial Board, 279 Ill. 235, 116 N. E. 662; Goelitz Co. v. Industrial Board, 278 Ill. 164, 115 N. E. 855. We do not understand we are authorized to weigh the evidence in this case to determine whether its weight and preponderance support the award, for there was competent testimony tending to authorize it.

The judgment is affirmed.

Judgment affirmed.

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FISCHER v. INDUSTRIAL COMMISSION ET AL. (No. 14350.)

(Supreme Court of Illinois. Feb. 22, 1922.)

134 Northeastern Reporter, 114.

MASTER AND SERVANT — APARTMENT HOUSE MANAGER HELD NOT AN "INDEPENDENT CONTRACTOR" LIABLE UNDER COMPENSATION ACT AS EMPLOYER OF JANITOR.

Where one was appointed agent for the renting and management of an apartment building by an investment company appointed renting and managing agent by an assignment of rents made by the owner to secure an issue of bonds purchased by the company which gave him a letter of appointment, revocable at any time, directing him to remit all proceeds above his commissions and necessary expenses, under which he made leases and minor repairs without consulting the owners, but in engaging janitors he submitted their references to the owner of the equity for approval, *held*, that he was not an employer or an "independent contractor" in the management of the building so as to render him liable under the Workmen's Compensation Act for the death of a janitor; the mere fact that an employer does not exercise direct supervision over the agent being insufficient to prove that the agent is an "independent contractor."

(For other cases, see Master and Servant, Dec. Dig. § 367.)

(For other definitions, see Words and Phrases, First and Second Series, Independent Contractor.)

Error to Circuit Court, Cook County; Oscar M. Torrison, Judge.

Proceeding under the Workmen's Compensation Act by Mary Hunter, administratrix of Augustus Robert Hunter, deceased, employee, to recover compensation from John J. Fischer, as employer. An award to claimant by the Industrial Commission was affirmed by the circuit court, and John J. Fischer brings error. Reversed and remanded.

Jasper M. Dresser, of Chicago (John Lyle Vette, of Chicago, of counsel), for plaintiff in error.

Landon & Holt, of Chicago (John B. Fruechtl, of Chicago, of counsel), for defendant in error.

CARTER, J. Augustus Robert Hunter, a married man 48 years old, having a wife and one child, was in his lifetime the janitor of an apartment building owned by Hope Thompson. On April 8, 1919, while engaged in putting in screens on the second floor of the building from a ladder on the outside of the building, he fell to the cement sidewalk because of the slipping or sliding of the ladder and died the following night without regaining consciousness. An application was made by his estate for recovery before the Industrial Commission. In this application Thompson and John J. Fischer were stated to be the names of the employers. Afterward another application for adjustment of claim was filed, stating that Hunter received the injury while in the employ of Thompson, Fischer, William R. Stirling, Augustus S. Peabody, Alexander Smith, James L. Houghteling, Jr., Burton Thomas, and E. M. Mills. The last of the abovenamed respondents received notice of the filing of claim July 13, 1919, and were notified of the time of the hearing. During the course of the hearing before the arbitrator, on motion of the applicant, Stirling, Smith, Houghteling, Thomas, and Mills, and the copartnership of Peabody, Houghteling & Co., were dismissed from the proceeding. On the same day Peabody, Houghteling & Co., the corporation, was made a party. On July 2, 1919, the arbitrator made an award, apparently against Thompson, Fischer, Peabody, and Peabody, Houghteling & Co., the corporation. From

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this decision of the arbitrator, on appeal for review before the Industrial Commission, Peabody, Houghteling & Co. was dismissed from the proceedings, and the Commission found that Peabody was not a party to the cause, was never served with notice and never appeared to defend, and he was dismissed from the case for that reason, as the record shows. The Commission found Thompson was not liable. that. the relation of employer and employee did not exist between him and Hunter nor between Hunter and Fischer, but that Fischer was acting as agent for a principal who was not made a party to the case. The circuit court. to which the case was taken for review, found that the relationship of employer and employee did exist between Hunter and Fischer, and remanded the case to the Industrial Commission. Further evidence was taken, and the Industrial Commission found that Hunter and Fischer were under the Workmen's Compensation Act (Hurd's Rev. St. 1919, c. 48, §§ 126–152i), and that the employee sustained injuries arising out of and in the course of the employment with Fischer, as the employer. This last decision of the Industrial Commission was affirmed on review by the circuit court, and from that finding this writ of error has been sued out.

The facts in this case as to the ownership and conduct of the property and the accident are not seriously disputed, and the question argued here by the parties is whether or not the relationship of Fischer and the deceased was such as to render him liable for the accident under the Workmen's Compensation Act. A special appearance was filed on behalf of plaintiff in error before the Industrial Commission. and it was urged there, as it has been since in all the proceedings, that Fischer was not an employer within the meaning of the Workmen's Compensation Act so as to render him liable under that act.

The apartment building seems to have been commenced in 1915, or prior thereto, and completed in 1916. In June, 1915, John D. Farrell, who was then the holder of the legal title of record, and his wife, executed a trust deed upon the property to secure an issue of bonds which Peabody. Houghteling & Co. purchased from them to sell to the public, and for the purpose of further securing this issue of bonds Farrell and his wife in November, 1915, executed an instrument of assignment to Augustus S. Peabody (Peabody holding the legal title as trustee) for the benefit of the holders and owners of the bonds for an indebtedness of about $140,000, turning over all the rents and profits from the building, and providing in the same for the appointment of Peabody, Houghteling & Co. as exclusive agent, or any agent it may select, to rent the premises and collect the rents. It authorized the payment of expenses in connection with the care and management of the premises; set out in detail the authority granted to Peabody. Houghteling & Co. or its agent for the renting of the premises, the collection of the rents, and the care and management of the building as Peabody, Houghteling & Co. might deem proper and advisable; provided for the payment of 2½ per cent. of all sums collected for renting the premises, and how the sums collected, above the amount used for the carrying on and repair of the building, should be paid over to John D. Farrell at stated times. Plaintiff in error, Fischer, had theretofore been employed in the office of Peabody, Houghteling & Co.. but previous to the transactions with reference to this apartment building had quit the exclusive employment of said company and had gone into the real estate, renting and insurance business for himself in a separate office. Some. of the business that he theretofore managed while employed by Peabody, Houghteling & Co. was turned over to him after he left its employ. to conduct for it under certain conditions. In November, 1915. shortly after Farrell and wife had assigned this property to Peabody as trustee (as a matter of fact for Peabody, Houghteling & Co.), the company wrote the following letter to Fischer;

"Until further notice you will act as our agent under a certain assignment of rents made by John D. Farrell to Mr. A. S. Peabody on November 8, 1915, a copy of which is attached herewith. You will put into

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immediate effect all the provisions of this assignment. with the following exception: You will remit to us on the first of each month all the proceeds above the necessary expenses and 2½ per cent. commission mentioned in this assignment, which you will retain for your services."

Fischer acted under this authority in the management and control of the apartment building even previous to the time all the building was put in a rentable condition; he made ordinary disbursements, such as for decorating, etc., on his own responsibility; and when any of the building was in shape to rent he rented the same and turned over the rent to Peabody, Houghteling & Co.. as provided in the letter just quoted. Not long after Fischer began acting as the agent of Peabody, Houghteling & Co., but before the accident in question, Hope Thompson, a lawyer of Chicago. purchased the equity in the apartment building. Although he entered into no agreement with Thompson as to the management and control of the building, Fischer continued to act as agent, apparently with the approval of Thompson, as he had previously acted for Peabody, Houghteling & Co., signing some of the leases thereafter made in the name of Thompson and paying salaries to janitors from the rent. The testimony, however, shows that when he was first seen by the deceased. Hunter, as to employment as janitor of the building, Fischer referred the matter to Thompson. The evidence shows that about April 27, 1916, Hunter called on Fischer with reference to being employed as a janitor for the apartment building and submitted references; that Fischer tried to get Thompson by telephone to submit the proposition to him, but was unable to reach him; that he then mailed Hunter's application, with the letters of recommendation, to Thompson, and in reply Thompson called Fischer on the telephone and said that the references were all right and to go ahead and engage Hunter as janitor. Fischer then wrote Hunter to that effect on May 2, 1916, and Hunter was then employed to work as janitor.

The evidence in the record tends to show that Peabody. Houghteling & Co. turned over to Fischer, when he quit their employment as a clerk in their office, without any specific business arrangement, matters pertaining to real estate brokerage and other matters that the company asked him to conduct for it, and the only arrangement between Fischer and the company is shown by the letter heretofore quoted. Peabody testified on the trial that he had the power to discharge Fischer as agent if he desired or deemed it necessary to do so, at any time. Peabody, Houghteling & Co., up to within two years previous to the time of the hearing, had been a copartnership, but shortly thereafter had changed to a corporation. and it was doing business as a corporation at the time of the arrangement with reference to the apartment building. It acted as a corporation in its business, which was dealing in bonds and investment securities. Fischer testified that, when he determined or was instructed to make repairs on buildings as to which he was acting as agent for Peabody, Houghteling & Co., he would get an estimate and let the contract, usually to the lowest bidder, for necessary plumbing repairs, minor carpenter repairs, decorating. repairs to roofs, and had general superintendence of the buildings; that for minor repairs he did not always consult the owners; that in engaging janitors he submitted their references to the owner for approval; that he did not have unlimited authority to repair the buildings. He testified further that about 75 to 80 per cent. of his business on an income basis was from the sales of real estate, and from 10 to 15 per cent. from the renting business; that he handled from 60 to 70 buildings, and when there was a small repair on a building he paid for it out of the rentals and charged it to the account of the owner of the building; that he did the same when he was acting for Peabody, Houghteling & Co. with reference to the apartment building here in question, and did the same with reference to rentals and minor repairs after Thompson became the owner of the building. The leases he used for tenants in the building after it was owned by Thompson were on printed forms, on which Fischer's name was printed as the person to whom the rent should be paid.

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The assignment from the original owner of the building to Peabody, Houghteling & Co. contains provisions with reference to the renting of the building, but there is no limitation found in such assignment upon the agent's discretion as to the parties to whom leases should be made, and the care and management of the premises were to be such as the agent deemed proper and advisable, and that rule seemed also to apply to paying for repairs. This authority as to the care and management of the build- seems to have been informally passed by Peabody. Houghteling & Co. to Fischer when he took over the management of this apartment building, with the understanding that he was to retain out of the rents the necessary expenses connected with the care and management of the building and a 2½ per cent. commission for his services, and we can reach no other conclusion than that Fischer, after Thompson took the title to this apartment building, conducted the management and control of the building, as to leasing and paying the expenses. in the same manner as he had conducted the same for Farrell, through Peabody, Houghteling & Co.

The final order of the Industrial Commission. which was concurred in by the order of the circuit court, was substantially to the effect that plaintiff in error, Fischer, was the only one liable under the Workmen's Compensation Act for the accident, and it would appear from the record that Fischer was held on the ground that he was acting as employer in the management, control, and conduct of the apartment building at the time of the accident, and this holding appears to have been based partly, if not mainly. upon the ruling of this court in Storrs v. Industrial Com., 285 Ill. 595, 121 N. E. 267. The evidence in that case showed that the buildings which it was alleged Storrs maintained were buildings which he himself owned, and that his sole occupation was maintaining, repairing, and leasing such buildings. We think the facts in that case as to Storrs' connection with the buildings which were maintained and controlled by him were very different from the facts in this case considering the extent of Fischer's powers as to the management, leasing, and control of the apartment building. If Fischer is liable under the Workmen's Compensation Act for this accident, it must be upon a principle somewhat similar to that involved in holding an independent contractor liable under the Workmen's Compensation Act because a person whom he employed had been injured while in his employ.

Counsel for defendant in error argue that plaintiff in error is liable under the reasoning of this court in Baird v. Shipman, 132 Ill. 16, 23 N. E. 384. 7 L. R. A. 128, 22 Am. St. Rep. 504, where the agent was held liable for an injury happening in a building of the leasing and management of which the agent had charge and control. In that case the agent was not held liable as an employer under the Workmen's Compensation Act, but because of the common-law requirement that one must so act with that which he controls as not to injure another; and that seems to be the general rule as to the liability of an agent in renting real estate. See Cramblitt v. Percival-Porter Co., 176 Iowa, 733, 158 N. W. 541, L. R. A. 1917C, 77, and authorities cited in note on page 83; also, to the same effect, Tippecanoe Loan & Trust Co. v. Jester. 180 Ind. 357, 101 N. E. 915. L. R. A. 1915E, 721. If the plaintiff in error is liable here, the liability must rest, not on the ground of negligence on his part, but because of the contractual relation that existed between him and the owner in the management and control of the building, he paying for repairs and employing the workmen, including the janitor. The mere fact that an employer does not exercise direct supervision over the agent or employee does not prove that the employee or agent is an independent contractor. Harper on Workmen's Compensation (2d Ed.) § 105. It is recognized that the degree of control retained and exercised by the person for whom the work is being done is one of the principal tests in determining whether a person is an employee or an independent contractor. Decatur Railway Co. v. Industrial Board, 276 Ill. 472, 114 N. E. 915. But the nature of

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one's duties or the character of his work may be such that much or little supervision may be necessary. so that the degree of actual supervision is not a sure test whether one is an employee or an independent contractor. Franklin Coal Co. v. Industrial Com., 296 Ill. 329, 129 N. E. 811. In Bristol & Gale Co. v. Industrial Com., 292 Ill. 16, 126 N. E. 599, it was said that it is impossible to lay down a rule by which the status of men working and contracting together can be definitely defined in all cases as employees or independent contractors; that each case must depend on its own facts, and ordinarily no one feature of the relation is determinative, but all must be considered together. It is clear from this record that as to many of the minor details there was little necessity for interference with or supervision of the agent or manager of the apartment building, but it is clear also that he recognized his limited authority as agent, as is shown by the course he took with reference to the employment of the deceased.

In our judgment it is manifest from this record that neither Fischer nor the owner of the building understood that Fischer was acting in an independent capacity. in the sense that an independent contractor would act under the Workmen's Compensation Act. when he employed the deceased to do the janitor work in the apartment building. We do not think it can be held that under the Workmen's Compensation Act, on the facts shown in this record, Fischer was acting as the employer of Hunter at the time of the accident. The following authorities tend to uphold this conclusion: Bradbury on Workmen's Compensation Law (3d Ed.) 136; Ship Victoria v. Barlow, 5 B. W. C. C. 570; Yolo Water & Power Co. v. Industrial Accident Com., 35 Cal. App. 14, 168 Pac. 1146; Pace v. Appanoose County, 184 Iowa, 498, 168 N. W. 916, 17 Neg. & Comp. Cas. Ann. 682. and cases cited in note. It is obvious that under his letter of appointment Fischer could have been discharged at any time by Peabody, Houghteling & Co. from his management and control of the apartment building, and on this record it necessarily follows that his authority after the new owner purchased the apartment building must have been under the same conditions as before as to the management and control of the building. Under his relation with Thompson it seems impossible to hold Fischer as an employer or as an independent contractor in the management and control of said building so as to render him liable for the death of Hunter.

The judgment of the circuit court will be reversed, and the cause remanded to that court, with directions to set aside the order of the Industrial Commission, and for such other proceedings as may be requested by either party under the Workmen's Compensation Act.

Reversed and remanded, with directions.

JAMES O'DONNELL TEAMING CO. v. INDUSTRIAL COMMISSION ET AL. (No. 13890.)

(Supreme Court of Illinois. Feb. 22, 1922.)

134 Northeastern Reporter, 156.

1. MASTER AND SERVANT—FINDING OF INDUSTRIAL COMMISSION SUSTAINED BY EVIDENCE CONCLUSIVE.

The finding of the Industrial Commission is conclusive as to the facts found if supported by the evidence.

(For other cases, see Master and Servant. Dec. Dig. § 417[7].)

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2. MASTER AND SERVANT — EVIDENCE HELD TO SUSTAIN FINDING OF COMPENSABLE DISABILITY.

Evidence before the Industrial Commission *held* to sustain the finding of the Commission that the paralysis of the employee, resulting in total disability, was the result of accident, though some of the physicians claimed he was malingering.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

3. MASTER AND SERVANT — COMPENSATION ACT PERMITS ONE EXTENSION OF TIME TO FILE TRANSCRIPT OF PROCEEDINGS BEFORE ARBITRATOR.

Under Workmen's Compensation Act 1915, § 19(b). the Industrial Commission can grant only one extension of time for 30 days beyond the 20 days allowed for the filing of the stenographic report of proceedings before the arbitrator, to entitle a party to a review by the Commission.

(For other cases, see Master and Servant. Dec. Dig. § 414.)

4. MASTER AND SERVANT—OBJECTION TO JURISDICTION OF COMMISSION TO REVIEW COMPENSATION PROCEEDING HELD TOO LATE.

The lack of jurisdiction on the part of the Industrial Commission to review the report of the arbitrator because the report of proceedings before the arbitrator was not filed within the time limited cannot be first raised in the Supreme Court.

(For other cases, see Master and Servant, Dec. Dig. § 418[3].)

Error to Circuit Court, Cook County; Oscar M. Torrison, Judge.

Proceedings under the Workmen's Compensation Act by Richard Fehrenkamp, employee, to recover compensation for injuries, opposed by the James O'Donnell Teaming Company, employer. An award of compensation by the Industrial Commission was affirmed by the circuit court. and the employer brings error. Affirmed.

John Clark Baker, of Chicago, for plaintiff in error.

Ray & Pease, of Chicago, for defendant in error.

CARTER, J. Richard Fehrenkamp was injured October 22, 1918, by a motor truck on the streets of Chicago. It is agreed that at the time of the injury he was an employee of plaintiff in error, that both were work-under and subject to the provisions of the Workmen's Compensation Act (Hurd's Rev. St. 1919, c. 48. §§ 126–152i), that due notice was given of the injury, and demand for compensation duly made, and that an allowance was made in his favor for certain compensation by the arbitrator, and later by the Industrial Commission.

There is no contention that there was not some evidence of some disability from the accident, but it is contended there was not sufficient evidence as to total disability arising out of the accident. The record does not contain the testimony of any one who saw defendant in error struck, but directly after the occurrence he was seen doubled over the front fender of the truck, on his stomach, with one foot dragging along the pavement. He was carried unconscious into a nearby freighthouse, and later removed to a hospital. He testified that he was knocked unconscious. and did not at first realize he was hit; that he was hurt in the side and the spine; that his right leg was hurt below the knee, and the leg swelled up; that his shoulder and head and his whole body hurt him; that after remaining at the hospital 3 weeks he went home, and was able to sit up and to walk with the aid of crutches; that following his injury

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his right leg and right arm were partially paralyzed, and he could not lift anything. He also stated that his hip bothered him, and that at the time of the hearing he could not use his right leg.

Several doctors, as well as some of his neighbors, testified concerning their observation of the claimant as to his condition since the accident. There was considerable medical testimony, some of it to the effect that the claimant was cured of the injuries resulting from the accident within a few weeks thereafter, and that later conditions were brought about by simulation of continuing pain and injury, while other doctors testified that the paralysis was real. Some of the doctors testified that the paralysis was functional. induced from mental attitude, and lack of use of the members. One of the doctors testified that his test was severe, and in a normal individual must produce signs of sensation, whereas there was none on the part of the claimant, but that, notwithstanding this apparent absence of sensation, he regarded the paralysis as functional. There was ample evidence by doctors and others that the claimant appeared to be affected in the various ways heretofore mentioned, and that there was restricted use of the right arm and right leg, some testifying the leg was cold and lacking in sensation; that he appeared to suffer pain and at times was unconscious of his surroundings.

[1, 2] This court has frequently stated that the finding of the Industrial Commission is conclusive as to the facts found by it if supported by evidence. Wasson Coal Co. v. Industrial Com., 296 Ill. 217. 129 N. E. 786; Halsted Co. v. Industrial Com., 287 Ill. 509, 122 N. E. 822; Heed v. Industrial Com., 287 Ill. 505, 122 N. E. 801; Sulzberger & Sons Co. v. Industrial Com., 285 Ill. 223, 120 N. E. 535; Pekin Cooperage Co. v. Industrial Com., 285 Ill. 31, 120 N. E. 530. It is not the court's province to pass on the weight of the evidence under these authorities. We think there was evidence to justify the Industrial Commission's finding that the condition of the applicant was due to the accident. and we cannot disturb that finding.

[3] It appears from the record in this case that the stenographic transcript of the evidence heard before the arbitrator was filed with the Industrial Commission more than 50 days after the petition for review was filed. The petition for review by the Industrial Commission was filed June 10, 1919. In that month. and every month thereafter until December, 1920, a motion was made, sometimes by counsel for one party to the litigation, and sometimes by counsel for the other, and allowed in each case every 30 days, for an extension of time to file the stenographic transcript. The decision of this court in People v. Andrus, 299 Ill. 50, 132 N. E. 223, was that, under section 19 of the Workmen's Compensation Act now in force, the stenographic transcript of the proceedings before the arbitrator was required to be filed within 20 days after the decision, and that, to relieve any hardship that may come from such limitation, a proviso allows a single extension of 30 days.

Counsel for plaintiff in error concedes this state of facts, but insists that the portion of the decision in the Andrus Case supra relating to the point here under discussion, was not necessary to the decision of the case, and was therefore dictum, and not controlling; that said decision is contrary to the holding on this point in Sulzberger & Sons Co. v. Industrial Com., supra, where the question, it is argued, was squarely decided, holding that more than one extension under the statute was authorized by the Industrial Commission. It is true, as suggested by counsel for plaintiff in error, that this court in the Sulzberger Case apparently did hold as counsel contends, but a careful examination of that opinion will show that, while the court was ostensibly construing paragraph (b) of section 19 of the Workmen's Compensation Act then in force (Laws of 1915, p. 408); it could not properly have construed the amendment to the act as shown in the Laws of 1915 but was construing the act in force prior to that time—that is, section 19 of the Compensation Act as shown in the

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Laws of 1913, p. 347. In the Sulzberger Case it is stated (285 Ill. p. 225, 120 N. E. 536):

"Plaintiff in error also contends that defendant in error's record, upon appeal from the decision of the committee of arbitration to the Industrial Board, was not filed within the time required by the statute. The petition for review was filed December 4, 1914, and the record was filed with the Industrial Board March 22, 1915, several extensions of time in which to file the record having been granted in the meantime, and each one being granted before the prior extension had expired."

This statement in the opinion, which is in accord with the record in that case, shows the extensions of time before the Industrial Board were made not later than March, 1915; that these extensions were made before the amendment to the Compensation Act shown in the Laws of 1915; and hence the decision of this court in the Sulzberger Case cannot be considered as decisive, or even persuasive, in construing the amendment to the Compensation Act in the Laws of 1915. Whether the holding of this court in the Andrus Case in construing the provisions of the Compensation Act with reference to the filing of the stenographic transcript should be considered as dictum or not, we think the provisions of the statute as to the extension of time were properly contsrued in that case. We hold that the statute in force when these proceedings were being heard before the Industrial Commission permitted only a single extension of 30 days for filing the stenographic transcript of the proceedings.

[4] The record shows here, without controversy, that the question as to the time for filing the stenographic transcript was first raised on petition for rehearing in this case. and that no question of that kind was raised in the circuit court or before the Industrial Commission. It has more than once been held by this court that the question of want of jurisdiction by the Industrial Commission or the circuit court cannot be raised for the first time on a motion for new trial in the circuit court, or on briefs in this court. American Milling Co. v. Industrial Board. 279 Ill. 560, 117 N. E. 147; Chicago Packing Co. v. Industrial Board, 282 Ill. 497, 118 N. E. 727. The question of jurisdiction because of failure to file the stenographic report within the time required by statute must be held to have been waived, and cannot now be first raised here.

The judgment of the circuit court will therefore be affirmed.

Judgment affirmed.

POCAHONTAS MINING CO INDUSTRIAL COMMISSION ET AL.
(No. 14332.)

(Supreme Court of Illinois. Feb. 22, 1922.)

134 Northeastern Reporter, 160.

2. MASTER AND SERVANT—COMPENSATION CLAIMANT REQUIRED TO SUBMIT TO PHYSICAL EXAMINATION WITHOUT PAYMENT OF AWARD.

Under Workmen's Compensation Act, § 12. requiring the employee, if requested by the employer, to submit to a physical examination under penalty of having his compensation suspended, the employer is entitled to have a physical examination made of the employee without being compelled first to pay the compensation awarded by the Commission.

(For other cases, see Master and Servant, Dec. Dig. § 399.)

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3. MASTER AND SERVANT—COMMISSION REQUIRED TO DECIDE QUESTION OF COMPENSATION CLAIMANT'S DUTY TO SUBMIT TO TREATMENT.

Where there was evidence before the Commission that the disability claimed by the employee was due to syphilis, and could be removed by a salvarsan treatment which was not dangerous in the hands of a skillful practitioner, the employer was entitled to a finding by the Commission as to whether the course of treatment was reasonably essential to permit the employee's recovery. and, if the employee then refused to submit to such treatment, was entitled to have the compensation suspended until such submission under Compensation Act, § 19, pars. (c), (d).

(For other cases, see Master and Servant, Dec. Dig. § 385[18].)

4. MASTER AND SERVANT—PERMANENT PARTIAL DISABILITY OF ARMS NOT SHOWN.

Evidence *held* insufficient to sustain a finding of the Industrial Commission that compensation claimant had permanently lost 25 per cent. of the use of his arms when the incompetent testimony as to the percentage of loss of use was eliminated.

(For other cases, see Master and Servant, Dec. Dig. § 405[6].)

5. MASTER AND SERVANT — REQUEST FOR FINDINGS IN COMPENSATION CASE ESSENTIAL TO REVIEW.

Where the employer made no request for special findings by the Commission, it cannot successfully complain in the court of the character of the findings made by the Commission in view of Compensation Act, § 19, par. (e). authorizing the Commission in its discretion to find specially upon any question of law or fact submitted in writing by either party.

(For other cases, see Master and Servant, Dec. Dig. § 417[4].)

6. MASTER AND SERVANT — COMPENSATION ACT PERMITS ONE EXTENSION OF TIME TO FILE TRANSCRIPT OF PROCEEDINGS BEFORE ARBITRATOR.

Under the Compensation Act as enacted in 1915. and subsequently, authorizing the Industrial Commission to extend the 20 days permitted for filing the stenographic report of proceedings before the arbitrator for review by the Commission, not to exceed 30 days, the Commission can grant only one 30-day extension.

(For other cases, see Master and Servant, Dec. Dig. § 414.)

7. MASTER AND SERVANT — OBJECTION TO JURISDICTION OF COMMISSION TO REVIEW COMPENSATION PROCEEDING HELD WAIVED BY APPEARANCE.

Appearance before the Industrial Commission and participation in the hearing waives the right to raise the question that the Industrial Commission was without jurisdiction to review the report of the arbitrator because the transcript of the proceedings before the arbitrator was not filed within the time required.

(For other cases, see Master and Servant, Dec. Dig. § 418[3].)

8. MASTER AND SERVANT—COMMISSION'S JURISDICTION OF COMPENSATION PROCEEDING AFTER ARBITRATOR'S REPORT ORIGINAL, NOT APPELLATE.

A review of an arbitrator's decision by the Commission is neither a review of the record nor a trial de novo, but is a combination of the two, analogous to the power of the court to review the report of a master or referee, and the jurisdiction of the Commission on such review is original as distinguished from appellate jurisdiction.

(For other cases, see Master and Servant, Dec. Dig. § 414.)

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9. MASTER AND SERVANT—"JURISDICTION" OF COMMISSION OF COMPENSATION PROCEEDING AFTER ARBITRATOR'S REPORT GOVERNED BY CRICUIT COURT PRACTICE AS TO FILING OF TRANSCRIPT.

Though the Industrial Commission is not a judicial body, and performs no judicial functions, so that the legal term "jurisdiction" is not strictly applicable to it, that term can be used to designate the authority of the Commission to hear and consider cases under the Compensation Act, and such jurisdiction with reference to review of the arbitrator's report is governed by analogy to the rules of practice applicable in circuit courts.

(For other cases, see Master and Servant, Dec. Dig. § 414.)

(For other definitions, see Words and Phrases, First and Second Series Jurisdiction.)

Error to Circuit Court St. Clair County; George A. Crow, Judge.

Proceeding under the Workmen's Compensation Act by John Delaurenti, employee, to recover compensation for personal injuries opposed by the Pocahontas Mining Company, employer. An award of compensation by the Industrial Commission was affirmed by the circuit court. and the employer brings error. Reversed and remanded, with directions.

R. W. Ropiequet and W. C. Ropiequet. both of St. Louis. Mo.. for plaintiff in error.

A. W. Kerr, of Chicago, and J. A. Londrigan. for defendant in error.

George B. Gillespie. of Springfield. and L. V. Hill. of Hillsboro. amici curiæ.

DUNCAN, J. On application for adjustment of his claim for injury in the mine of plaintiff in error, which he received on October 5, 1918, while employed as a shot firer, John Delaurenti. was on April 19, 1919, awarded by the arbitrator $15 per week for 22 weeks for temporary total incapacity, amounting to $330, all of which was then due, and was paid by plaintiff in error. The arbitrator further found that he had sustained a permanent loss of 25 per cent. of the use of each of his arms and a permanent loss of 25 per cent. of the sight of each eye, and allowed him a further sum for such loss of his arms and his sight of $15 per week for 150 weeks, and also found that the sum of $75 was then due for such loss of sight and use of his arms. and that the remainder thereof should be paid in weekly installments, beginning with April 26, 1919. On a review the Industrial Commission confirmed the award October 2. 1919, merely finding that in the opinion of the Commission the findings and award of the arbitrator were correct. The Commission declined to consider the petition of plaintiff in error to suspend the payment of such compensation for failure of defendant in error to accept medical treatment tendered him for his injuries. on the ground that under its rulings compensation must be paid up to the filing of such petition, which was not done. The record of the proceedings of the Commission was quashed in certiorari proceedings before the circuit court of Bond county, and the cause was remanded for further evidence. Further evidence was heard, and the Commission again declined to consider the petition to suspend the compensation of defendant in error, and declined to require him to be examined by the medical director of the Commission, or by any physician selected by it, at the expense of plaintiff in error, and allow the report of such physician to be incorporated in the record as evidence. On July 2, 1920, the Commission made the same findings and in the same words as in its previous findings, and confirmed the award of the arbitrator. On June 23, 1921, the award of the Commission was

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approved and confirmed by the circuit court of St. Clair county, and a writ of error was allowed by this court.

The evidence in the record bearing on the question of injury to the defendant in error's arms and eyes is in substance the following: He was thrown to the ground in said mine by an explosion, commonly called a "windy" or "blown-out" shot. He sustained burns all over his body. He testified that he lived in Pocahontas, and was 34 years old. and when injured was working as a shot firer. Both of his arms were good arms before the injury. He could handle lumps of coal weighing 100 or 125 pounds, and shovel coal as well as any man. He could handle and put up top pieces and heavy timbers five feet long and a foot square when he worked as a timberman. The fire from the explosion left scars on his elbows. His head was swelled considerably from the burns and injuries. The back of his right hand was cracked by the burns, and there was no change in the scar for four months. As a shot firer he had no lifting to do, and his arms would not bother him in shot firing. His eyes were injured also. He never wore glasses before he was hurt, but wears them now because he cannot see where he is going. He can see pretty near, but not, half as far as he could before he was burned and hurt, He does not know people 20 feet away without his glasses. He sees better with them. Before he was hurt he had good eyes, but never had them tested before he was injured. He returned to the mine as timberman for two days, and also worked as a jackman. putting cars on the track with a jack when they got off, and worked there until he was discharged for reasons not connected with his injuries. Over the objections of plaintiff in error he was allowed to testify that he had lost 40 per cent. of the use of each arm and of his sight in both eyes. After the cause was remanded for further evidence he testified that he was not running coal because his arm hurts him. He cannot see without glasses, and they would get dusty in the mine. Before he was injured he could see to write. Now his eyes are not as strong as before, and he cannot see to read or to sign his name without glasses. He cannot see any better than when he appeared at the first hearing. If he takes a hammer and strikes hard with it his arm tingles and hurts him, and he is not strong in his arms, but says his arms are not stiff in any way. He has full use of the joints of his arms and at the elbows and at his shoulders and in his fingers. He runs a soft drink parlor, and lifts cases of near beer with 36 bottles in them, but denies that he lifted half barrels of beer and cakes of ice weighing near 250 pounds.

The testimony of three physicians was to the effect that all the burns on defendant in error were first degree burns except as to the arms, which were second degree burns. There was no swelling or discoloration of the eyelids. They moved normally up and down. There was a superficial scar on the outside of one lid. and the inner lining was moderately chronically inflamed. The conjunctiva of the eyeball (the mucous membrance lining of the eyelid and covering the anterior part of the eyeball) in the lower half of the right eye showed numerous minute, dust-like particles. The eyeballs have normal positions, and move normally in every direction. The cornea of the right eye showed, on examination with a microscope, a small, round, faint, grayish opacity in the area of the pupil, and was an old opacity, probably due to a foreign body located there at one time. The cornea of the left eye showed no signs of disease or injury. The anterior chambers of both eyes were clear and normal. The irises of both eyes were normal in color and structure. The pupils were equal, and normally round. The lens and vitreum were normal. The optic nerve and retina were intact. His eyes showed far-sightedness. The sight of both is equal, six-eighths, and with correcting lenses he had normal vision. He can see at 20 feet what the normal can at 24 feet, caused by far-sightedness, which is not caused by burns or injuries, but by faulty development. The burns all healed with new-

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skin grown, and there are only a few superficial scars on each elbow. The muscles move and act freely. There are no adhesions of the skin to the muscles, and no nerves involved underneath the skin or scars. The skin is freely movable over the tissues and over the muscles below, except in one little spot over one elbow. There is nothing wrong with his eyes due to any burn or injury he received in the explosion. His arms are all healed, and the injury to them was only temporary, and not permanent in any degree.

The blood test of defendant in error showed 3 plus positive, which means a specific or syphilitic condition, specific. Defendant in error made no denial of having such a condition, and, in fact, did not reply to this testimony in any manner. Dr. F. J. Dietz, of St. Louis, Mo., a physician and surgeon, recommended the salvarsan treatment or salvarsan injection for this syphilitic condition, and testified that he was satisfied that it would remedy specifically the trouble that defendant complained of in his eyes and arms, and also testified that there was no danger involved in giving the treatment by an experienced operator. He also stated there might be some danger of giving salvarsan in the hands of an inexperienced operator, as well as to a subject who is not properly prepared. Salvarsan is an arsenic solution held in suspension, or a solution of arsenic and benzol, which is neutralized by adding a solution of water and sodium hydrate and acid. He testified that there are instances where apparent loss of sight of an eye was cleared up by the administration of salvarsan solution, by checking an atrophy of the optic nerve, which adds strength to the eye, but that it will not relieve or restore sight to an eye that is lost. On the hearing plaintiff in error made a distinct offer to defendant in error of the salvarsan treatment by Dr. Dietz, all expenses of hospital treatment to be paid for by plaintiff in error, and without charge of any kind to defendant in error, which offer was refused by defendant in error, as heretofore stated.

Four residents of Pocahontas—Emery A. Rea and Guy Rea, doing a delivery garage, and draying business, Wiley Paine, village marshal, and Arthur Clark, a coal miner— testified, in substance, to seeing defendant in error handling large cakes of ice weighing from 250 to 300 pounds and half barrels of near beer weighing about 200 pounds by unloading, unassisted, the beer and ice from the rear end of a dray. His manner of doing this was by pulling them out of the dray and easing them to the ground, a distance of 3 or 4 feet, and letting them drop most of the way so as not to be injured thereby. One of these witnesses testified positively that he saw defendant in error lift one of the half barrels of beer and put it into an ice box, and then lift a second one and put it on top of the first half barrel, unassisted, and that he then piled chunks of ice clear to the top of the ice box and on top of the half barrel, as high as 5 feet above the floor; that the pieces of ice were sawed from the larger pieces weighing 250 or 300 pounds. the large pieces being sawed into 3 or 4 smaller ones.

[1] The Commission, under the evidence in this case, was required to find as ultimate facts whether or not the defendant in error had sustained any permanent loss of the use of his arms or eyes, and, if any, what per cent. of such loss. We have frequently ruled that lay witness, or even an expert, cannot testify in direct terms that an injured employee has lost any stated per cent. of the use of an eye or of a limb, etc. It is proper for an injured employee to testify how and in what manner his injuries affect him, to detail his ability to see or to use his injured parts. and his ability to work or to use his injured eyes or limbs, and in what manner such use affects him. It is proper for an expert to testify as to whether or not a man's vision is normal or otherwise and as to the amount or extent of his vision as disclosed by scientific tests or examination, and as to the amount of movability or apparent use he has of an injured limb, but he cannot answer in direct terms as to what per cent. of loss he has

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sustained in the use of an eye or of a limb, as such conclusion or finding must be made by the Commission from the legitimate evidence in the record.

[2, 3] Paragraph (c) of section 19 of the Compensation Act (Hurd's Rev. St. 1919, c. 48, § 144) authorizes the Commission, at its own expense, to appoint a duly qualified. impartial physician to examine the injured employee and report to the Commission. It further provides that the fee of the physician for such services, and the payment thereof, upon request of either the employer, the employee, or the beneficiary affected, is subject to review and decision of the Commission. Paragraph (d) of the same section provides that, if any employee shall persist in insanitary or injurious practices which tend either to imperil or retard his recovery, or shall refuse to submit to such medical, surgical, or hospital treatment as is reasonably essential to promote his recovery, the Commission may, in its discretion. reduce or suspend the compensation. The employer is entitled to a physical examination of his employee by a physician without being compelled to pay the compensation awarded by the Commission. Hafer Washed Coal Co. v. Industrial Com.. 293 Ill. 425, 127 N. E. 752. Section 12 of the act (section 137) requires the employee, if requested by the employer, to submit himself, at the expense of the employer for examination by a duly qualified medical practitioner or surgeon selected by the employer as provided in that section, and, if the employee refuses so to submit himself for examination, or unnecessarily obstructs the same, his right to compensation payments shall be temporarily suspended until such examination shall have taken place, etc. Plaintiff in error was entitled to a decision of the Commission as to whether or not the defendant in error should submit to the treatment for his ailments that was tendered by plaintiff in error, and, if it found that such treatment was reasonably essential to promote his recovery. the Commission should have entered an order that he submit to the same, and, in case of his refusal, should reduce or suspend the compensation. It seems to us that an examination of defendant in error by an impartial expert as to his physical injuries and condition, and his opinion upon the question of the efficacy of the proposed treatment and desirability of the same, will be most valuable to the Commission in making its decision as to whether or not defendant in error was acting within his reasonable discretion in refusing to submit to such examination and treatment, without having his compensation suspended or reduced. For the failure of the Commission to properly consider and act upon such questions, the judgment in this case will have to be reversed, and the cause remanded for the further consideration of the Commission.

[4] When the incompetent evidence in this record, as above indicated, is eliminated, we do not think there is any evidence in the record that supports the finding that defendant in error has suffered 25 per cent. of the loss of the use of his arms, but, as this cause will have to be remanded for a further consideration, and as it may be desirable to introduce further evidence; we shall not further discuss this case upon the merits.

[5] We have indicated heretofore in our decisions that the Commission should pass upon all controverted questions of fact raised in the case, and make findings in the record, but that we would not reverse a judgment because of the fact that the Commission had failed to do so. Paragraph (e) of section 19 of the Compensation Act provides that in any case the board may, in its discretion, find specially upon any question of law or fact which may be submitted in writing by either party, whether ultimate or otherwise. No question whatever was submitted by plaintiff in error for such a finding. and it cannot therefore complain successfully of the character of the Commission's finding in this case.

Defendant in error has presented the question in this court for the first time in this case that the decision of the arbitrator must be considered as final. This contention is based upon the proposition that the

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Commission did not have jurisdiction to review the decision of the arbitrator or lost jurisdiction of the case by reason of the fact that plaintiff in error failed to file an agreed statement of facts or stenographic report before the Commission within the time required by the statute, and the decision of this court in the case of People v. Andrus, 299 Ill. 50, 132 N. E. 225, is relied upon as sustaining his position. The case just cited seems to be regarded by the attorneys in this case as in serious conflict with some of the former decisions of this court, and, because of the fact, or of the supposed fact, that our former decisions are in direct conflict with each other upon this question, it will be necessary for us to distinguish or explain them at some length. We are aided considerably in this matter by the able briefs by plaintiff in error upon that question, as well as by a very exhaustive brief filed by counsel for W. K. Kavanaugh, president of the Coal Operators' Association of the Fifth and Ninth districts of Illinois, and others, as amici curiæ.

The arbitrator's award was filed with the Industrial Commission April 19, 1919, and the petition for review of the arbitrator's decision was filed April 25, 1919, within the time required by the statute. Plaintiff in error requested and obtained four different extensions of time, for 3 days each, in which to file the stenographic report of the evidence before the arbitrator, and the stenographic report was not filed until September 2, 1919. The petition to suspend compensation was filed with the Industrial Commission September 10, 1919. Under the provisions of paragraph (b) of section 19 of the Compensation Act, as enacted in 1915 and 1917, it was an absolute requirement that the stenographic report should be filed with the Commission within 20 days after the receipt of a copy of the decision, or that an agreed statement of facts appearing before the arbitrator should be filed within the same time, and if this provision was not compiled with, the decision of the arbitrator should become the decision of the Commission. There was a proviso added that the Commission for sufficient cause might grant further time to file such stenographic report or agreed statement of facts, not exceeding 30 days. These same provisions of the statute continued in force under the acts of 1919 and 1921 without any material change, so far as the question raised in this case is concerned; but the act of 1921 (Laws 1921, p. 456) added a further provision in paragraph (c) of the same section that, if a reporter does not for any reason furnish a transcript of the proceedings before the arbitrator in any case for use on a hearing or review before the Commission, within 30 days of the filing of the petition for review, the Industrial Commission may, in its discretion, order a trial de novo before it in such case, upon application of either party. The foregoing provisions with reference to the time in which the stenographic report or the agreed statement of facts should be filed with the Commission was also the law as enacted in 1913, except that in the proviso of the latter act it was provided that, for sufficient cause shown, the Commission might grant further time in which to petition for review or to file such agreed statement of facts or stenographic report, and there was no limit placed upon the further time that the Commission might give on cause shown.

[6, 7] As we said in the Andrus Case, supra, the condition upon which the right of review by the Commission depends is plainly declared, in terms which cannot be misunderstood, in all the acts aforesaid enacted since 1913, and a compliance with those terms is an absolute requirement of the statute that cannot be dispensed with if taken advantage of at the proper time but may be waived, as will be later shown. Only one extension of time is provided by this statute, and that extension is for 30 days, and the Commission is without authority to make any further extension. Had defendant in error taken advantage of the failure of plaintiff in error to file the stenographic report in the time required by the statute and in the proper manner before the Commission, his claim that the Commission lost jurisdiction of the case would have been available to

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him. But this was not done. Defendant in error appeared before the Commission, and participated in the contest before the Commission until its conclusion, and he thereby waived all right to raise the question now before us, either in the circuit court or in this court, as the circuit court and this court have appellate jurisdiction of this class of cases, and not original jurisdiction.

[8, 9] A review of an arbitrator's decision by the Commission, as stated in the Andrus Case, supra, is sui generis, since it is neither a review of the record made by the arbitrator nor a trial de novo but a combination of the two. The transcript of the record is to be reviewed by the Commission, and the parties have the right to introduce further evidence, which, when taken and properly filed before the Commission, must be also considered by it along with the evidence taken before the arbitrator. The jurisdiction of the Commission to review the evidence before the arbitrator and to consider any further evidence properly presented to it is original jurisdiction as distinguished from appellate jurisdiction. As suggested by counsel for amici curiæ, the Industrial Commission appoints the arbitrator, and the arbitrator in his consideration of the case is but the agent of the Commission, similar in character to that of a master in chancery or a referee in bankruptcy, so far as the character of the functions performed by the arbitrator is concerned. The award of the arbitrator, like the report of the master in chancery, may become final by its entry upon the records of the Commission, and does become final if it is not contested, but, if it is contested before the Commission, the jurisdiction of the Commission to review is original jurisdiction as certainly as the action of the circuit court in reviewing or passing upon the master's report and entering final decree is original jurisdiction. We recognize the fact that the Industrial Commission is not a judicial body, and performs no judicial functions, and have so held. Savoy Hotel Co. v. Industrial Board, 279 Ill. 329, 116 N. E. 712.

It is true, as suggested by counsel for plaintiff in error, that the legal term "jurisdiction," strictly speaking, applies only to courts, but, for want of a more apt term to express what we mean, we have heretofore applied, and will continue to apply, the term "jurisdiction" to the Industrial Commission, by which we are to be understood as meaning the statutory authority given to it to hear and consider cases under the Compensation Act (Hurd's Rev. St. 1919, c. 48, §§ 126–152i). As the jurisdiction of the Commission is original jurisdiction, in considering the question now before us the rules of practice applicable in circuit courts, which are courts of original jurisdiction, by analogy are applicable to the rules of practice before the Commission, with respect, however, only to the particular question now in hand.

[10] Counsel for defendant in error have presented this question upon the theory that the Commission had no jurisdiction of the subject-matter of this suit. This theory is entirely erroneous. The real question is whether or not the Commission had jurisdiction of this particular case and of the parties to the suit when it made its decision. It obtained jurisdiction of the case when the petition for review was filed before it, as it was filed in apt time. It obtained jurisdiction of the parties by their appearance and participation in the contest, and for that reason never lost jurisdiction of the case if it had jurisdiction of the subject-matter.

"Jurisdiction of the subject-matter does not mean simply jurisdiction of the particular case then occupying the attention of the court, but jurisdiction of the class of cases to which that particular case belongs." 7 R. C. L. 1029.

[11] It cannot be doubted, and certainly will not for a moment be questioned, that the Commission has jurisdiction or the statutory right and power conferred upon it to hear and determine the class of cases to which this case belongs. It may not have jurisdiction of the particular case in hand, or it may lose jurisdiction for a number of reasons not

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necessary now to be stated, but there can be no question that it has jurisdiction of the subject-matter of this case and all other cases of like character in its class. The rule is that, where a court or a nonjudicial body has no jurisdiction of the subject-matter of a suit or controversy given by the law or by a statute, such jurisdiction cannot be conferred by agreement of the parties or by waiver, and that all acts performed by the court or such nonjudicial body where it has no jurisdiction of the subject-matter are null and void. It is also true that, where such jurisdiction of the subject-matter is wanting in a court or a nonjudicial body which has acted and made final decision therein, the fact may be taken advantage of at any time on review in a court having appellate jurisdiction. These propositions are elementary, and have been so frequently decided by this court we do not deem it necessary to cite our decisions. It is to be understood that in these statements we are talking of courts and nonjudicial bodies having original jurisdiction as distinguished from appellate jurisdiction.

[12] Under the decisions of this court it may be broadly stated that, where a court of original jurisdiction has jurisdiction of the subject-matter of a suit, and the parties enter their appearance before the court and contest their rights before the court to a final judgment, without objection in any way to the right of the trial court to hear the cause and to render such final judgment, it does not matter in what manner the parties were brought before the court, and, on appeal or review by writ of error to an appellate court or to this court, the parties will be absolutely bound, so far as the question of jurisdiction of their persons and of the particular case asked to be reviewed is concerned. Accordingly this court has frequently held that, in cases tried before the circuit court on appeal from a justice of the peace, or from some county or probate court, and wherein the circuit court had jurisdiction of the subject-matter, and the trials are de novo in the circuit court, all objections to process or service of process in such court, and all irregularities in taking an appeal, are waived, if the case is by appeal, unless such irregularities in process or in bonds or in other proceedings on appeal are taken advantage of in the circuit court, and before any appearance is made in the suit by the party questioning such irregularities. In fact where the circuit court has jurisdiction of the subject-matter of a suit, and exercises original jurisdiction in trying and in deciding the case, on review by appeal or writ of error it does not matter how the case got into the circuit court, and the court of review will not entertain any objections to irregularities in process, or any other irregularities whatever, in getting the case into the circuit court unless such objections were first properly raised in the circuit court in apt time. Our decisions have gone so far as to hold that, even where a case tried in the circuit court was appealed from another court having absolutely no jurisdiction of the subject-matter of the suit, if the trial in the circuit court on appeal was de novo and is a case in which the circuit court has jurisdiction of the subject-matter, on review the irregularity that the suit was first begun in a court without jurisdiction is waived unless properly raised in the circuit court. The following are some of the many cases decided by this court sustaining the propositions announced in this paragraph: Randolph County v. Ralls, 18 Ill. 29; Crull v. Keener, 18 Ill. 65; Mitchell v. Jacobs, 17 Ill. 235; Jarrett v. Phillips, 90 Ill. 237; Grier v. Cable, 159 Ill. 29, 42 N. E. 395. Courts in other jurisdictions have made rulings similar to those in the cases just cited. 3 Corpus Juris, 1250, and notes.

The rule that, where a court of original jurisdiction has jurisdiction of the subject-matter of a suit, and is given jurisdiction of the proper parties by appearance, it has the power or jurisdiction to proceed in the cause to final judgment, and that all objections to irregularities as to process or as to the manner in which the suit was brought before the court are waived if not properly raised in that court before appearance, has

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been many times applied by this court to proceedings of the Industrial Commission on review of the award of an arbitrator. In Tribune Co. v. Industrial Com., 290 Ill. 402, 125 N. E. 351, we held that the statutory provision that a claim for compensation must be filed in the time specified by the act was waived because not properly objected to before the Commission before appearance, and there said:

"The general rule seems to be that while the defendant may make a quasi appearance for the purpose of objecting to the manner in which he is brought before the court, and, in fact, to show that he is not legally there at all, 'if he ever appears to the merits he submits himself completely to the jurisdiction of the court and must abide the consequences.'"

The same ruling was made, and for the same reason, in Storrs v. Industrial Com., 285 Ill. 595, 121 N. E. 267. In American Milling Co. v. Industrial Board. 279 Ill. 560, 117 N. E. 147, the jurisdiction of the Commission was questioned because the record did not show any notice was given to the employer, and that the claim was not filed within six months after the accident. and the objections were held waived because not raised before the Commission. In Chicago Packing Co. v. Industrial Board, 282 Ill. 497, 118 N. E. 727, it was for the same reason held that the objection that the deceased was not engaged in an extrahazardous occupation was waived, and that the board had jurisdiction, because it was stipulated that the only question for decision before the board was whether the accident arose out of and in the course of the employment. In Bloomington, Decatur & Champaign Railroad Co. v. Industrial Board. 276 Ill. 454, 114 N. E. 939. and in Illinois Midland Coal Co. v. Industrial Board, 277 Ill. 333, 15 N. E. 527, it was held that, if at any time before the hearing the stenographic report is properly authenticated. the statute is complied with, and the board has jurisdiction. Those two decisions are not in conflict with the decision in the Andrus Case, supra, and the decisions of the court might have well been placed upon the sole ground that the objections were waived by not taking advantage of them before the Industrial Board, if that had not been done, or upon the further ground that the statute of 1913 authorized the board to extend the time for the filing of such stenographic report, which authority for extension was not then limited by the statute. The same is true of the case of Sulzberger & Sons Co. v. Industrial Com., 285 Ill. 223, 120 N. E. 535, where several extensions of time were granted by the Commission to file the stenographic report, each one being granted before the prior extension had expired, as that case was heard before the Commission under the act of 1913. It was inadvertently said in that case that the case came under the act of 1915, but the decision was substantially correct, and is not in conflict with the Andrus Case.

We adhere to the ruling in the Andrus Case as correctly laying down the law in every particular that was involved therein. It was sought in that case by mandamus proceedings to compel the Commission to reinstate and hear a petition for review of the decision of the arbitrator. The Commission had dismissed the case in question before it because the stenographic report was not filed until 25 days after notice of the decision of the arbitrator, and without having obtained any extension of time for that purpose. The Commission had therefore lost jurisdiction of the case, as an objection had been made to the Commission in apt time for the dismissal of the proceedings, and there was therefore no waiver of the objection to the Commission's taking jurisdiction. The Commission could not, therefore, be mandamused to reinstate and hear the case, and that is the sum and substance of what the Andrus Case decided. In the case now before us, as already shown, defendant in error did not raise any objection before the Commission to its taking jurisdiction and deciding the case, but appeared and participated in the contest until the Commission had entered its final order. He therefore completely waived any

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right to raise the question that the Commission had lost jurisdiction of the case, either in this court or in the circuit court.

For the reasons aforesaid, the judgment of the circuit court is reversed, and the cause remanded, with directions to remand the cause to the Commission for further consideration, and with leave to the parties to introduce further evidence if they shall so desire.

Reversed and remanded, with directions.

PARADISE COAL CO. v. INDUSTRIAL COMMISSION ET AL.
(No. 14331.)

(Supreme Court of Illinois. Feb. 22, 1922.)

134 Northeastern Reporter, 167.

1. MASTER AND SERVANT — EVIDENCE HELD NOT TO SUPPORT COMPENSATION AWARD FOR PARTIAL INCAPACITY.

Award for partial incapacity of coal miner under Workmen's Compensation Act, § 8, par. (d), *held* not supported by evidence.

(For other cases, see Master and Servant, Dec. Dig. § 405[6].)

3. MASTER AND SERVANT—COMPENSATION CLAIMANT REQUIRED TO SUBMIT TO PHYSICAL EXAMINATION BEFORE DETERMINATION OF CLAIM.

The employer's right under Workmen's Compensation Act, § 12, to require an injured employee to submit to an examination is not restricted to cases where the employer acknowledges his liability to make compensation payments, and if an employee whose right to compensation has not been determined refuses to submit to such examination at a time and place reasonably convenient, his right to compensation payments is suspended until such examination shall have taken place.

(For other cases. see Master and Servant. Dec. Dig. § 399.)

4. MASTER AND SERVANT — OBJECTION TO JURISDICTION OF COMMISSION TO REVIEW COMPENSATION PROCEEDING HELD WAIVED BY APPEARANCE.

The objection that. because of the failure to file the stenographic report of the proceedings before the arbitrator within the statutory time, the decision of the arbitrator became the decision of the Industrial Commission, conclusive upon all parties, and not reviewable either by the Commission, the circuit court by certiorari, or by the Supreme Court, cannot be raised for the first time in the Supreme Court, not having been presented to the Commission or to the circuit court by the employee, who, by appearing by his counsel without objection to the jurisdiction of his person, waived any right to raise the question that the Commission had lost jurisdiction of the case.

(For other cases, see Master and Servant, Dec. Dig. § 418[3].)

Error to Circuit Court, St. Clair County; George A. Crow, Judge.

Proceeding under the Workmen's Compensation Act by Oliver Dinnis, employee, opposed by the Paradise Coal Company, employer. Award of the Industrial Commission was approved by the circuit court, and the employer brings error. Reversed and remanded, with directions.

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R. W. Ropiequet and W. C. Ropiequet, both of St. Louis, Mo., for plaintiff in error.

A. W. Kerr, of Chicago, and George R. Stone, of Marion, for defendant in error.

DUNN, J. Oliver Dinnis, an employee of the Paradise Coal Company, while lifting on a car of coal on June 17, 1919, fell astride the rail, and the car came back against him, injuring his back and one of his testicles. He went to a physician, Dr. Daggett, who found him suffering with varicocele, and directed him to stay off his feet as much as possible, and to lie on his back, with his hips elevated. The doctor recommended an operation for varicocele, and offered to perform this operation at the expense of the Paradise Coal Company, as the latter had authorized him to do. Dinnis did not avail himself of this offer, but returned to work on August 15, 1919. He applied to the Industrial Commission on October 2, 1919, for an award of compensation, claiming temporary total and partial disability. At the hearing before the arbitrator it was stipulated that payment had been made in full for temporary total disability up to August 15, from which time any compensation for further disability should be computed, and that the question in dispute was as to the extent of disability, and what, if any, compensation the petitioner was entitled to on account of such disability. On November 25, 1919, an award was made, finding:

"That petitioner is entitled to have and receive from respondent the sum of $6 per week for a period of 407$^{4}/_{7}$ weeks, as provided in paragraph (d) of section 8 of said act, as amended (Hurd's Rev. St. 1919, c. 48, § 133), for the reason that the injuries sustained caused partial incapacity for pursuing his usual and customary line of employment, $6 being 50 per cent. of the difference between what applicant earned before the injury and what he is able to earn in some suitable employment."

A petition for review was filed with the Commission, and, on the hearing before the Commission, no additional evidence was introduced except statements showing the earnings of the claimant after August 15, 1919. The Industrial Commission confirmed the award of the arbitrator, and the circuit court of St. Clair county, upon review by certiorari, approved the award of the Commission. A writ of error was awarded to bring the record before this court for review.

[1, 2] It was stipulated on the hearing before the arbitrator that the weekly wages of the petitioner for the year preceding his injury were $34.08. His testimony at the hearing on November 25, 1919, was that his wages after he returned to work averaged about $4.50 a day until the last pay day, which was $27 for a week of 6 days. Paragraph (d) of section 8, under which the award was made, provides that for partial incapacity an injured employee shall receive compensation equal to 50 per centum of the difference between the average amount which he earned before the accident and the average amount which he is earning or is able to earn in some suitable employment or business after the accident. The difference between the earnings of the defendant in error before the accident and what he was earning and what he was able to earn, as shown by his testimony, is $7.08 a week, and therefore there was no evidence before the arbitrator to sustain a finding of $6 a week. The only additional evidence produced on the hearing before the Commission showed that from August 15, 1919, to December 31, 1919, he earned $252.94, and that from January 1, 1920, to April 30, 1920, he earned $573.91, which was at the rate of $33.75 a week, which is 33 cents a week less than his earnings before his injury. The hearing before the Commission was on May 26, 1920, and it is apparent that there was no material difference between the earning capacity of the defendant in error at that time and his average wages before his injury. Since there was no other evidence on this point in the record, the award cannot be sustained. When an employee

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is physically able to work and is able to earn in a suitable employment the same wages as he received before he was injured an award for partial incapacity is not justified. Voight v. Industrial Com., 297 Ill. 109. 130 N. E. 470; Old Ben Coal Corporation v. Industrial Com., 296 Ill. 229, 129 N. E. 772.

[3] On the hearing before the arbitrator the plaintiff in error requested of the arbitrator that Dr. Daggett, who was present, be permitted to examine the applicant to ascertain the extent of his injury, and to what, if any, compensation he might be entitled, as authorized by section 12 of the Workmen's Compensation Act (Section 137). The attorney for the applicant objected, not on the ground that it was not a reasonable time and place, but on the ground that no compensation was being paid, and the arbitrator sustained the objection on the ground that he could no order the applicant to submit to an examination until after it had been determined he was entitled to compensation. The employer's right to require an injured employee to submit to an examination is not restricted to cases where the employer acknowledges his liability to make compensation payments, and, if the employee refuses to submit to such examination at a time and place reasonably convenient, his right to compensation payments is suspended until such examination shall have taken place. Hafer Washed Coal Co. v. Industrial Com., 293 Ill. 425, 127 N. E. 752, Jackson Coal Co. v. Industrial Com., 295 Ill. 18, 128 N. E. 813.

[4] Notice of the decision of the arbitrator was given to the plaintiff in error on December 8, 1919, and the petition for review was filed with the Industrial Commission on December 23. The Industrial Commission made orders extending the time for filing the stenographic report for 30 days on December 23, 1919, January 27, 1920, and February 26, 1920, and the stenographic report was not filed until March 20, 1920, more than 3 months after the date of notification of filing of the award. The defendant in error has made a motion, which was taken with the case, to dismiss the writ of error and affirm the judgment, for the reason that, because of the failure to file the stenographic report within the time fixed by the statute, the decision of the arbitrator became the decision of the Industrial Commission, conclusive upon all parties, and was not subject to review by the Commission, by the circuit court by certiorari, or by this court. This question is raised for the first time in this court. It was not presented to the Industrial Commission or to the circuit court, but the defendant in error appeared by his counsel, and made no objection to the jurisdiction of his person, and thereby waived any right to raise the question that the Commission had lost jurisdiction of the case. Pocahontas Mining Co. v. Industrial Com. (No. 14332) 134 N. E. 160; Taylor Coal Co. v. Industrial Com. (No. 14224) 134 N. E. 169. The motion will therefore be overruled.

The judgment of the circuit court will be reversed, and the cause will be remanded, with directions to set aside the order of the Industrial Commission and remand the cause for a further hearing and the introduction of further evidence if either of the parties so desires.

Reversed and remanded, with directions.

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TAYLOR COAL CO. v. INDUSTRIAL COMMISSION ET AL.
(No. 14224.)

(Supreme Court of Illinois. Feb. 22, 1922.)

134 Northeastern Reporter, 169

1. MASTER AND SERVANT — COURTS HAVE JURISDICTION OVER CERTIORARI TO REVIEW COMPESATION AWARD OF INDUSTRIAL COMMISSION MADE WITHOUT JURISDICTION.

The circuit court on certiorari to the Industrial Commission and the Supreme Court on writ of error to circuit court judgment have jurisdiction to review an award by the Industrial Commission on questions of law, including whether the commission had jurisdiction of the case, so that a writ of error will not be dismissed because the Industrial Commission had lost jurisdiction for failure to file in time the stenographic report of the proceedings before the arbitrator.

(For other cases, see Master and Servant, Dec. Dig. § 418[1].)

4. MASTER AND SERVANT — OBJECTION TO COMMISSION'S JURISDICTION OF COMPENSATION PROCEEDING WAIVED BY APPEARANCE.

The objection that the Commission was without jurisdiction to review the report of the arbitrators because of delay in filing the stenographer's report of proceedings before the arbitrators is waived where the parties appeared before the Commission without raising that objection, and participated in the proceedings by the Commission.

(For other cases, see Master and Servant, Dec. Dig. § 418[3].)

6. MASTER AND SERVANT—OBJECTION TO CONSTITUTIONALITY OF COMPENSATION ACT HELD WAIVED.

Where the employer stipulated certain facts before the Industrial Commission, participated in the proceedings before the Commission, without objection, and took credit for compensation already paid by virtue of the Compensation Act, it waived its right to object that the Compensation Act, by preventing a review of the facts by the court, deprived it of its property without due process of law.

(For other cases, see Master and Servant, Dec. Dig. § 417[4].)

Error to Circuit Court, Williamson County; D. T. Hartwell, Judge.

Proceeding by Oscar Hall, as employee, to recover compensation under the Workmen's Compensation Act, opposed by the Taylor Coal Company, employer. An award of compensation by the Industrial Commission was confirmed by the circuit court, and the employer brings error. Affirmed.

Denison & Spiller, of Marion, for plaintiff in error.

A. W. Kerr, of Chicago, and George R. Stone, of Marion, for defendant in error.

CARTWRIGHT, J. The defendant in error, Oscar Hall, applied to the Industrial Commission for compensation for an alleged injury by reason of an accident arising out of and in the course of his employment on October 24, 1919, in the mine of the plaintiff in error, the Taylor Coal Company. An arbitrator heard the evidence, and made an award of $14 per week for 16 weeks for temporary total incapacity, and $14 per week for 50 weeks for the reason that the injury caused 33$^1/_3$ per cent. permanent

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loss of the use of the right hand. Upon a review by the Industrial Commission the award of the arbitrator was confirmed, and, upon a writ of certiorari from the circuit court of Williamson county, the writ was quashed and the award affirmed. This court allowed a writ of error to the circuit court to review the proceeding.

The argument for the plaintiff in error is devoted to the single proposition that the Workmen's Compensation Act in force before July 1, 1921 (Hurd's Rev. St. 1919, c. 48, §§ 126–152i), as construed by this court, prohibits a judicial review of both law and facts in accordance with the general rules established in our system of jurisprudence for the security of private rights, and is therefore in conflict with the requirement of due process of law in the Fourteenth Amendment of the federal Constitution, and is null and void. The sole reply of the defendant in error to that argument is that the record shows that no agreed statement of facts appearing upon the hearing before the arbitrator or a correct stenographic report of the proceedings was filed with the Industrial Commission within 50 days after the plaintiff in error received notice of the filing of the award, and this is the ground of a motion to dismiss the writ of error and affirm the decision of the Industrial Commission.

[1] It will be observed that the motion calls upon the court to disclaim jurisdiction of the writ of error and dismiss the same because of an alleged want of jurisdiction in the Industrial Commission, and also to exercise such jurisdiction by affirming the decision of the Commission. That part of the motion calling upon the court to dismiss the writ for want of jurisdiction cannot be allowed. The court has jurisdiction, by virtue of the statute, to review judgments and orders of the circuit court under the Compensation Act upon writ of error, which the court in its discretion may order to issue if applied for as provided in the act, and upon such writ of error may determine whether the circuit court acquired jurisdiction under the provisions of the statute, and, if it had jurisdiction, whether error was committed. By the act in question the circuit court was given jurisdiction, by writ of certiorari to the Industrial Commission, to review all questions of law presented by the record except such as arose where a decision of the arbitrator or committee of arbitration had become the decision of the Industrial Commission. No question of jurisdiction of the circuit court to review the award in this case was presented to or passed upon by the circuit court. Oscar Hall filed his motion in writing to quash the writ of certiorari, and did not raise any question such as is sought to be raised here, but, among other things, averred as follows:

"Said record shows that the Industrial Commission had jurisdiction of the subject-matter and of the parties and that said decision is in all respects regular and legal."

Not only was no question raised or passed upon by the circuit court concerning the jurisdiction of the Industrial Commission, but no objection was made to a review of the award by the Commission. A stenographic report was not filed within 50 days after notice, but Hall appeared, made no objection to the review by the Commission, and did not present in any manner the proposition that the award had become or should become the decision of the Industrial Commission. If, therefore, the question of jurisdiction of the Industrial Commission or the circuit court was one that could be waived, it was waived.

[2, 3] The general rule as applied to courts is that jurisdiction of the subject-matter—which means jurisdiction of the class of cases to which the particular case belongs and not jurisdiction of a case within such a class—cannot be waived. The method by which jurisdiction of a particular case within the general class of cases is obtained, and any defects or irregularities in respect thereto, may be waived, and are waived unless seasonable objection is made in accordance with the established practice. O'Brien v. People, 216 Ill. 354, 75 N. E. 108, 108 Am. St. Rep. 219, 3

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Ann. Cas. 966; Franklin Union v. People, 220 Ill. 355, 77 N. E. 176, 4 L. R. A. (N. S.) 1001, 110 Am. St. Rep. 248. Where a court has jurisdiction of the subject-matter and may take jurisdiction of a particular case if certain conditions exist, and no objection is raised to the exercise of jurisdiction, as in case of a limitation barring a writ of error, an adequate remedy at law, and the like, a party will be deemed to have waived the jurisdictional question. Burnap v. Wight, 14 Ill. 303; Stout v. Cook, 41 Ill. 447; Crawford v. Schmitz, 139 Ill. 564, 29 N. E. 40; Hauger v. Gage, 168 Ill. 365, 48 N. E. 142; Law v. Ware, 238 Ill. 360, 87 N. E. 308; Peterson v. Manhattan Life Ins. Co., 244 Ill. 329, 91 N. E. 466, 18 Ann. Cas. 96; People v. Evans, 262 Ill. 235, 104 N. E. 646.

Counsel for plaintiff in error insist that no question concerning the jurisdiction of the circuit court either as to subject-matter or the particular case should be considered, because the court decided in Sulzberger & Sons Co. v. Industrial Com., 285 Ill. 223, 120 N. E. 535, that the Industrial Board might grant extensions of time beyond 30 days to file an agreed statement or stenographic report. The opinion in that case has caused considerable misunderstanding on account of a reference to the wrong statute. The accident occurred on June 8, 1914, and petition for review was filed on December 4, 1914. Several extensions of time in which to file the record were granted by the Industrial Board, and it was filed on March 22, 1915. The proceeding, therefore, was under the act of 1913, which required an agreed statement of facts or stenographic report to be filed within 20 days after the decision, but gave the Industrial Board power to grant further time, without limitation, in which either to petition for a review or to file an agreed statement or stenographic report. The proceeding was completed under the act of 1913, and the decision of the court was right. The court could not, in the case presented, construe the provisions of the act of 1915, which was not in force, as shown by the dates given in the opinion, and the quotation from that act was an error.

[4] Decisions respecting jurisdiction, and the authorities on that subject, relate to courts and judicial action under settled rules and methods of procedure, and, as applied to administrative boards or agencies acting under special statutes, they may be somewhat confusing. As far as similar rules can be applied to such boards or agencies, an examination of the statute under which authority is attempted to be exercised must be made to determine the question. The provision for a review by the Industrial Commission is peculiar, partaking both of the nature of a review for error and also a trial de novo upon additional evidence. So far as analogies go, a mere review is somewhat in the nature of a writ of error, and, as applied to a court of review, such a writ is a new suit, in which the court obtains jurisdiction of the particular case by the filing of a præcipe and issue of the writ, and obtains jurisdiction of the parties by the issue and service of process. An appeal is a continuation of the same suit, and jurisdiction is acquired by complying with the conditions on which the appeal was allowed and the filing of the record in the court of review. Neither of these methods is precisely applicable to a review by the Industrial Commission, since there is no writ and the record is already filed with the Industrial Commission. The Commission already has complete jurisdiction of the subject-matter, which is conferred by law, and the method of its exercise in particular cases is prescribed by the statute. The entire administration of the law and the adjustment of claims for compensation are committed to the Industrial Commission. It may designate an arbitrator or chairman of a committee of arbitration to hear evidence and make a report, but no jurisdiction is given to either. A decision of the arbitrator or committee is not a judgment or in the nature of a judgment, but, if there is no proceeding for a review within the time limited by the statute, the decision reported is to become the decision of the Industrial Commission, and, in the absence of fraud, is to be conclusive. If an award made and reported to the Industrial Com-

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mission is assented to by the parties by not applying for a review, it is to be adopted by the Commission as its decision. In administering the act and exercising the authority conferred by it the Industrial Commission must determine in each particular case whether the conditions prescribed by the statute have been complied with, so that the jurisdiction may be exercised. In Friedman Mfg. Co. v. Industrial Com., 284 Ill. 554, 120 N. E. 460, it was held that jurisdiction was acquired by the Industrial Board by the application for compensation; that jurisdiction of the subject-matter of the controversy was conferred by law, which gave the board jurisdiction of all claims for accidental injuries or death arising out of and in the course of employment; that the question for what injuries recovery could be had involved a construction of the act, and, if the construction was erroneous, there might be a review by a writ of error or proceeding in chancery to be instituted within 20 days. In like manner the petition for review in this case gave the Industrial Commission jurisdiction for a review of a case within the general class of cases of which it had jurisdiction. If objection had been made to the exercise of jurisdiction in the case because the statement of facts or stenographic report had not been filed within the time fixed by the statute, and the decision of the Commission was wrong, it would be subject to review on a writ of certiorari by the circuit court. The Commission having jurisdiction of the subject-matter, Hall waived any question of the exercise of authority by the Commission to review the award. The motion is denied.

As before stated, the single claim of the plaintiff in error is that the Workmen's Compensation Act as it existed at the time of this proceeding was in violation of constitutional rights. The stenographic report of the proceeding before the arbitrator contains the following:

"Appearances and stipulation whereby it is agreed that Oscar Hall and Taylor Coal Company were working under and subject to the provision of the Workmen's Compensation Act on the 24th day of October, A. D. 1919; that Oscar Hall was in the employ of the Taylor Coal Company on the 24th day of October, A. D. 1919; that he received an injury which arose out of and in the course of the employment on that day; that respondent had notice of an accident within 30 days from the date of the injury; that demand for compensation was made within 6 months, as required under the provisions of the Workmen's Compensation Act; that the annual earnings of petitioner for the year preceding the injury were $1,248; that the average weekly wage of petitioner during said year was $24 per week; that respondent paid petitioner compensation to the amount of $234."

[5] The objection to the constitutionality of the act was first made in the circuit court, where it was repeated, in varying language, as ground for a motion to quash the record. The particular in which it is claimed that the Workmen's Compensation Act violated the guaranty of due process of law relates solely to a property right. Such rights are sacred from interference or destruction by legislative or judicial act, but the protection afforded by a constitutional provision in such cases may be waived, and is alway held to be waived unless an objection is raised by the party entitled to the benefit of the provision whenever it appears that the right is being invaded or disregarded.

[6] After the stipulation plaintiff in error took part in the proceeding without any objection, and took credit for $234 compensation already paid by virtue of its provisions. Both by the express language of the stipulation and by participating in the hearing before the arbitrator and securing a review under the statute by the Industrial Commission the right to question the validity of the statute was waived, and the plaintiff in error cannot be permitted to raise it now. Wood v. Child, 20 Ill. 209; Smith v. Bryan, 34 Ill. 364; Springfield & Illinois Southeastern Railway Co. v. Hall, 67 Ill. 99; Holcomb v. People, 79 Ill. 409; Dobbins v.

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First Nat. Bank, 112 Ill. 553; Winslow v. People, 117 Ill. 152, 7 N. E. 135; Illinois Central Railroad Co. v. City of Wenona, 163 Ill. 288, 45 N. E. 265; Woods v. Soucy, 166 Ill. 407, 47 N. E. 67; People v. Clark, 283 Ill. 221, 119 N. E. 329; Shoal Creek Coal Co. v. Industrial Com., 300 Ill. 551, 133 N. E. 218; Shepard v. Barron, 194 U. S. 553, 24 Sup. Ct. 737, 48 L. Ed. 1115; 6 R. C. L. 94; 12 Corpus Juris, 769. The circuit court did not err in refusing to quash the record on account of the alleged invalidity of the act.

It is not claimed that the award was incorrect on the merits.

The judgment is affirmed.

Judgment affirmed.

TAYLOR COAL CO. v. INDUSTRIAL COMMISSION ET AL. (No. 14225.)

(Supreme Court of Illinois. Feb. 22, 1922.)

134 Northeastern Reporter, 172.

1. MASTER AND SERVANT—OBJECTION TO DELAY IN FILING TRANSCRIPT OF ARBITRATION PROCEEDINGS HELD TOO LATE.

The objection that the stenographer's report of the proceedings before the arbitrators was not filed within time prescribed to give the Commission power to review the award of the arbitrators, cannot be first raised in the Supreme Court.

(For other cases, see Master and Servant, Dec. Dig. § 418[3].)

2. MASTER AND SERVANT — CAUSAL RELATION BETWEEN EMPLOYMENT AND INJURY IN FIGHT ESSENTIAL TO COMPENSATION.

Where an employee is injured in a fight with another employee, the fight must have had its origin in some risk in connection with the employment to entitle the injured employee to compensation, since the question whether the injury arose out of the employment must depend on whether there was some causal relation between the employment and the injury, though it is not necessary that the injury be one which ought to have been foreseen.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

3. MASTER AND SERVANT—SHOOTING OF FOREMAN BY EMPLOYEE IN DISPUTE OVER DOCKING HELD COMPENSABLE AS INJURY "IN COURSE OF EMPLOYMENT."

Where a mine top foreman was shot by another employee in a quarrel between them over a claim by the other employee that the foreman had unjustly docked him, and after the foreman had struck the other employee, the foreman was entitled to compensation, since his injury resulted from an accident in the course of his employment.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

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5. MASTER AND SERVANT—OBJECTION TO CONSTITUTIONALITY OF COMPENSATION ACT HELD WAIVED.

Where the employer appeared before the Industrial Commission and presented evidence on the merits without objection, it cannot first raise the question that the Compensation Act is unconstitutional when the case has reached the circuit court.

(For other cases, see Master and Servant, Dec. Dig. § 417[4].)

6. MASTER AND SERVANT—EVIDENCE HELD NOT TO SHOW PERMANENT COMPENSABLE DISABILITY.

Evidence in proceedings for compensation to an employee *held* not to sustain the Industrial Commission's finding that the injury to plaintiff's arm, resulting in a partial loss of the use thereof, was permanent.

(For other cases, see Master and Servant, Dec. Dig. § 405[6].)

7. MASTER AND SERVANT—FINDING OF COMPENSABLE PERMANENT INJURY CANNOT REST ON CONJECTURE.

The evidence upon which the Industrial Commission bases its conclusion that the injury was permanent should not be a mere conjecture or surmise, but should be a legitimate conclusion from competent evidence.

(For other cases, see Master and Servant, Dec. Dig. § 405[6].)

Error to Circuit Court, Williamson County; D. T. Hartwell, Judge.

Proceedings by W. E. Padgett, employer, for compensation under the Workmen's Compensation Act, opposed by the Taylor Coal Company. An award of compensation by the Industrial Commission was sustained by the circuit court, and the employer brings error. Reversed and remanded, with directions.

Denison & Spiller, of Marion, for plaintiff in error.

George R. Stone and W. R. Kee, both of Marion, for defendant in error.

CARTER, J. W. E. Padgett, a married man 40 years of age, and having a wife and two children, both under 16 years of age, was acting as top foreman at the mine of plaintiff in error on August 14, 1918, when he was shot and injured by an employee of plaintiff in error. Compensation was awarded Padgett by the arbitrator. That award was confirmed by the Industrial Commission, and a judgment was entered by the circuit court sustaining the award, and the case has been brought here by writ of error for further review.

[1] Notice of the decision of the arbitrator, dated February 26, 1920, was given to the parties by the Commission. The petition for review was filed with the Industrial Commission March 4, 1920, and a transcript of the evidence was filed with the Commission June 26, 1920. The decision on review by the Industrial Commission was dated August 11, 1920, five extensions after that date being granted by the order of the Industrial Commission. The circuit court confirmed the finding of the Industrial Commission in June, 1921. It is argued that the record shows that no agreed statement of facts or stenographic report was filed with the Commission within 50 days after the plaintiff in error received notice from the Commission of the filing of the award, and that the stenographic report of additional proceedings before the Commission on review was not filed within 20 days after the plaintiff in error received notice, or within 30 days after such 20 days. Under the reasoning of this court in O'Donnell Teaming Co. v. Industrial Com. (No. 13890) 134 N. E. 156, Chicago-Sandoval Coal Co. v. Industrial Com. (No. 14201) 134 N. E. 158, and Pocahontas Mining Co. v. Industrial Com. (No. 14332) 134 N. E. 160,

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plaintiff in error cannot for the first time raise that question in this court.

It was stipulated in the case that the claimant earned $1,248 yearly, or $24 per week, and that he and the coal company were operating under and subject to the provisions of the Workmen's Compensation Act (Hurd's Rev. St. 1919, c. 48, §§ 126–152i) on August 14, 1918. It appears from the evidence that on that date Padgett was acting as top foreman of plaintiff in error at mine No. 5, which position he had held only four or five days, having been dock boss for some time previous to that; that on that date, between 11:30 and 12 o'clock, while he was on his way down from the tipple going to the office to eat his lunch, which he had with him, he met Mose Sweet, a miner, who was then going home. A dispute arose between them as to penalty on docking that had been imposed by Padgett upon Sweet as to his work some three weeks previous. It would appear that Sweet claimed that he had been wrongfully docked by Padgett for his work on the day in question. Following this statement there was some discussion and dispute between them, and Padgett testified that he thought Sweet had a gun, and was fearful he was going to be shot; that he struck Sweet, and then turned and ran hurriedly towards the office, and Sweet shot him through the arm, just below the shoulder; that he had never known Sweet previous to this time. There was some testimony by other employees of plaintiff in error, but most of them agree that the dispute arose over the alleged action of Padgett in docking Sweet as to his work. There is also some evidence on the part of certain witnesses that Padgett had injured his arm and hand in previous fights with other persons before this trouble; that he had a stiff elbow, as well as an injured knuckle, and he had said at different times that his right arm was not as good as before he had these fights. Padgett admitted that he had injured a knuckle of the third finger of the right hand previous to this shooting. There was also some testimony on the part of one or two witnesses that Padgett hit Sweet with a blackjack or billy before Sweet shot him. The evidence showed that he was injured by a 38-caliber revolver bullet, and the Industrial Commission found that he had sustained a $33^1/_3$ per cent. permanent loss of the use of his right arm.

[2, 3] Counsel for plaintiff in error argue that this accident did not arise out of and in the course of the employment. This court has had the question of disputes or fights between employees under discussion in several cases as to whether or not the injury arose out of and in the course of the employment, and all these decisions agree that the accident, to be within the Compensation Act, must have had its origin in some risk in connection with the employment, and that no fixed rule to determine what is a risk of the employment can be established; that whether the injury arose out of the employment must depend on whether there was some causal relation between the employment and the injury, and while it is not necessary that the injury be one which ought to have been foreseen or expected, it must be one which, after the event, may be seen to have had its origin in the nature of the employment. Swift & Co. v. Industrial Com., 287 Ill. 564, 122 N. E. 796, and cases there cited. To the same effect see City of Chicago v. Industrial Com., 292 Ill. 406, 127 N. E. 49, 15 A. L. R. 586, and Chicago, Rock Island & Pacific Railway Co. v. Industrial Com., 288 Ill. 126, 123 N. E. 278, 10 A. L. R. 1170. We do not think there is any different conclusion reached in the reasoning of this court in Marion County Coal Co. v. Industrial Com., 292 Ill. 463, 127 N. E. 84. On the facts in this case, under these authorities, it seems clear that the dispute arose out of and in the course of the employment of Padgett, and that, for the accident arising out of this dispute, plaintiff in error was rightly held liable by the Industrial Commission.

[4] Plaintiff in error argues that the Workmen's Compensation Act is unconstitutional, and that therefore the Industrial Commission and the court had no authority to make the award in question in favor of Padgett.

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This court has frequently held that a person may waive the right to raise a constitutional objection for his personal benefit; that the right to question the validity of a statute may be waived either by act or omission. It may be participating in litigation which, by fair inference acknowledges the validity of the statute, or by a course of conduct which shows an intention to waive any question as to the validity of the statute, or where it would be unjust to others to permit objection afterward to be made. The general rule is that it is the duty of a person, whenever he regards his constitutional right as invaded, to raise an objection at the earliest fair opportunity, and the failure to do so amounts to a waiver of the right. See the reasoning of this court in Shoal Creek Coal Co. v. Industrial Com., 300 Ill. 551, 133 N. E. 218, Chicago-Sandoval Coal Co. v. Industrial Com., supra, and Pocahontas Mining Co. v. Industrial Com., supra, and authorities cited in those cases.

[5] Plaintiff in error first raised the question as to the constitutionality of the Workmen's Compensation Act when the case reached the circuit court. Both parties appeared before the Industrial Commission and presented evidence on the merits without objection as to the jurisdiction; hence they cannot raise the constitutional question as to such jurisdiction.

[6] The finding of the Industrial Commission was that Padgett has been permanently injured, and the award was made in accordance with that view. We do not think the record shows satisfactorily that Padgett is permanently injured. Dr. Gardner testified that there was no permanent injury. Dr. Black testified that at the date of the hearing on review Padgett had a partial wrist drop and a partial paralysis of the extensor muscles of the forearm, and that there was a lack of feeling in the arm; that he could not say whether the condition would improve or get worse in the future. There was some testimony to the effect that Padgett's right arm was normal except as to the finger on the right hand, the injury to which, the testimony tends to show, was the result of a prior injury. Padgett testified before the Commission and showed his elbow and shoulder, stating that he had a wrist drop.

[7] Beyond doubt the evidence upon which the Industrial Commission bases its conclusion as to a permanent injury should not be a mere conjecture or surmise, but should be a legitimate conclusion from the competent evidence before it. Under this rule the evidence does not support the finding that there was a permanent injury.

For the reason that the permanent character of the injury is not satisfactorily shown in the evidence, the judgment of the circuit court will be reversed, and the cause remanded to that court, with directions to set aside the finding of the Industrial Commission, and for such further proceedings as may be provided by statute.

Reversed and remanded, with directions.

CENTRALIA COAL CO. v. INDUSTRIAL COMMISSION ET AL.
(No. 14200.)

(Supreme Court of Illinois. Feb. 22, 1922.)

134 Northeastern Reporter, 174.

1. MASTER AND SERVANT — PRE-EXISTING DISEASE DOES NOT PRECLUDE COMPENSATION.

The presence of a pre-existing disease is not, of itself, sufficient to warrant a denial of compensation where such disease is shown not to have

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been of a character to disable the claimant, and, where the injury is shown to be a contributing cause of such disasbility, or such an aggravation of the disease as to result in such disability, compensation will be awarded.

(For other cases, see Master and Servant, Dec. Dig. § 376[2].)

2. MASTER AND SERVANT — COMPENSATION AWARD SUSTAINED.

Award for permanent total incapacity of coal miner *held* supported by evidence.

(For other cases, see Master and Servant, Dec. Dig. § 405[6].)

3. MASTER AND SERVANT—COMPENSATION AWARD BASED ON DEPRECIATED EARNING CAPACITY VALID.

Where injured employee's earning capacity before injury was depreciated by a pre-existing disease, but not destroyed, an award based upon such depreciated earning capacity, so that the employer was not required to pay compensation for the effects of the disease as it existed prior to the injury, was valid.

(For other cases, see Master and Servant, Dec Dig. § 385[1].)

4. MASTER AND SERVANT—CONSTITUTIONALITY OF COMPENSATION ACT HELD WAIVED.

An employer who first raised the question of the constitutionality of the Workmen's Compensation Act in the circuit court waived the question.

(For other cases, see Master and Servant, Dec. Dig. § 417[4].)

Error to Circuit Court, Marion County; Thomas E. Ford, Judge.

Proceeding under the Workmen's Compensation Act by John Gutzler, employee, opposed by the Centralia Coal Company, employer. Award of the Industrial Commission was confirmed by the circuit court, and the employer brings error. Affirmed.

Frank F. Noleman, June C. Smith, and Andrew J. Dallstream, all of Centralia, for plaintiff in error.

A. W. Kerr, of Chicago, and George R. Stone, of Marion, for defendant in error.

STONE, C. J. Defendant in error, John Gutzler, was injured on November 30, 1918, while working in plaintiff in error's mine. A rock fell from the roof of the room in which he was working, and struck him across the hips. The Industrial Commission awarded as compensation for permanent total incapacity for work the sum of $12 per week for a period of 291 weeks, one week at $8, and a pension for life of $23.33 per month. The award was based on a finding, not disputed, that claimant had earned during the year next preceding the injury the sum of $1,400 as loader in plaintiff in error's mine, at which work he was engaged at the time of the accident. The circuit court of Marion county confirmed the award and the case comes here on writ of error to review the judgment of that court.

Plaintiff in error raises two questions: First, that there is no competent evidence in the record upon which to base the award; and, second, that the Workmen's Compensation Act (Hurd's Rev. St. 1919, c. 48, §§ 126–152i) is unconstitutional, in that it violates the due process clause of the state and federal Constitutions.

The testimony of defendant in error is that he was injured while loading a car; that he was lying on his side when the rock fell from the roof of the room and struck his hip, crushing the bones of the hips together;

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that he had from that time been unable to work; that he had tried to do little things; that on one occasion he cemented a hole in the sewer pipe in his house, and suffered for three days from that effort; that he cannot stoop without pain; that when he attempts to do so there is something too short to allow him to do so; that when he sits down he experiences pain which he characterizes as, "Something sticks me inside"; that at times it hurts all along his stomach and bowels; that he has lost weight; that during the year previous to the injury he worked in the mine regularly as loader, and lost but 3 days of time when the mine was in operation. He also testified that he had suffered from what the doctors called catarrh of the bladder; that he has had this disease for 20 years, but that it did not keep him from work except on an occasion of an operation for stones in his bladder, over a year and 9 months previously. On behalf of the defendant in error two physicians were called, who testified that he had been operated on for stone in the bladder in 1913, and later another operation was had for an appendicular abscess; that he had trouble indicating stone in the bladder. One of these witnesses, Dr. Diehl, testified that he made an X-ray examination of him, showing a mass on the side of the bladder in which he thought was a stone; that traumatism would aggravate such a condition.

[1-3] The record discloses that, while the claimant was suffering from a disease of the bladder, affecting his earning power at the time of the accident, his present inability to work is due to the injury received or to an aggravation of the disease ensuing therefrom. The presence of a pre-existing disease is not, of itself, sufficient to warrant a denial of compensation where such disease is shown not to have been of a character to disable the claimant, and, where the injury is shown to be a contributing cause of such disability, or such an aggravation of the disease as to result in such disability, compensation will be awarded. Big Muddy Coal Co. v. Industrial Board, 279 Ill. 235, 116 N. E. 662; Rockford City Traction Co. v. Industrial Com., 295 Ill. 358, 129 N. E. 135. The evidence in this record shows that Gutzler earned $1,400 per year as loader, but, owing to the pre-existing disease, he could not load as many cars as a strong man. His earning power was depreciated by the disease, but was not destroyed. The award in this case was based upon that depreciated earning capacity. Plaintiff in error is therefore not required to pay compensation for the effects of the disease as it existed prior to the injury. The award in this case is sustained by the record.

[4] Plaintiff in error's second contention is that the Workmen's Compensation Act, by reason of its failure to provide for a judicial review of the facts as well as the law, contravenes the Fourteenth Amendment to the Constitution of the United States, relating to due process. This question was raised in the circuit court, as shown by the assignments of error. The matter was presented in the circuit court on motion to quash the record and return and on propositions of laws submitted. The rule in this state is that, in order to take advantage of a constitutional question, the unconstitutionality of the act must be raised at the first opportunity; that where a party by stipulation participates in a hearing until the cause comes into a court of review without raising the constitutional question he cannot be heard upon it. Chicago-Sandoval Coal Co. v. Industrial Com. (No. 14201) 134 N. E. 158. The reasoning of that case is controlling here, and under it plaintiff in error must be held to have waived the constitutional question involved in the case.

The judgment of the circuit court is affirmed.

Judgment affirmed.

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HOOSIER VENEER CO. v. INGERSOLL. (No. 11166.)

(Appellate Court of Indiana, Division No. 1. Feb. 21, 1922.)

134 Northeastern Reporter, 301.

1. MASTER AND SERVANT—FINDING ON EVIDENCE AS TO EMPLOYMENT OF COMPENSATION CLAIMANT CONCLUSIVE.

In a proceeding under the Workmen's Compensation Act, the question as to whether the injured person was at the time an employee is an ultimate fact to be determined from the evidence, and if the evidence before the Industrial Board is conflicting, or if from such evidence reasonable minds might draw opposite conclusions, the finding of the Board will not be disturbed.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

2. MASTER AND SERVANT — FINDING OF COMPENSATION CLAIMANT'S EMPLOYMENT SUSTAINED.

A finding by the Industrial Board, in a proceeding under the Workmen's Compensation Act, that one employed to haul logs at a certain rate per hundred, and at any time he desired, and over any roads that he saw fit, was an employee, and not an independent contractor, *held* supported by sufficient evidence.

(For other cases, see Master and Servant, Dec. Dig. § 405[2].)

Enloe, J., dissenting.

Appeal from Industrial Board.

Proceeding by Edwin E. Ingersoll under the Workmen's Compensation Act (Laws 1915, c. 106) to obtain compensation for personal injuries, opposed by the Hoosier Veneer Company, the employer. There was an award of compensation, and the employer appeals. Affirmed.

Joseph W. Hutchinson, of Indianapolis, for appellant.
Crane & McCabe, of Crawfordsville, for appellee.

REMY, J. This is an appeal from an award of the Industrial Board, and the only question involved is the sufficiency of the evidence to sustain the Board's finding that appellee was, at the time of his injury, an employee of appellant. It is urged by appellant that the evidence shows appellee to have been, at the time, an independent contractor. The facts as shown by the evidence are substantially as follows:

Appellee was a farmer, who from time to time hauled logs for timber buyers, who had purchased timber in his neighborhood; such work being done by him at such times as it did not interfere with his farm work. A short time prior to his injury, one Mutchler, an agent of appellant, called appellee by telephone, and told him that appellant had purchased a certain tract of timber, and asked if appellee and his brother-in-law, Herron, would haul the logs to the railroad. In response, appellee told Mutchler that they would try it for awhile, and see if they could make wages, and if they found they could not make wages they would quit. Nothing was said at the time as to how much they were to be paid; but they were told to go ahead with the work. Appellee and Herron each began to haul, each using his own team and wagon, chains, skids, etc., and each kept an account of the number of feet of timber, log measure, he had hauled, each reporting to appellant, and each was paid for the number of feet hauled by him, as per his statement to the company. Compensation was at first $1.75 per hundred, but upon complaints by appellee and Herron that they

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could not make wages the pay was increased to $2 per hundred. The haulers had the choice as to what road they would haul over, how long they would work each day, and on what days they would work, except that they were "not to haul when it was too muddy." Nothing was said as to any definite time within which the work was to be done. There was no certain amount of timber to be hauled by them, or either of them, and neither was required or undertook to haul all of the timber or any definite part thereof.

As to the manner of loading the logs and the number of logs in a load, each hauler determined for himself. After appellee and Herron had been hauling, Mutchler said to appellee that he "had a notion to put on some other teams," but, upon an offer by appellee to furnish another team, to be driven by his son, Mutchler said that in that event he would have all the teams he needed. Appellee and Herron did not always haul at the same time, and neither had any control over the other as to when or how he should haul. Frequently, when both were hauling, they would "work together just for company, or to help each other out when in a tight place." Appellee and Herron loaded upon cars the logs they hauled, for which work they received 35 cents per hundred. In this they always worked together. This was under a separate arrangement, entered into through Mutchler after the parties had been employed to haul the logs. Appellee's son began hauling on Monday, before appellee was injured later in that week, and got his pay from appellee out of the last pay check received by appellee, which was in accordance with the directions of Mutchler, who at the time the son began hauling told appellee to include the amount due the son in appellee's statement, and appellee could pay his son. Appellee was injured while he was in the act of fastening logs on his wagon preparatory for hauling.

[1] In a proceeding before the Industrial Board for compensation, the question as to whether the person who suffered the injury was at the time an employee is an ultimate fact to be determined from the evidence. If the evidence presented to the Industrial Board at the hearing is conflicting, or if from such evidence reasonable minds might draw opposite conclusions the question is for the Board. McDowell v. Duer (Ind. App.) 133 N. E. 839; Coppes Bros. & Zook v. Pontius (Ind. App.) 131 N. E. 845; Board v. Shertzer (Ind. App.) 127 N. E. 843. See, also, Sargent Paint Co. v. Petrovitzky (Ind. App.) 124 N. E. 881. In the case of McDowell v. Duer, supra, which was recently decided by this court, the facts found by the Industrial Board are similar to the facts in the case at bar. The controlling questions of law, which are the same in both cases, were fully considered in the court's opinion in that case. Since we adhere to the law as there laid down, no good purpose would be served by a restatement in this opinion.

[2] We hold that there is evidence to support the finding of the Industrial Board that appellee was, at the time of his injury, an employee of appellant.

Affirmed.

ENLOE, J. (dissenting). I find myself unable to concur in the conclusion reached by my Associates, for the reasons hereinafter stated.

There is no conflict in the testimony given in this case upon any material fact. The sole question arising in this record for our decision is: Was the appellee an employee or an independent contractor at the time he received the injuries causing the disability upon which the award was based? If he was an employee within the meaning of our Compensation Act, then the award is right, and this case should be affirmed; but if, on the other hand, he was an independent contractor, then the award is contrary to law, and should be set aside.

The appellee and one Mutchler were the only persons who testified concerning the contract of employment, and their testimony is entirely in

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harmony. We learn from the testimony of the appellee that his business was that of farming and log hauling, and that he had been hauling logs for four or five years, furnishing and using his own team, wagon, harness, chains, skids, hooks and all implements used in hauling logs; that he engaged in the business of hauling logs, when he was not busy on the farm, and had hauled logs for appellant at different times during a period of four or five years then last past. He further testified that one Herron, a neighbor, was also hauling logs from the same timber, using his own team, wagon, etc., and that in hauling the logs he and Herron usually worked together, so that they could assist each other, if either needed help, and that he had no control over Herron, nor had Herron any control over him; that the logs were measured, and they were paid according to the quantity hauled, at first at the rate of $1.75, and later at $2 per hundred feet. It appears from his testimony that the hauling was done irregularly—sometimes one day, and sometimes three or four days per week. He also testified that while doing this work neither the appellant nor Mutchler, its agent, had any authority or control over him, as to the loading or hauling of the logs, or as to the number of logs he should haul, or the road he should travel; he determined those things for himself.

As to the contract under which he was working, appellee testified that—

"Mutchler called me up by telephone, and told me he had bought that timber, and wanted to know if we, meaning Herron and myself, would haul it, and I said we would try it for a while and see if we could make wages, and if we couldn't, we would quit, and Mutchler said, 'Go ahead.'"

The evidence further discloses that Mutchler was a timber buyer for appellant, and that when he bought timber he made arrangements for having it cut and the logs hauled to a railroad, to be shipped to Indianapolis. While the appellee was engaged in hauling logs under his employment as above, he received an injury by accident, for which he asks compensation from appellant.

Whether a finding is an ultimate fact, or a conclusion of law, depends upon whether it is reached by natural reasoning from evidential facts, or by the application to such facts of the artificial rules of law. Levins v. Rovegno, 71 Cal. 273, 12 Pac. 161. The Industrial Board has found that the appellee was an employee of appellant at the time he received such injury. If this finding is a finding of fact, and is sustained by any evidence, we cannot disturb it. It is the exclusive duty and province of such Board to weigh the evidence, and draw any and all reasonable inferences therefrom, and its conclusion in such a case is final, and not subject to review. But even where there is no conflict in the evidence, and it is susceptible of but a single inference, if the question is a conclusion of law, it is then one for the court to determine, by the application thereto of recognized rules of law. Columbia School Supply Co. v. Lewis, 63 Ind. App. 386, 115 N. E. 103. And it therefore necessarily follows that, if there is no evidence to sustain the finding that appellee was an *employee* of appellant, this court must apply the law to the facts as they exist, and declare that said finding is not supported by any evidence, and is therefore contrray to law.

Our statute (section 76 of Workmen's Compensation Act; Acts 1919. p. 158) has declared that the word *"employee"* shall "include every person, including a minor, lawfully *in the service of another.*" (Our italics.) In the case of Western Indemnity Co. v. Pillsbury, 172 Cal. 807, 159 Pac. 721, one Little was a contractor engaged in performing work for the city and county of San Francisco in connection with the grading of a street, preparatory to laying a municipal railway line, and one Stevens was the owner of teams and wagons, and went to Little and offered to furnish teams and wagons and drivers for said work at $6 per day. A few days later Stevens was requested to furnish a team for said work, which he

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did, himself being the driver thereof. A short time later he put on a second team and employed the driver himself. Thereafter Stevens was injured, and asked an award of compensation as an employee. Compensation was awarded, but the award was set aside on appeal; the court holding that Stevens was an independent contractor and not an employee within the meaning of the statute of the state.

In Zeitlow v. Smock, 65 Ind. App. 643, 117 N. E. 665, this court, speaking by Hottel, C. J., said:

"While some other tests indicated in these decisions may have had more or less influence in particular cases, in determining whether the relation between the employer and the injured party was that of master and servant, employer and employee, or that of contractor and contractee, the test which seems to be recognized as controlling in all such cases is the right of control over the means, methods and manner of performing the work; that is to say, if the employer retains such right he thereby creates the relation of employer and employee. If, on the other hand, the person employed is permitted to choose for himself the method and manner of doing the work, and is permitted to select the persons to do it, free from the control of his employer in all matters connected with the doing of said work, * * * such person is an independent contractor."

Numerous authorities are cited to sustain the rule as thus announced. The right of control as to means and methods of doing the work seems to be the determining factor. Legislative enactment has fixed definitely the *class* of persons who are entitled to the benefits of the Compensation Act. This was a proper exercise of the legislative power, and we, as a court, while it is our duty to give the said act a liberal interpretation in applying its provisions to those who are entitled to its benefits, being within the designated class, have no power to extend the designated class, and thereby extend the benefits of said act to persons not brought within its provisions by the Legislature.

The benefits of the act in question were given to a certain class of persons—employees—and then the class was further designated and restricted to those lawfully *"in the service of another,"* servants. In 7 Words and Phrases. First Series, p. 6426, it is said:

"The word 'servant,' in legal nomenclature, has a broad significance, and embraces all persons of whatever rank or position, who are in the employ or subject to the direction or control of another in any department of labor or business."

The Century Dictionary defines a servant as:

"A person employed by another and *subject to his orders.*"

It has been said that the true test of a contractor is that he renders service in the course of an independent occupation, following his employer's desires in the results, but not in the means used. Whether or not a given person is an employee or an independent contractor is determined by the rules of law aplicable in ordinary actions at law; so in this case the status of the appellee at the time he was injured is to be determined by the same rules which we would apply, had this been an action at law, brought by some third person who had received an injury by reason of said log which injured appellee, striking and injuring such person, under circumstances such that, if the relation of master and servant (employer and employee), existed between appellant and the appellee herein, the appellant would be liable to such action.

Applying these well-established rules to the facts of this case, I am clearly of the opinion that the appellee, at the time he received the injury in question. was simply following one branch of his (appellee's) business, that of log hauling; that he was not an employee of appellant within the meaning of our Compensation Act, and therefore not entitled to an award of compensation.

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It therefore follows, as I view it, that the award of the full Board is not sustained by sufficient evidence, and is contrary to law. The award of the Industrial Board should be set aside and annulled.

BLAIR ET AL. v. WASHINGTON. (No. 11240.)

(Appellate Court of Indiana, Division No. 2. March 10, 1922.)

134 Northeastern Reporter, 503.

2. MASTER AND SERVANT—COMPENSATION AWARD NEED NOT STATE METHOD OF FIXING DISABILITY.

The Industrial Board need not state in its award the method by which it determined the amount of disability under Workmen's Compensation Act 1915, § 31.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

3. MASTER AND SERVANT—DISCRETION OF COMPENSATION BOARD NOT REVIEWABLE.

Discretion of Industrial Board exercised in making award under Workmen's Compensation Act will not be disturbed by the Appellate Court unless an abuse appears.

(For other cases, see Master and Servant, Dec. Dig. § 417[5].)

On petition for rehearing. Petition denied.

For former opinion, see 133 N. E. 392.

NICHOLS, J. [1] Counsel for appellant, on petition for rehearing, asks us to determine what force and effect is to be given to expert testimony on facts like those involved in the present case, and as to whether such testimony is to be taken as controlling. We cannot go further than to say that such testimony as in case of a jury trial, is competent for the Industrial Board to hear and consider. It is for the Board to determine its force and effect, to weigh it, as it does other testimony. For this court to say that such testimony must be taken as controlling is to say, in effect, that appellant through its expert, unless contradicted by another expert, may fix the amount of impairment, and, as a result, the amount of compensation, thereby in effect dispensing with the services of the Industrial Board. Nor do we agree with appellant's counsel that appellee's evidence as to the condition of his eyes shall have no probative force. Such evidence is to be considered by the Board, along with other evidence, expert and otherwise, and after hearing all of the evidence the Board under the provisions of section 31 of the Workmen's Compensation Act (Acts 1915, c. 106) in force at the time of the accident, determines the amount of compensation to be allowed.

[2, 3] It is not necessary that the Board state in its award the method by which it reached its result, and its discretion will not be disturbed by this court unless an abuse thereof appears.

The petition for rehearing is denied.

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DODSON v. KANSAS CITY REFINING SALES CO. (No. 23502.)

(Supreme Court of Kansas. Feb. 11, 1922.)

204 Pacific Reporter, 532.

(Syllabus by the Court.)

MASTER AND SERVANT — DRIVING MOTOR TRUCK HELD NOT TO INVOLVE A "PROCESS" REQUIRING USE OF EXPLOSIVE WITHIN COMPENSATION ACT.

The development of power in motor-truck engines by use of gasoline is not a "process" which brings the employment of one who drives a truck for a sales company engaged in distributing petroleum products within the section of the Workmen's Compensation Act, which embraces "all employments wherein a process requiring the use of any dangerous explosive or inflammable materials is carried on." Laws 1917, c. 226, § 1.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

(For other definitions, see Words and Phrases, First and Second Series, Process.)

Appeal from District Court, Wyandotte County.

Proceedings under the Workmen's Compensation Act by Sadie Dodson for compensation for the death of her husband, opposed by the Kansas City Refining Sales Company, employer. Demurrer to petition sustained, and petitioner appeals. Affirmed.

J. H. Brady and T. F. Railsback, both of Kansas City, for appellant.

A. L. Berger, of Kansas City, for appellee.

BURGH, J. The action was one by a widow to recover compensation for death of her husband. A demurrer to the petition was sustained, and the plaintiff appeals.

The defendant is a sales company engaged in distributing gasoline and other petroleum products. In the conduct of its business it uses motor trucks. The deceased was a truck driver, and his injury was occasioned by collision between the truck he was driving and another truck operated by the defendant.

The Workmen's Compensation Act applies to employment on, in, or about specified localities—railway, factory, mine, laundry, natural gas plant, etc.—and to "all employments wherein a process requiring the use of any dangerous explosive or inflammable materials is carried on." Laws 1917, c. 226, § 1. The petition expressly disclaimed any purpose to predicate liability on conduct of business localized in an establishment. It was alleged the defendant's business involved operation of motor trucks on the streets of the city in transporting and delivering petroleum products in course of trade, and liability was rested on the distinguishing factor of process requiring use of dangerous, explosive, and inflammable material. This process consisted in development of power in the truck engines by use of gasoline.

The question presented is novel and is ingeniously argued in the plaintiff's brief as follows:

"We have alleged that this was an employment wherein a process requiring the use of gasoline was carried on. This is exactly true. This automobile truck was propelled by an internal combustion engine and the fuel is gasoline, which (theoretically at least) is a high explosive and is inflammable. The gasoline of itself does not propel trucks, but without it the truck refuses to move. Intervening between the gasoline and the propulsion of the vehicle is a process whereby that gasoline is changed in

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its form and converted from one sort of substance into a volatile substance highly explosive, extremely inflammable, and by means of that process and the equipment it is harnessed and required to do useful rather than destructive work. One who would be engaged in blasting rocks by means of giant powder would be engaged in an employment wherein a process of using dangerous explosives is carried on. The process there would be the method of drilling the holes, filling them with powder, tamping it down and igniting the powder by the electric spark or the fuse, to procure the requisite explosion and its consequent result. In this case the process is parallel. Instead of drilling the holes we have them provided in the cylinder in the engine; instead of pouring gunpowder into them, we inject there a mixture of gasoline and air which has been processed through a clever device on the engine and made from a crude nonexplosive substance, into a highly refined and dangerously explosive substance, and instead of tamping the powder with a tamping rod like a blaster, we compress it with the pistons of the engine and then ignite it by the spark, and when the explosion occurs, instead of tearing the earth asunder, it causes the engine to revolve by a process of mechanics. All through this matter there is a process which requires the use of gasoline. and without gasoline, and without the treatment of the gasoline by the process, there is no energy. In this manner we convert the lifeless fluid, with its potential capacity, into an active dynamic force, and the change is wrought by a process."

Although the Workmen's Compensation Act contains many definitions, the term "process" is not defined. It is to be construed, therefore, according to context and approved usage of language. Generally, "process" means method of operation or treatment in regular course of performing, producing, or making something. Immediately there come to mind the Bessemer process of making steel, pasteurization, and other processes known by names of inventors; processes named from the substances used—the carbon process, the gelatine process—and a multitude of methods employed to produce useful results in arts, sciences, and industries. Should we speak of processing fruit, it is not likely we would be understood as referring to gasoline-car delivery from commission house or grocery store; and nobody would think of a cab company as processing a traveler from railroad station to hotel.

Turning to context, the statute states that the employments referred to are inherently dangerous and, from the nature, conditions, or means of prosecution, involve extraordinary risk to life and limb of employees. If the business of motor-vehicle transportation be extrahazardous the peril does not lie in the method of developing power. That process is merely an incident, and cannot be regarded as stamping itself upon the whole business as a characteristic mark of danger. Motor-vehicle transportation was a well-known business when the statute was enacted, and had grown to enormous proportions when the sections under consideration were revised in 1917. Under the definitions of "railway," "factory," mine," "quarry," "electrical work," and "engineering work," a great many kinds of employment are specified. Laws 1917, c. 226, § 2. Numbers of them involve processes of various classes. The workmen's compensation acts of other states had placed operation of trucks among hazardous employments, and it is fair to assume that, if the Legislature had intended to include so important and so extensive a business as motor-vehicle transportation within the provisions of the statute, it would have been more explicit.

The word "factory" is so defined that the term is limited to premises where power is used in manufacturing, including certain named premises. An obvious purpose of the provision relating to processes was to extend the act to manufactories not included in the class distinguished by the attribute, use of mechanical power. The provision may have other appli-

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cations, but the court is not able to interpret it as embracing the employment in which the plaintiff's husband met death.

The judgment of the district court is affirmed.

All the justices concurring.

DUNCAN v. KANSAS CITY PACKING BOX CO. (No. 23510.)

(Supreme Court of Kansas. Feb. 11, 1922.)

204 Pacific Reporter, 543.

(Syllabus by the Court.)

1. MASTER AND SERVANT — COMPENSATION SUIT HELD MAINTAINABLE WITHOUT ARBITRATION.

The plaintiff, seeking compensation for an injury, sent a letter to his employer that he objected to submitting his claim to any committee, and that "unless you do within 10 days consent in writing to arbitration as hereinbefore set out," he would take as true such failure as being a refusal to consent to arbitration. The employer, although in the same city, paid no attention to the letter, and after some 15 days the employee sued. *Held,* that he had a right to maintain an action without applying for the appointment of an arbitrator.

(For other cases, see Master and Servant, Dec. Dig. § 408.)

2. MASTER AND SERVANT—COMPENSABLE INJURY SHOWN.

The testimony *held* sufficient to support the findings of the jury that the plaintiff's injury was in the course of and arose out of his employment.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

3. MASTER AND SERVANT—MINIMUM COMPENSATION HELD PROPER.

Following Stefan v. Elevator Co., 106 Kan. 369, 187 Pac. 861, it is *held* that the recovery was not limited to 60 per cent. of the difference between what the plaintiff was earning and could earn, but was properly fixed at the statutory minimum of $6 a week.

(For other cases, see Master and Servant, Dec .Dig. § 385[11].)

Appeal from District Court, Wyandotte County.

Action by Theodore Duncan, a minor, by his father and next friend, W. H. Duncan, against the Kansas City Packing Box Company, under the Workmen's Compensation Act. Judgment for plaintiff, and defendant appeals. Affirmed.

J. K. Cubbison and Wm. G. Holt, both of Kansas City, Mo., for appellant.

J. H. Brady and T. F. Railsback, both of Kansas City, Kan., for appellee.

WEST, J. The plaintiff recovered a judgment under the Workmen's Compensation Act (Laws 1911, c. 218, as amended by Laws 1913. c. 216), and the defendant appeals, assigning as the principal errors that the plaintiff did not comply with the terms of the act by requesting any judge of the

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district court to appoint an arbitrator; that the judgment is erroneous as to the amount because it was stipulated that men in like employment were earning $17.80 prior to the time of the accident and the jury found that the plaintiff could earn $12 a week, and he is therefore entitled to judgment, at most, for 60 per cent. of the difference, or $3.48 a week for 415 weeks, amounting to $1,444.20, his recovery being $6 a week for 416 weeks, or $2,469. But counsel say:

"The main question is: Where a workman is employed to do a certain class of work which is not dangerous in a factory, and he voluntarily leaves that work and voluntarily goes to a buzz saw which is in motion and is injured by the saw, is the employer liable for his injury?"

The plaintiff was a young colored man employed as a part of a saw crew, his duty being to handle boards and to get them to another man who was to feed them or press them against the buzz saw for resawing. His hand in some way came in contact with the saw, and the injury resulted.

[1] He alleged that on June 24, 1920, he mailed to the defendant company, by registered mail, postage prepaid, an offer to arbitrate as claimed, but that the defendant had failed and refused to accept arbitration, although the time therefor had expired. This offer was in the form of a letter notifying the defendant of the accident and that the plaintiff thereby consented to arbitration of his claim under the Workmen's Compensation Law; that he objected to submitting his claim to any committee of the employer's organization for the purpose of settling disputes and—

"You are further notified that, unless you do within 10 days consent in writing to arbitration as hereinbefore set out * * * the said Theodore Duncan will take as true said failure as being a refusal * * * to consent to arbitration. * * *"

Section 11, c. 226, of the Laws of 1917, provides that, if any committee exists, the matter shall, unless either party objects by notice in writing delivered or sent by registered mail to the other party before the committee meets to consider the matter, be settled in accordance with the rules such committee or by an arbitrator selected by it, and that, if either party objects, the matter shall be settled by a single arbitrator agreed on by the parties, or appointed by any judge of a court where an action might be maintained upon the written application of either party. The consent shall be in writing and signed by the parties. By the letter sent to the defendant the plaintiff properly objected to having the matter arbitrated by the committee or one selected by it and offered to arbitrate by some one agreed on by the parties or appointed by a judge of a court. The time for the defendant to answer was fixed at 10 days, and no answer was given, so it cannot be said that there was any agreement to arbitrate.

It was argued that, when the parties fail to agree, an application must be made for the appointment of an arbitrator by the judge; such application being a condition precedent to the right to maintain an action.

The plaintiff's counsel urge that the application to the judge has reference to the selection of an arbitrator when the parties cannot agree upon the person, but does not apply to the selection of the arbitrator when the employer has refused to arbitrate.

In Goodwin v. Packing Co., 104 Kan. 747 180 Pac. 809, the plaintiff consented to arbitration, but served notice that he would not arbitrate before the committee, and the defendant refused to arbitrate otherwise. It was held that in this situation the plaintiff had a right to maintain the action without applying for the appointment of the arbitrator. In the opinion it was said;

"In default of agreement, the statute requires compensation to be settled by arbitration, and employer and workman are expected to sign a writing expressing such consent." 104 Kan. 749, 180 Pac. 810.

"The workman must consent to arbitration, or go without compensation. If the employer consent, arbitration is compulsory upon the work-

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man. If the employer withhold consent to arbitration, the workman must nevertheless have consented, or he, too, is at fault, and is denied remedy by action." 104 Kan. 750, 180 Pac. 810.

In Roper v. Hammer, 106 Kan. 374, 187 Pac. 858, it was held that—

'If a workman has made fair effort to secure consent of his employer to arbitration, expressed in writing, and the writing is not executed, the employer may be regarded as having refused to consent." Syl. par. 2.

It was said;

"In some regrettable intances the employer, or the insurance carrier who takes charge of his case, plays the part of the dog in the manger. While consent to arbitration is not definitely refused, it is not definitely given, by promptly signing an agreement, as the statute requires, and the matter is kept hanging in the air. After a workman has made fair effort to secure consent expressed in writing, and the writing is not executed, the employer may be regarded as having refused to consent." 106 Kan. 376, 187 Pac. 859.

See, also, Stefan v. Elevator Co., 106 Kan. 369, 187 Pac. 861.

In Southern v. Cement Co., 108 Kan. 213, 194 Pac. 637, it was held that the writing of a letter by a workman that he wishes to negotiate for a settlement, and if an agreement cannot be reached he desires an arbitration, and requests that the matter be taken up with the employer's attorney, amounts on his part to a consent to arbitrate, "and a failure of the employer for over two months to respond to it may be regarded as such a refusal to consent thereto as to authorize the bringing of an action by the workman without a request to the judge of the district court to appoint an arbitrator." Syl. par. 2. It was also held that if, after such delay, the plaintiff should bring a suit, it cannot be impaired by the employee thereafter offering to arbitrate. Here the parties both resided in Kansas City, Kan., and the letter was mailed the 24th of June, and the petition was not filed until the 9th of July, 15 days thereafter, and no sort of excuse is offered why response was not made.

One manifest object of the Workmen's Compensation Act was to speed the settlement of claims for injuries and avoid the delay as well as the expense of litigation Ordinary regard for the common courtesies between business men would dictate that such a letter be answered with reasonable promptness, and, as no reason appears for the failure so to answer, we do not feel called upon to imagine or devise any.

[2] Much space is devoted to the proposition that the workman who needlessly gets in contact with a buzz saw when the duties of his employment do not require it cannot recover for an injury thereby sustained, and it is claimed that this was what the plaintiff did, and that his injury did not arise out of his employment. It is sufficient to say that, with no more than the usual conflict of testimony, the evidence was sufficient to say that, with no more than the usual conflict of testimony, the evidence was sufficient to warrant the findings which the jury made that the plaintiff was not instructed to keep away from the saw while in motion, that he did not play with it while in motion, and that his work of carrying lumber to the operator of the saw necessarily brought him in contact therewith.

[3] As to the claimed excess in the amount of the judgment, it may be observed that the jury found the average amount a week which the plaintiff would be able to earn was $12, and that he would be partially incapacitated for 416 weeks or during his lifetime. It was stipulated that the amount a like employee would earn is $17 a week. This matter depends on the construction to be given to section 4, pars. "a" to "c" of chapter 226 of the Laws of 1917, and this troublesome question was settled by Stefan v. Elevator Co. supra, which held that under circumstances similar to those herein involved the minimum of $6 a week may be recovered.

The judgment is affirmed

All the justices concurring.

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KINZER v. WYANDOTTE COUNTY GAS CO. (No. 23913.)

(Supreme Court of Kansas. Feb. 11, 1922. Rehearing Denied March 17, 1922.)

204 Pacific Reporter, 999.

(Syllabus by the Court.)

MASTER AND SERVANT—ARBITRATOR'S FINDING ON QUESTION OF COMPENSABLE DISABILITY CONCLUSIVE IN ABSENCE OF UNFAIRNESS OR MISCONDUCT.

Where a claim under the Workmen's Compensation Act is heard before an arbitrator appointed by the court, the vital question in controversy being whether the claimant is still under disability, and the arbitrator upon sufficient evidence decides that he has fully recovered and is merely simulating incapacity for work, such finding of fact cannot be set aside by the district court without a showing of unfairness or misconduct on the part of the arbitrator.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Appeal from District Court, Wyandotte County.

Application by John H. Kinzer to the district court to appoint an arbitrator to settle his claim for allowance under Workmen's Compensation Act. On finding of no liability, he brought this action against his employer, the Wyandotte County Gas Company, to review the decision of the arbitrator and for a modification of the award. From a judgment for plaintiff, the defendant appeals. Judgment reversed, and cause remanded with directions to render judgment in accordance with the arbitrator's award.

A. L. Berger, of Kansas City, Kan., and Hogsett & Boyle, of Kansas City, Mo., for appellant.

L. O. Carter, of Kansas City, Kan., for appellee.

MASON, J. John H. Kinzer was injured while in the employ of the Wyandotte Gas Company by being struck on the head with a hammer. He applied to the district court to appoint an arbitrator to settle his claim for an allowance under the Workmen's Compensation Act (Gen. St. 1915, §§ 5896–5942). An arbitrator was appointed who heard the evidence, and on March 26, 1921. made findings that as a result of his injury the plaintiff was totally disabled for a period of nine weeks, ending October 5, 1920, but from that time was fully recovered, and had received all the compensation to which he was entitled—$120 and the payment of hospital and doctor's fees. On April 2, 1921, the plaintiff brought this action for a review of the decision of the arbitrator and a modification of the award. A jury was impaneled to which were submitted two questions, which they answered in the affirmative, whether the plaintiff was still totally incapacitated for work as the result of his injury, and whether he would continue permanently to be so totally disabled. Judgment was rendered in his favor for $622.60 in a lump sum and an allowance of $15 a week for the remainder of eight years. The defendant appeals.

The statute does not allow a general appeal from the award of an arbitrator. It gives only a limited review expressed in these words;

"If the court shall find that the award has been obtained by fraud or undue influence or that the committee or arbitrator making the award acted without authority or was guilty of serious misconduct or that the award is grossly excessive or grossly inadequate, or that the incapacity or disability of the workman has increased or diminished, the court may

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modify such award, upon such terms as may be just, by increasing or diminishing the compensation. * * *" Laws 1917, c. 226, § 16.

The allegations of the petition upon which the setting aside of the award of the arbitrator was asked read:

"Said arbitrator, * * * without any authority or right whatsoever, and contrary to the testimony offered by the respective parties hereto, found that the plaintiff had fully recovered from the effects of said injury, and that he was now and ever since said 5th day of October, 1920, had been capable of performing all kinds of manual labor, the same as he had been prior to said accident. That said findings of said arbitrator are without justification or foundation and should be by this court vacated, set aside and nullified. * * *"

In the plaintiff's brief it is said that, while the petition does not charge and is not intended to charge willful fraud of the arbitrator, it does charge indirect fraud and undue influence.

At the hearing before the arbitrator there was really but one vital controversy to be determined, and that was a pure question of fact—whether the plaintiff had recovered from the effects of his injury. This necessarily had to be determined largely from the testimony of physicians. There was abundant medical evidence including that of two doctors selected by the arbitrator by consent of the parties that the plaintiff was merely a malingerer and there was also evidence to the contrary. We find nothing whatever in any part of the record to suggest that the arbitrator acted without authority or that the award was arrived at otherwise than by a fair and candid consideration of the evidence. The hearing in the district court was a reexamination of the same question of fact upon the same and some additional evidence, and the jury reached a different conclusion from that of the arbitrator. To sustain the finding of the jury in this situation would be merely to substitute its judgment for that of the arbitrator upon an issue of fact decided by him upon conflicting testimony. We do not think this is within the contemplation of the Compensation Act. The decision of the arbitrator upon issues properly before him is final, except for the limited review provided by the statute. Roper v. Hammer, 106 Kan. 374, 187 Pac. 858; Wilson v. Ward, 202 Pac. 862, decided December 10, 1921. It is true that gross inadequacy of an award is one of the grounds upon which it is authorized to be set aside, but, if the pretended disability of the plaintiff was a sham, the award was not inadequate, and, that fact having been determined by the arbitrator upon sufficient evidence, we do not think the finding can be set aside without some showing of unfairness or misconduct. As was said in Roper v. Hammer, supra:

"The nature and extent of the injury were questions of fact for the determination of the arbitrator."

To hold otherwise would be practically to allow a re-examination of specific issues of fact fairly determined by the arbitrator, and make arbitration a superfluous and futile part of the machinery for the carrying out of the provisions of the compensation act.

The judgment is reversed, and the cause remanded with directions to render judgment in accordance with the award of the arbitrator.

All the Justices concurring.

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RUSCH v. LOUISVILLE WATER CO. ET AL.

(Court of Appeals of Kentucky. Feb. 10, 1922.)

237 Southwestern Reporter, 389.

1. MASTER AND SERVANT—COMPENSATION BOARD'S FINDINGS OF FACT CONCLUSIVE.

Findings of fact by the Workmen's Compensation Board, if supported by credible evidence, will not be disturbed on review by the courts; but where there is no issue of fact, or the fact is undisputed, then the question on the facts becomes one of law, and the finding of the board is a finding of law subject to review.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

2. MASTER AND SERVANT—DEATH FROM HEART FAILURE HELD NOT COMPENSABLE AS RESULTING FROM INJURY BY "ACCIDENT" WITHIN COMPENSATION ACT.

Where valve on steam boiler blew out and employee ascended ladder and closed the valve, and descended went to a window and then walked out of a door for a few steps, staggered, and fell dead, being the result of a pre-existing disease of the heart which the excitement caused to fail, death was not compensable as resulting from traumatic "injury by accident" within Workmen's Compensation Act (Ky. St. Supp. 1918, § 4880), defining compensable accidents.

(For other cases, see Master and Servant, Dec. Dig. § 376[2].)

(For other definitions, see Words and Phrases, First and Second Series, Accident—Accidental.)

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Fourth Division.

Proceedings by Margaret Rusch under the Workmen's Compensation Act to obtain compensation for the death of her husband, Allen Rusch, opposed by the Louisville Water Company, the employer. The Compensation Board denied compensation, and their decision was sustained by the circuit court on appeal, and the applicant appeals. Affirmed.

S. A. Anderson, of Louisville, for appellant.

Charles W. Morris, of Louisville, for appellees.

MOORMAN, J. Allen Rusch, the husband of appellant, Margaret Rusch, was an employee of the appellee, Louisville Water Company, at the time complained of in this action. The water company was then operating under the provisions of the Workmen's Compensation Act (Ky. St. Supp. 1918, § 4880 et seq.), which had been accepted by Rusch.

On April 4, 1918, a valve connected with the steam boiler where Rusch was working blew out, and he with another employee ascended the ladder to close the opening. After closing it, he descended the ladder, went to a window near the door of the plant, walked out the door for a few steps, staggered, and fell to the ground dead. The appellant, as the dependent widow of deceased, filed claim before the Workmen's Compensation Board, asking for compensation as a dependent under the Workmen's Compensation Act. The board found that:

"1. The death of decedent was not the result of traumatic injury by accident, but was due to pre-existing disease of the heart.

"2. Overexcitement and hurry at a critical moment, taken in connection with a diseased heart, caused the heart to fail."

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The board also ruled that the burden of proof was on claimant to show that the accident arose out of and in the course of the employment, and that the death of Rusch was not the result of pre-existing disease. The claim was dismissed.

Appellant, as provided by the act, appealed to the circuit court for a review of the order of the board. By appropriate pleadings in that court the issues were made up, but on a hearing, on the evidence adduced before the board, the decision of the board was sustained and the petition dismissed. On this appeal it is argued that the judgment should be reversed on the ground that the death of decedent resulted from an accident arising out of and in the course of his employment.

This ground of reversal raises a question to be determined by an application of section 4889, Kentucky Statutes, defining accidents for which there is liability against the employer, and excluding therefrom death or or disability resulting from pre-existing disease or disease not the natural or direct result of traumatic injury.

[1] Conforming to the language of the Compensation Act this court is committed to the rule that the findings of fact by the Compensation Board, if supported by credible evidence, will not be disturbed on review by the courts. The findings of the board as to questions of fact are to be given the same force and effect as the verdict of a properly instructed jury. Hollenbach Co. v. Hollenbach, 181 Ky. 262, 204 S. W. 152, 13 A. L. R. 524; Bates & Rogers Construction Co. v. Allen, 183 Ky. 815, 210 S. W. 467; Valentine v. Weaver, 191 Ky. 37, 228 S. W. 1036; Andrews Steel Co. v. McDermott, 192 Ky. 679, 234 S. W. 275.

We have also held in the Allen Case, supra, that where there is no issue of fact or where the facts are undisputed, the question on the facts then becomes one of law, and the finding of the board is a finding of law subject to review by the courts, with respect to its effect as applied to the rights of the claimant.

[2] In this case the board found that the death of Rusch was not the result of traumatic injury by accident, but was due to pre-existing disease of the heart, and, further, that excitement and hurry at a critical moment, taken in connection with a diseased heart, caused the heart to fail. There is no question of the accuracy of these findings, nor is there any contrariety in the evidence by which they are shown to exist. The single inquiry then is as to their legal effect.

Section 4880, Kentucky Statutes, fixes liability against the employer in applicable cases for personal injuries sustained—

"by accident arising out of and in the course of his employment, or for death resulting from such accidental injury; provided, however, that personal injury by accident as herein defined shall not include diseases except where the disease is a natural and direct result of a traumatic injury by accident, nor shall they include the results of a pre-existing disease."

The clause quoted provides that injury by accident, for which compensation is allowed, shall not include disease not the natural and direct result of traumatic injury by accident, nor shall it include the results of pre-existing disease.

Our attention has not been directed to any case in which a statute, containing the provisional clause referred to, has been construed, but the argument is advanced that the death of decedent was accidental, in that it resulted from the blowing of the valve from the steam boiler. On that point, however, the finding of the Compensation Board was against appellant. The finding was that the death was not the result of traumatic injury by accident, but was due to a pre-existing disease of the heart. The liability created by the statute for injury or death resulting from accident, arising out of and in the course of employment, is explicitly defined as excluding disease, except where the same is the natural and direct

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result of traumatic injury by accident. There is no claim here of any traumatic injury.

The legal effect of the facts found by the board brings the case directly within the clause referred to. The language of the statute is too clear to admit of doubt as to its meaning. Whatever the Legislature may have intended to do, it clearly expressed the purpose of relieving the employer from liability in cases of this kind. Unfortunate as was the death of Rusch, his dependents are bound by the statute, which denies to them compensation. We, therefore, concur in the view adopted by the Compensation Board as to the legal effect of the established facts.

The conclusion reached obviates the necessity of determining on this appeal whether the burden of proof was on claimant to show that Rusch's death did not result from a disease for which there is no liability. The facts found by the board are uncontradicted, and their legal effect alone is pertinent here. Finding that they were given the proper effect by the court below, the judgment is affirmed.

BRONSON v. HARRIS ICE CREAM CO., INC. (No. 24188.)

(Supreme Court of Louisiana. Jan. 2, 1922. Rehearing Denied Jan. 30, 1922.)

90 Southern Reporter, 759.

(Syllabus by Editorial Staff.)

MASTER AND SERVANT — COMPENSATION NOT DEFEATED BY REFUSAL TO SUBMIT TO OPERATION.

Where an injured employee 59 years old refused to submit to an operation to remove broken parts of his knee, requiring an anæsthetic and resort to a hospital as a charity patient, his refusal was not unreasonable, and did not defeat recovery for his disability under Workmen's Compensation Act, §§1, 28, 36, and section 10, as amended by Act No. 38 of 1918 § 1, containing no provision for an operation.

(For other cases, see Master and Servant, Dec. Dig. § 385[18].)

Appeal from Civil District Court, Parish of Orleans; Wynne G. Rogers, Judge.

Proceeding by W. T. Bronson against the Harris Ice Cream Company, Inc., for compensation under the Workmen's Compensation Act. From judgment for defendant, plaintiff appeals. Judgment set aside, and compensation to plaintiff decreed.

Wm. H. Byrnes, Jr., and Rene A. Viosca, both of New Orleans, for appellant.

Farar, Goldberg & Dufour, of New Orleans, for appellee.

PROVOSTY, J. Plaintiff suffered an injury to his knee in the course of his employment at defendant's ice cream factory. He sues under the Workmen's Compensation Act and its amendments (Acts 20 of 1914; 243 of 1916; 38 of 1918) as for total disability. He describes the accident as follows:

"I started to go up on the elevator, and there was a large hole in the elevator. I stepped to the side of it; but the elevator there was very slippery with ice and cream, and before I knew it my left foot slipped into

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the hole; and the elevator was pulled by hand by a negro pulling a rope by hand, and he took a long pull, when he started the elevator, and that threw me down in the hole; went in up to the crotch."

The disability is not contested, but is said not to be attributable to the accident, but to plaintiff's refusal to allow an operation to be performed, which would probably have cured him, and certainly relieved him of all pain, and thus restored his ability to work.

The operation, as we understand, would have consisted in opening the knee, and removing therefrom some broken parts. Plaintiff, being 59 years old, hesitated about having this done, and finally concluded not to, after consultation with several surgeons. These surgeons advised that the operation would not be dangerous to life or health, and that the chances of success, in which event the use of the limb would be completely restored, and of nonsuccess, in which event the limb would become ankylosed and rigid, were about even. Plaintiff would have had to be anæsthetized; and, being without means, would have had to resort to the Charity Hospital as a charity patient, which appeared to him in the light of a humiliation.

He refers the court to section 1, par. 1, of Act 20 of 1914, reading "* * * and for such employee and employer the payment of compensation, according to and under the terms, conditions and provisions hereinafter set out in this act, shall be exclusive, compulsory and obligatory," and argues that the having to submit to an operation is not mentioned among the "terms, conditions and provisions hereinafter set forth in this act," and that therefore submission to an operation cannot be made a condition precedent to recovery under the act; that to so require would be to add a "condition" to the act, and that the absence of such a requirement is not accidental, since provision is made for having to submit to an examination (see section 10 of the act as amended in 1918); that, moreover, section 28 of the act specifies the conditions under which compensation shall not be allowed, and does not include among them the refusal to submit to an operation. The act, in its section 36, provides further—

"That no contract, rule, regulation or device whatsoever shall operate to relieve the employer, in whole or in part, from any liability created by this act except as herein provided."

To the legal action which the injured employee might have been to recover full indemnification the act substitutes a right to partial indemnification, but seeks to facilitate and insure as far as possible the recovery of this indemnity. To that end it takes away defenses, simplifies procedure, and creates presumptions. That purpose would in a large measure be defeated if the door were opened for discussion as to whether the injured employee should or not have recourse to an operation. This would be adding uncertainty where the law clearly desires that there should be none.

At the same time we must recognize that such a thing might be as an injury curable by an operation so simple and unattended by risk that plainly the real cause of the disability would be not so much the injury as the not making use of the easy remedy at hand.

On this question of whether under the Workmen's Compensation Act an injured employee may have to resort to an operation as a prerequisite to recovery of compensation for disability, and on the further and much difficult question of under what circumstances he will be required to do so, there is much jurisprudence. The plaintiff cites the cases of McNally v. Hudson, 87 N. J. Law, 455, 95 Atl. 122; Ranbon Coal Co. v. Thomas, 3 B. W. C. 32; Bothanell v. Davies, 19 T. L. R. 423; 5 W. C. C. 141; Sweeney v. Pumpherston Oil Co., 5 F. 972; 40 Sc. L. R. 721; Mercurio v. California Trans. Co., 1 Cal. Ind. Acc. Com. Did. (No. 16, 1914) 11; 10 N. C. C. A. 197, note B, and 15 N. C. C. A. p. 81, note II, B.; Marshall v. Navigation Co., 1 King's Bench Div. 79. Defendant cites the same case of McNally v. Hudson, etc., supra; and the following: Lesh

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v. Illinois Steel Co., 163 Wis. 124, 157 N. W. 539, L. R. A. 1916E, 105; O'Brien v. Albrecht Co., 206 Mich. 101, 172 N. W. 601, 6 A. L. R. 1257; Kricinovich v. American Car & Foundry Co., 192 Mich. 687, 159 N. W. 362; Warncken v. Moreland, 100 L. T. 12 (1909) 1 K. B. 184; Walsh v. Locke Co., 6 N. C. C. A. 675, and note; Paddington Borough Council v. Stack, 2 B. W. C. C. 402; Anderson v. Baird & Co., 5 F. 373; 40 Sc. L. R. 263 (1903); Joliet Motor Co. v. Industrial Board, 280 Ill. 148, 117 N. E. 423; Enterprise Fence & Foundry Co. v. Majors, 68 Ind. App. 575, 121 N. E. 6. Most of these cases are inapplicable under our statute, except in so far as establishing the proposition that the injured employee must not be entirely unreasonable in refraining from an operation, however simple and harmless; and the others turn upon the facts, as does the present.

In view of the age of the plaintiff, and of the seriousness of the operation, requiring the administration of an anæsthetic and in view of the natural (though unreasoning and, we may add, groundless) prejudice against the resorting to the Charity Hospital, we do not think that plaintiff's unwillingness to submit to an operation was entirely unreasonable. It was not the result of caprice, but of the natural dread of a surgical operation always attended with more or less risk, especially after a certain age.

The judgment appealed from is therefore set aside, and it is now ordered, adjudged, and decreed that the plaintiff, W. T. Bronson, have judgment against the defendant, the Harris Ice Cream Co., Inc., in the sum of $11.55 per week, payable from week to week, for 400 weeks, or as long as the disability shall continue, beginning on November 1, 1918, with 5 per cent. per annum interest on the past-due installments thereof from the date the same became due, under the present judgment, less the sum of $485 already paid, and operating in part satisfaction of the present judgment; and that the defendant pay the costs of this suit.

BROADBENT'S CASE.

(Supreme Judicial Court of Massachusetts. Suffolk. March 1, 1922.)

134 Northeastern Reporter. 632.

1. MASTER AND SERVANT — DEATH OF ASSAULTED EMPLOYEE HELD ONE "ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT."

Where it was the duty of a Y. M. C. A. counter man to sell dormitory checks, candy, and other articles, and also keep an inclosure clear, and while trying to quell a disturbance and clear such inclosure he received a blow which resulted in cerebral hemorrhage, causing his death, and though there was evidence that his superior told him to go back to his place behind the counter, this was not until after he was struck, findings that he was acting within the scope of his employment, and that the risk of assault was a risk of such employment, were warranted.

(For other cases, see Master and Servant, Dec. Dig. § 273.)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

3. MASTER AND SERVANT—COMPENSATION NOT ALLOWABLE TO ILLEGITIMATE "CHILD OR CHILDREN" OF DECEASED.

An illegitimate child, born of a bigamous marriage, is not entitled to compensation for the death of his father, under the Workmen's Compen-

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sation Act; the words "child or children," as used therein, referring only to the legitimate child or children.

(For other cases, see Master and Servant Dec. Dig. § 388.)

(For other definitions, see Words and Phrases, First and Second Series, Child—Children.)

4. MASTER AND SERVANT—COMPENSATION BOARD'S FINDING ON EVIDENCE AS TO DESERTION AND SEPARATION CONCLUSIVE.

Under St. 1911, c. 751, pt. 2, § 7, as amended by St. 1914, c. 708, § 3, and St. 1919, c. 204, the finding of a single member of the Industrial Accident Board, affirmed and adopted by the board, that deceased's widow had not sustained the burden of showing that deceased deserted her, or that she was living apart from him for justifiable cause, must stand, if there is any evidence to support it.

(For other cases, se Master and Servant, Dec. Dig. § 417[7].)

5. MASTER AND SERVANT — COMPENSATION BOARD NOT BOUND TO BELIEVE WIDOW'S TESTIMONY AS TO SEPARATION.

In a workman's compensation proceeding, the Industrial Accident Board and the member who heard the case were not bound to believe the testimony of deceased's widow, tending to show that she was living apart from him for justifiable cause.

(For other cases, see Master and Servant, Dec. Dig. § 405[5].)

6. MASTER AND SERVANT—COMPENSATION BOARD'S FINDING AS TO WIFE'S CONDONATION OF HUSBAND'S ACTS WARRANTED.

In a workman's compensation proceeding, involving the question whether his widow was living apart from him for justifiable cause, findings that she had condoned his improper relations with other women and assaults on her were not unwarranted, where they had continued to live together up to the time he left his native country for this country.

(For other cases, see Master and Servant, Dec. Dig. § 405[5].)

7. MASTER AND SERVANT—COMPENSATION HELD NOT ALLOWABLE TO WIDOW LIVING APART FROM HUSBAND.

If a wife living apart from her husband did not learn of his subsequent bigamous marriage until after his death, she could not be found to have been living apart from him for that cause, within St. 1911, c. 751, pt. 2, § 7, as amended by St. 1914, c. 708, § 3, and St. 1919, c. 204, though if she learned of such marriage before her desertion of him was complete, she would have been justified in continuing to live apart from him, and would not have been prevented from obtaining compensation.

(For other cases, see Master and Servant Dec. Dig. § 388.)

(For other definitions, see Words and Phrases, First and Second Series, Live Apart.)

Appeal from Superior Court, Suffolk County.

Proceeding under the Workmen's Compensation Act by Sarah Broadbent and William H. B. Broadbent for compensation for the death of Joel Broadbent, husband of the first-named claimant and father of the second-named claimant, opposed by the Massachusets Trustees International Y. M. C. A. for Army and Navy Work, Inc., employer, and the Ocean Accident & Guarantee Corporation, Limited, insurer. Compensation was denied, and decree entered dismissing the claim and the widow appeals. Affirmed.

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The questions before the Industrial Accident Board were whether the employee received a personal injury in the course of and arising out of his employment, whether death resulted from the injury, and dependency. The board member hearing the case found that deceased was acting within the scope of his authority when injured by an assault, that the risk of the assault was a risk of his employment, that his death resulted from hemorrhage induced by a blow on his face and the resulting excitement, but that neither of the claimants was entitled to compensation under the statute. The board adopted his findings and gave the insurer's requested rulings that William H. Broadbent was not dependent on deceased for support, and that Sarah Broadbent was not living apart from her husband for a justifiable cause, or because he had deserted her, and refused the widow's requested ruling that on all the evidence she was living apart from him for justifiable cause.

Chester J O'Brien, of Boston, for appellant.

James T. Connolly, of Boston, for appellee.

Crosby, J. The claims for compensation in this case in behalf of the employee's widow and illegitimate minor son arise out of a personal injury received by the employee early in the morning of November 16, 1919, which, it is claimed, resulted in his death. At the time of his injury he was employed at the "Army and Navy Y. M. C. A., in Charleston," as a "counter man."

[1] 1. The single member of the Industrial Accident Board made the following findings: That Broadbent's duties were to sell checks entitling the buyer to the use of the dormitory maintained there, and to sell candy, cigarettes and other articles; that three men, including the deceased, were employed there at night, the other two being Kinney and Best; that Best was required to collect the checks from those who used the dormitory; that Kinney, as well as the deceased sold checks; that there was more or less disorder; that while trying to quell a disturbance the deceased was struck on the right side of his face by a petty officer in the United States Navy, and received an injury which resulted in cerebral hemorrhage, from which he died on November 23, 1919. There was evidence from which it could have been found that Kinney was in charge, that the deceased came from behind the counter and endeavored to stop the disturbance, and that Kinney ordered him to go back. The single member found that such order was not given until after Broadbent had been struck, and that it was a part of his duties "to keep the inclosure clear and it was within this inclosure that he was hurt, and while trying to clear the inclosure." The single member further found that at the time of his injury Broadbent was acting within the scope of his employment and that the risk of assault was a risk of such employment; it is plain that these findings were warranted.

[2] 2. The single member also found that the employee's death was the result of cerebral hemorrhage. The death certificate of the medical examiner filed in the office of the city clerk states that—

"The cause and manner thereof are as follows: Cerebral hemorrhage, blow on the forehead; * * * blow probably had no direct effect in producing the hemorrhage; the excitement which followed probably a contributing factor."

This certificate was admitted without objection. We are of opinion that it was admissible under R. L. c. 29, § 20 (G. L. c. 46, § 19), and is prima facie evidence of the facts recorded. Shamlian v. Equitable Accident Co., 226 Mass. 67, 115 N. E. 46. Apart from the certificate of the medical examiner, there was other medical evidence from which it could have been found that the death of the employee was due to cerebral hemorrhage resulting from the blow and the attendant excitement.

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[3] 3. At the time of the employee's injury and death, his illegitimate son was under the age of sixteen years and was not living with his father. While the employee went through the form of a marriage ceremony with the mother of the boy on February 14, 1900, he had a wife living in England, who is the claimant in the case at bar. The mother of the son predeceased the employee. It is plain that the child is not entitled to compensation under the Workmen's Compensation Act. It was held in Gritta's Case, 236 Mass. 204, 127 N. E. 889, that the words "child or children," as used in the act and amendments thereto, refer only to a legitimate child or children. Baylis v. Baylis, 207 N. Y. 446, 101 N. E. 176; Murrell v. Industrial Commission, 291 Ill. 334, 126 N. E. 189. The single member rightly dismissed the claim of the minor son.

4. The question remains whether the widow, who lives in England, is entitled to compensation as matter of law. The evidence upon this question is contained in her deposition in which she states that she was married to the deceased in England on April 18, 1892; that they lived together thereafter about 5½ years; that one child now living was born as the result of the marriage; that during the time they lived together her husband was guilty of improper relations with other women; that on many occasions he struck and otherwise ill-treated her; that his wages were insufficient to supoprt the family and that she worked as a weaver from the time of their marriage until shortly before he left her, except during a period of time when she was confined; that he left for America in November 1897; that she never actually declined to accompany him, and that—

"When he asked me to go to America, I said I would, if he would alter his ways. His reply was that he would please himself, to which I made no answer."

She also testified that on April, 1906, she learned that after he came to America "he had contracted a bigamous marriage." The single member found as follows;

That from the claimant's evidence it is not clear "as to whether she actually ever surprised her husband in adultery"; that "whatever his relations with other women to which she objected, the fact remains that she continued to live with him up to the time he made up his mind to come to America; that he did ask her to come with him and she did not accept the opportunity. * * * The reasonable inference from all the circumstances appears to me to be that she did not wish to leave her native country to journey to a strange land with her husband for whom her affection appears to have been neither deep nor abiding. I do not consider that she was justified in this refusal. * * * It was the husband's right to choose and establish the marital domicile and in exercising his right to change his domicile I cannot see that he acted unreasonably. * * * I see nothing in the present case to show a legal excuse for the wife's refusal to accompany her husband on his change of domicile and I find that she did so refuse. * * * Both of them, I believe, were willing to separate, but the fact remains that the wife refused to accompany her husband when he was willing that she should and had requested her to. Even though he was glad to get rid of her, that does not prevent her conduct from constituting desertion."

[4] To entitle the claimant to compensation under the act she must show affirmatively that at the time of her husband's death she was living apart from him for justifiable cause or because he had deserted her. St. 1911, c. 751, part 2, § 7, as amended by St. 1914, c. 708. § 3; Gen. Acts 1919, c. 204. Upon this question, in addition to the findings of the single member above quoted, he states:

"Considering the facts of the case here, the circumstances under which she separated from her husband and that they lived apart for 22 years without any effort on her part to communicate with him, I find that she has not sustained this burden."

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It is provided by St. 1911, c. 751, part 2, § 7, as amended by St. 1914, c. 708, § 3, that—

"The findings of the board upon the questions of such justifiable cause and desertion shall be final."

It follows that the findings of the single member, which were affirmed and adopted by the Industrial Accident Board on review, must stand if there is any evidence to support them. Pigeon's Case, 216 Mass. 51, 102 N. E. 932, Ann. Cas. 1915A, 737; Pass's Case, 232 Mass. 515, 122 N. E. 642; Beckles's Case, 230 Mass. 272, 274, 119 N. E. 653; Sciola's Case, 236 Mass. 407, 413, 128 N. E. 666. The findings in effect are that the claimant was not living apart from her husband for justifiable cause and that she deserted him.

[5-7] If all the evidence offered by her and contained in her deposition were believed, it is plain that she was living apart from the deceased for justifiable cause; but neither the single member nor the board was bound to believe her testimony, Lindenbaum v. New York, New Haven & Hartford Railroad, 197 Mass. 323, 84 N. E. 129, and it is apparent from the findings that it was not deemed worthy of credence. The finding that the husband's improper relations with other women and his assaults upon her had been condoned as the husband and wife continued to live together up to the time he left for this country was not unwarranted. Her testimony that she learned of his subsequent marriage in April, 1906, could have been disbelieved. If she did not learn of such subsequent marriage until after his death, she could not be found to have been living apart from him for that cause; although if she had learned of it after she deserted him and before the period making the desertion complete, she would have been justified in continuing to live apart from him and would not thereby be prevented from obtaining compensation under the act.

We cannot say that, as matter of law, the findings of the board that the widow was not living apart from the deceased for justifiable cause and that she had deserted him were erroneous. It follows that the entry must be.

Decree affirmed.

FELDMAN'S CASE.

(Supreme Judicial Court of Massachusetts. Suffolk. March 3, 1922.)

134 Northeastern Reporter, 251.

1. MASTER AND SERVANT—DECREE REQUIRED IN COMPENSATION CASE.

The decree to be entered in a compensation case on presentation to the superior court of copies of the decision of the Industrial Accident Board should be such a decree as the law requires on the facts shown by the record.

(For other cases, see Master and Servant, Dec. Dig. § 418[2].)

2. MASTER AND SERVANT — FINDINGS IN COMPENSATION CASE CONCLUSIVE.

The findings of fact by the Industrial Accident Board in a workmen's compensation proceeding are conclusive if supported by the evidence.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

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3. MASTER AND SERVANT — FINDING ON QUESTION OF CAUSE OF DEATH SUPPORTED BY EVIDENCE IN COMPENSATION CASE.

Evidence in a workmen's compensation proceeding that a baker fell and struck his head on the floor and died soon afterwards of cerebral hemorrhage, and that the hemorrhage could have been caused by the fall; or by the high temperature of the room, *held* to make a question of fact for the Industrial Accident Board as to the causal connection, and hence its finding that the claimant had not sustained the burden of proof could not be reversed.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

4. MASTER AND SERVANT — EVIDENCE IN COMPENSATION CASE HELD NOT PREJUDICIAL.

In a workman's compensation proceeding, the admission of evidence that decedent and two of the claimant's witnesses were members of the same union was not prejudicial error, where the evidence could not affect the result.

(For other cases, see Master and Servant, Dec. Dig. § 417[8].)

Appeal from Superior Court, Suffolk County; Franklin T. Hammond, Judge.

Proceedings under the Workmen's Compensation Act (Laws 1911, c. 751, as amended by Laws 1912, c. 571), by Pauline Feldman for compensation for the death of her husband, Charles Feldman, opposed by Jacob Bikofsky, employer, and the Maryland Casualty Company, insurer. Compensation was denied and decree entered accordingly, and the claimant appeals. Affirmed.

The question before the Industrial Accident Board was whether the employee's death was due to a personal injury arising out of and in the course of the employment. The evidence showed that he died from cerebral hemorrhage, the dispute being as to whether the cerebral hemorrhage was caused by a fall or due to some other cause. The Board member found on all the evidence that the claimant had failed to sustain the burden of proving that the death was due to a personal injury arising out of and in the course of the employment, and such finding was adopted by the Board.

Roewer & Bearak and E. M. Shanley, all of Boston, for appellant.
Edward I. Taylor, of Boston, for appellees.

BRALEY, J. [1-3] The decree to be entered upon presentation of copies of the decision of the Industrial Accident Board should be such a decree as the law required upon the facts shown by the record. McNicol's Case, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306; Brown's Case, 228 Mass. 31, 116 N. E. 897; Keohane's Case, 232 Mass. 487, 122 N. E. 573; Sciola's Case, 236 Mass. 413, 128 N. E. 666. The findings of fact are conclusive if supported by the evidence. Pigeon's Case, 216 Mass. 51. The decedent, employed as a baker, was preparing to put dough into an oven when he slipped and fell. "His head struck a stone on the floor and he cried out, 'Oh, my head!' " It could be found that the cement floor in the front of the oven was wet, "the same as it is always," and that the temperature was high "because the three ovens were going all the time." A fellow employee also "heard a fall and cry, 'My head!' " While the decedent did not become entirely unconscious and "kept crying about his head saying that he felt badly," and died within fifteen minutes at the hospital to which he was immediately removed, he made no ref-

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erence to the cause of his fall; nor did it appear that the fall caused any external physical injuries. The record of the hospital properly received in evidence showed that the patient was admitted in a state of collapse from cerebral hemorrhage. Bilodeau v. Fitchburg & Leominster Street Railway, 236 Mass. 526, 540. 128 N. E. 872. And the certificate of death stated as the cause "natural causes, probably cerebral hemorrhage." It was the opinion of the claimant's medical expert, who had read the hospital report, that—

"A man could sustain an epidural or a subdural hemorrhage by reason of slipping and falling and suddenly striking his head upon a cement or stone flooring when there was a loud report or a heavy thud from striking the floor."

[4] The decedent, however, having been fifty-seven years of age, he also testified that in a man of that age it is usual to find hardening of the arteries. and that extreme heat might "induce cerebral hemorrhage." To the question, "Assuming that in this case the decedent was a man fifty-seven years of age and working in a bakery with a temperature very high, would you say that would probably cause a cerebral hemorrhage?" he answered, "Yes; it is probable that the high temperature produced an intro-cerebral hemorrhage in this case." The claimant's counsel contends this evidence warranted a finding that the employee suffered an injury as a natural incident of his work, the effect of which caused his death. McNicol's Case, 215 Mass. 497, 499, 102 N. E. 697, L. R. A. 1916A, 306. But the causal connection was a question of fact, involving also the credibility of the witnesses, and the decision of the Industrial Accident Board, rested upon the ground that the claimant had failed to sustain the burden of proving "that the death of her husband was due to a personal injury which arose out of the course of his employment," cannot be reversed. Fitzgibbons' Case, 230 Mass. 473, 474, 119 N. E. 1020; Sanderson's Case, 224 Mass. 558, 563, 113 N. E. 355; Pass's Case, 232 Mass. 515, 122 N. E. 642; Bolden's Case, 235 Mass. 309, 310, 126 N. E. 668. The evidence that the decedent and two of the witnesses for the claimant were members of the Bakers' Union, to the admission of which in cross-examination the claimant objected, cannot affect the result. No prejudicial error is shown. Pigeon's Case, 216 Mass. 51, 102 N. E. 932, Ann. Cas. 1915A, 737.

Decree affirmed.

HURLEY'S CASE.

(Supreme Judicial Court of Massachusetts. Worcester. Feb. 28, 1922.)

134 Northeastern Reporter, 252.

MASTER AND SERVANT — INJURY WHILE USING BEAM AS FOOTPATH, HELD NOT TO "ARISE OUT OF EMPLOYMENT."

Where a gas company's employee, having occasion to go from a blower room to the forge, went upon a beam supporting the building, for the purpose of getting his raincoat, and then attempted to use such beam as a footpath in passing to another building, and fell and was injured, injury *held* not to arise out of his employment, but from an outside peril having no causal relation to his duty.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

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Appeal from Superior Court, Worcester County; Lawton Judge.

Proceeding under the Workmen's Compensation Act (Laws 1911, c. 751, as amended by Laws 1912, c. 571) by Patrick Hurley for compensation for injuries, opposed by the Worcester Gaslight Company, employer, and the Employers' Liability Assurance Corporation, insurer. Compensation was awarded, and defendants appeal. Reversed, and decree entered for insurer.

Charles C. Milton, of Worcester, for appellants.

James E. Hafey, of Chicopee, for appellee.

PER CURIAM. The claimant had occasion, in the course of his work at the Worcester Gas Works, to go from the blower room to the forge to get some bars. To go to the forge the natural course was to leave the blower room, go down the stairs, out into and across the yard and enter another building. He needed a raincoat, which he found on a beam. He stepped out on the beam, got his coat and put it on. The beam "was connecting the two blower rooms." He made an effort to walk along the beam, which was about a foot wide and about a foot thick, for perhaps 20 feet, and stepped through what seemed to be a broken opening in the partition. The partition was made of old boards and there was no roof over the opening between the two buildings. He started to walk on the beam from the opening in one building on to another beam "which was running 'alongside.'" The beams were for the support of the building. If he had reached the other room he would have had to go down stairs and across the yard to the forge. He fell from the beam about 20 feet and received severe injuries. It was not within the scope of the claimant's work to walk on the beam. Every circumstance demonstrates that the beam was not a place where his employment called him either directly or incidentally. He voluntarily encountered an added risk not within the contemplation of his contract of service. Even though he had to get on the beam for the raincoat, that was no warrant for using the beam as a footpath into regions where manifestly no employee was justified in trying to travel. The case is covered by Borin's Case, 227 Mass. 452, 116 N. E. 817, L. R. A. 1918A, 217; Rochford's Case, 234 Mass. 93, 124 N. E. 891; Haggard's Case, 234 Mass. 330, 125 N. E. 565; Bolden's Case, 236 Mass. 342, 128 N. E. 400. The claimant "went into a territory with which he had nothing to do" as employee. Bourton v. Beauchamp, [1920] A. C. 1001, 1006, 1007; Barnes v. Nunnery Colliery Co., Ltd., [1912] A. C. 44; Plumb v. Cobden Flour Mills Co., Ltd., [1914] A. C. 62; Lancashire & Yorkshire Railway v. Highley, [1917] A. C. 352; A. G. Moore & Co. v. Donnelly, [1921] 1 A. C. 329. The principle of serious and willful misconduct, illustrated by Nickerson's Case, 218 Mass. 158, 105 N. E. 604, Ann. Cas. 1916A, 790, has no relevancy to these facts, which, taken in their aspect most favorable to the claimant, show that his injuries did not arise out of his employment, but from an outside peril having no causal relation to his duty.

Decree reversed. Decree to be entered for insurer.

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FERNALD'S CASE.

(Supreme Judicial Court of Massachusetts. Suffolk. March 3, 1922.)

134 Northeastern Reporter, 347.

1. MASTER AND SERVANT—APPEAL FROM DENIAL OF MOTION TO RECOMMIT COMPENSATION CASE WAIVED WHEN NOT ARGUED.

In a compensation case, where the insurer appealed from the decree and also from the denial of its motion to recommit the claim to the Industrial Accident Board, the appeal from such denial must be treated as waived, when not referred to in the brief nor argued at the bar.

(For other cases, see Master and Servant, Dec. Dig. § 418[5].)

2. MASTER AND SERVANT — INADMISSIBLE EVIDENCE IN COMPENSATION CASE AS TO PISTOL WOUND HELD NOT TO AFFECT SUBSTANTIAL RIGHTS.

In a workmen's compensation proceeding the testimony of the medical examiner that deceased died from internal hemorrhage from a pistol or bullet wound "accidentally," though it should have been stricken, *held* not to affect the substantial rights of the insurer so as to furnish ground for reversal of the decree.

(For other cases, see Master and Servant. Dec. Dig. § 418[5].)

3. MASTER AND SERVANT—EVIDENCE IN COMPENSATION CASE HELD TO SHOW ACCIDENTAL DISCHARGE OF PISTOL.

In a proceeding for compensation for the death of a night watchman, whose duty, it was to shovel snow off the sidewalk, and who died from a bullett wound received while shoveling snow, evidence *held* to warrant the inference that his pistol was discharged accidentally while removing it from his hip pocket because it hampered his movements while shoveling.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

4. MASTER AND SERVANT — SUICIDE NOT PRESUMED IN COMPENSATION CASE.

In a proceeding for compensation for the death of a night watchman killed by the discharge of his own pistol, it is not to be presumed that he intended to commit a felony by taking his own life.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

5. MASTER AND SERVANT—CREDIBILITY AND WEIGHT OF TESTIMONY IN COMPENSATION CASE NOT REVIEWABLE AS MATTER OF LAW.

In a proceeding for compensation for the death of a night watchman killed by the discharge of his own pistol, which the claimant claimed was accidental, where an expert testified that the revolver could not be discharged unless cocked and then fired, his credibility and the weight to be given his testimony was not reviewable as matter of law.

(For other cases, see Master and Servant, Dec. Dig. § 418[6].)

Appeal from Superior Court, Suffolk County.

Proceeding under the Workmen's Compensation Act (St. 1911, c. 751, amended by St. 1912, c. 571) by Lavina Fernald for compensation for the death of her husband, George Fernald, opposed by Mitchell &

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Co., Inc., employer, and the Employer's Liability Assurance Corporation, Limited, insurer. Compensation was awarded, and the insurer's motion to recommit the claim to the Industrial Accident Board was denied, and decree entered on the award, and the insurer appeals from the decree and from the denial of its motion to recommit. Affirmed.

Deceased was employed as night watchman, and was authorized to carry a revolver, and died from a pistol shot received while shoveling snow from the sidewalk. The Industrial Accident Board found that there was no evidence to suggest that the bullet was fired by any one other than the employer, that there was a presumption against suicide, and that the only reasonable conclusion was that the death resulted from the accidental discharge of the revolver. The insurer moved to recommit the claim for newly discovered evidence that a few days prior to the employee's death he had made statements that he had stolen property to the value of about $1,600 and promised to make restitution therefor. An associate medical examiner testified that he formed the opinion that deceased died from internal hemorrhage from a pistol or bullet wound accidentally. Insurer's counsel asked that the word "accidentally" be stricken from the record, and renewed his motion after the witness had testified on cross-examination that there was no surgical evidence that the shooting was accidental, but the Commissioner denied the motion, and permitted the testimony to remain.

Sawyer, Hardy, Stone & Morrison, of Boston (Gay Gleason, of Boston, of counsel), for appellant.

Edward R. Hale, of Haverhill, for appellee.

Braley, J. [1] The insurer's appeal from the denial of its motion to recommit the case to the Industrial Accident Board on the ground of newly discovered evidence not having been referred to in the brief nor argued at the bar must be treated as waived.

[2] It was uncontroverted that the employee was hired as a "night watchman and he did the sweeping as well." And that in the performance of his regular duties shoveling snow off the sidewalk in front of the store, he received a bullet wound in the abdomen from which in the opinion of the assistant medical examiner death by internal hemorrhage ensued the same day. The use by him of the word "accidentally" which the insured asked "be stricken from the record," although the request should have been substantial rights of the insurer. When the entire record is reviewed it furnishes no ground for reversal of the decree. Pigeon's Case, 216 Mass. 51, 55, 102 N. E. 932, Ann. Cas. 1915A, 737.

[3] If the injury, however, could be found to have been received in the course of his employment, the insurer contends there was no evidence which warranted a finding that it arose out of his employment. The only witness of what actually occurred said in substance:

"That there had been quite a fall of snow and while on his way to his place of business on the same side of the street at the employer's store he saw a man about 'twenty or thirty feet away shoveling snow off the sidewalk of which about three or four square yards had been cleaned.'"

The man was stooping over shoveling when he "saw him straighten up, reach back and take something out of his right hip pocket." A minute or two after he had straightened up and removed it the witness heard the explosion. The man looked up and down the street, and "in his side pocket in a hurried fashion," shoveled a little and then fell to the ground. The witness also looked "to see if anybody was near." It further appeared in his evidence that he saw the employee "reach back and reach around," and "make a movement towards his right hip pocket" and "take

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something out of his hip pocket." "It looked as though he was trying to put it in his left inside pocket and then he put his hand down at his side." "As near as he could locate it, the sound, the explosion came from the man who had been shoveling." The witness also testified that after the report he kept on up the street towards his own store, and when quite a distance "from the place where the shot occurred," he saw "three men * * * walking down the street" and as "they got about opposite the man who was shot * * * crossed the street over to him." The man who was shot did not fall to the ground until just before these men crossed over." The evidence showed and it could be found that the employer required the employee to carry and furnished him with a revolver "to protect the money and goods inside the building," and "possibly himself too." And the employee had a license to carry firearms which had not expired at the date of the injury. See G. L. c. 140, § 131. The head of the firm's drapery department called by the insurer stated:

"That when any watchman had a revolver of his own they carried it. If not, the firm gave them one."

The employee "did not carry the firm revolver very long. * * * He came to the witness * * * showed him a revolver which he said belonged to him," and upon the witness saying "that as long as he had one of his own there was no need of his carrying the firm's. * * * He gave the revolver back to the witness." The evidence of the city marshal introduced by the insurer, warranted a finding that the revolver produced at the hearing was on the morning of March 20th "taken from George Fernald," from which "three shells had been fired and two shells were undischarged." It is certain that a wound from a bullet caused the employee's death, but the associate medical examiner did not probe the direction of the wound or make an autopsy. It was his opinion that "unless a post mortem was performed there was nothing about the wound from which he could * * * determine the angle or position in which the gun was held at the moment of discharge" or the distance of the body from "the muzzle of the pistol * * * when the shot was fired." The finding that the employee was not feloniously or accidentally shot by an outsider was justified on the evidence.

[4] But two inquiries of fact remain. Did he commit suicide, or did he accidentally shoot himself? It is not to be presumed that the employee intended to commit a felony by taking his own life. Commonwealth v Mink, 123 Mass. 422, 25 Am. Rep. 109; Sponatski's Case, 220 Mass. 526, 108 N. E. 466, L. R. A. 1916A, 333; Von Ette's Case, 223 Mass. 56, 111 N. E. 696, L. R. A. 1916D, 641. Without reciting the evidence as to the employee's temperament and religious habits or financial difficulties, we cannot say as matter of law that a finding that this presumption had not been overcome was unwarranted. Barron v. International Trust Co., 184 Mass. 440, 68 N. E. 831; Von Ette's Case, 223 Mass. 56, 111 N. E. 696. L. R. A. 1916D, 641; Sponatski's Case, 220 Mass. 526, 108 N. E. 466, L. R. A. 1916A, 333. But even if these findings were warranted the insurer urges that the evidence is so meager, inconclusive and conjectural as to preclude the further finding of the single member that he accidentally shot himself, which the Industrial Accident Board adopted on review, and awarded compensation to the claimant, the employee's widow. It was said in Prince, Adm'r, v. Lowell Electric Light Corporation, 201 Mass. 276, 87 N. E. 558, an action for death by wrongful act of the defendant, and where there was no eyewitness at the time of death, that it was not necessary that any positive act of the intestate showing due care should be proved. "It may be inferred from the absence of fault when sufficient circumstances are shown fairly to exclude the idea of negligence on his part." A jury "must often reason according to probabilities drawing an inference that the main fact in issue existed, from collateral facts not directly proving, but strongly

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tending to prove its existence." Wright v. Tatham, 5 Cl. & F. 670, 764. It could be inferentially found, on the circumstances considered in the light of the direct evidence, that the revolver in his hip pocket interfered with and hampered the performance of his work, because freedom of movement was retarded. And that while transferring the revolver from his hip pocket to the inside pocket of his coat it was accidentally discharged. The motions of the employee described in the evidence quoted are not inconsistent with this view. Uzzio's Case, 228 Mass. 331, 117 N. E. 349; Sanderson's Case, 224 Mass. 558, 113 N. E. 355, is plainly distinguishable.

[5] We have not overlooked the evidence of the city marshal, who qualified as an expert "in firearms," that the revolver if held in the pocket and removed from it could not be discharged unless it was cocked by somebody and then fired. But the credibility of the witness and the weight to be given to his evidence are not reviewable as matter of law. Pigeon's Case, 216 Mass. 51, 102 N. E. 932, Ann. Cas. 1915A, 737; Diaz's Case, 217 Mass. 36, 104 N. E. 384; Savage's Case, 222 Mass. 205, 110 N. E. 283. It follows that the decree should be affirmed.

Ordered accordingly.

GAGLIONE'S CASE.

(Supreme Judicial Court of Massachusetts. Suffolk. March 6, 1922.)

134 Northeastern Reporter, 240.

MASTER AND SERVANT—ORIGINAL INJURY SHOWN TO BE CAUSE OF RECURRENCE OF COMPENSATION CLAIMANT'S DISABILITY.

In a compensation proceeding in which it appeared that the employee subsequent to the injury went to work for another employer, and that there was a recurrence of the hernia resulting from the injury received while working for the first employer, evidence *held* to make a question of fact for the Industrial Accident Board whether this condition had a causal relation to the original injury, and to warrant its findings in favor of the employee.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

Appeal from Superior Court, Suffolk County.

Proceeding under the Workmen's Compensation Act (St. 1911, c. 751, as amended by St. 1912, c. 571) by Carmine Gaglione for compensation for injuries, opposed by the Beacon Oil Company, employer, and the Travelers' Insurance Company, insurer. Compensation was awarded and decree therefor entered, and the insurer appeals. Affirmed.

The question before the Industrial Accident Board was whether the insurer was responsible for compensation following an injury resulting in a hernia, the employee having previously been paid compensation for an earlier hernia at or about the same location. The member of the Board hearing the case found that the employee was injured while working for the employer, received compensation and after a period of disability went to work for the city, that after a few days there was a recurrence of the hernia as a result of which he was totally incapacitated, and that the injury, if he received one while working for the city, was not sufficient to break the causal connection between the original injury and the recurrence of the hernia. His findings were adopted by the Board.

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Walter I. Badger and Walter I. Badger, Jr., both of Boston, for appellant.

Brodbine & Pasquale and James J. Pasquale, for appellee.

CARROLL, J. The employee was injured on November 7, 1919, while in the employment of the Beacon Oil Company. He was paid compensation and later went to work for the city of Everett; after working for the city for a few days there was a recurrence of the hernia which had resulted from the injury received at the Beacon Oil Company. The insurer asked for the ruling that—

"The work undertaken by the employee for the city of Everett, which work resulted in producing a recurrence of the hernia after the operation, was an intervening efficient cause while working for a new employer; and the disability resulting does not entitle the employee to compensation from the Travelers' Insurance Company, the insurer of the original employer."

This request was denied. The Industrial Accident Board found that the cause of the employee's disability was directly traceable to the original injury, and that—

"The injury, if he received one while working for the city of Everett. was not sufficient to break the causal connection between the original injury and the recurrence of the hernia"

The employee testified that he was asked by the insurer "to go and try to work." He secured employment from the city shoveling snow from the sidewalks, and was in pain all the time during the five days he worked but tried to remain on the job as long as he could; on the last day of his employment about 5 o'clock in the afternoon he felt pain in his left groin; that it was the same pain he felt all day except that it was a little more intense at that time. There was in addition medical testimony indicating a recurrence of the hernia; that the employee was in a weakened condition; and that the tissues had not thoroughly knitted after the first operation and the rupture came out while he was working for the city.

There was no question in the case that the employee suffered a rupture while in the employ of the Beacon Oil Company; and if there was a return of the hernia while in the employ of another it was a question of fact on all the evidence for the Industrial Accident Board to determine whether this condition had a causal relation to the original injury. There was evidence to warrant this finding and the employee was properly awarded compensation against the insurer of the original employer. See Hartnett v. Tripp, 231 Mass. 382, 121 N. E. 17; Clayton v. Holyoke Street Railway, 236 Mass. 359, 128 N. E. 460; Wilder v. General Motorcycle Sales Co., 232 Mass. 305, 122 N. E. 319.

Decree affirmed.

GALLAGHER'S CASE.

(Supreme Judicial Court of Massachusetts. Suffolk. March 1, 1922.)

134 Northeastern Reporter, 344.

MASTER AND SERVANT—TRUCKMAN WORKING WITH HIS OWN TEAM AND WAGON HELD "INDEPENDENT CONTRACTOR," AND NOT "EMPLOYEE," WITHIN COMPENSATION ACT.

One contracting with a company to carry and deliver bundles, packages, and barrels, with his own horse and wagon at specified prices per

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bundle, barrel, or package, and who was required to be at the company's place of business about 9 o'clock each morning, and work there most of the day, but had the right to carry goods for other parties, and whose contract included loading and unloadaing, was an independent contractor, and not an "employee," within Workmen's Compensation Act, when injured while unloading barrels, though the company's employees sometimes assisted with the loading and unloading, and though its foreman sometimes gave directions respecting the unloading of the wagon.

(For other cases, see Master and Servant, Dec. Dig. § 367.)

(For other definitions, see Words and Phrases, First and Second Series, Employee; Independent Contractor.)

Appeal from Superior Court, Suffolk County.

Proceedings under the Workmen's Compensation Act by Francis Gallagher for compensation for injuries opposed by the Viscol Company, employer, and the Travelers' Insurance Company, insurer. Compensation was awarded, and decree therefor entered, and the insurer appeals. Reversed, and decree entered for insurer.

One of the questions before the Industrial Accident Board was whether or not the claimant was an employee or an independent contractor. The member of the board hearing the case found the facts as to the employment as stated in the opinion and further found that he was an employee at the time he received the injury. The insurer requested rulings, which the board member denied, that the claimant was not entitled to compensation, that as a matter of law he was an independent contractor and not an employee, that he was not paid wages within the meaning of the Compensation Act, that there was no evidence upon which the wages earned in his employment could be computed, and that as a matter of law he was doing an express business as an independent contractor. The board, with two members dissenting, adopted the findings of the member hearing the case.

Paul L. Keenan, of Boston for claimant.

Walter I. Badger and Louis C. Doyle, both of Boston, for insurer.

CROSBY, J. The question in this case is whether the evidence warranted a finding that the claimant was an employee of the Viscol Company at the time of receiving his injury on June 9, 1920.

In the month before the injury the claimant bought a horse and wagon, and soon afterwards made a contract with the subscriber to carry merchandise to and from the place of business of the latter at a certain price per bundle, barrel or package so carried, the price depending upon the size of the articles and the distance they were taken. The board member found that the claimant also was given the right to carry merchandise for other parties, but was required to be at the place of business of the subscriber daily, and at such time as the amount of merchandise called for; this made it necessary for him to go there about 9 o'clock in the morning and work for the subscriber most of the day. The foreman and other employees of the Viscol Company helped Gallagher to load his wagon at the company's place of business, and when he brought goods there they helped him to unload them, sometimes using for that purpose a crane. When this was used, he was directed to fasten the hook to the article to be loaded or unloaded; he had nothing to do with operating the crane. On the day of the accident he brought to the Viscol Company's place of business a load of barrels; the crane was not then in working condition and he was told to roll the barrels out of the wagon to the platform. While he was so engaged, the king pin came out

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of the wagon, throwing the front of it up, which caused one of the barrels to fall upon him breaking his leg.

He was injured in the performance of his contract which, as the board member found, included the work of loading and unloading the wagon; and although the subscriber's employees were assisting him at the time he was hurt he was required to do that work under the terms of the contract. The undisputed facts make it plain that he was an independent contractor. He was an expressman, or truckman paid to carry and deliver bundles, packages and barrels in his team at a certain price for each article. He could do work for other persons, under the agreement, and receive compensation therefor. He was not paid any definite sum as wages. The work which he performed included the services rendered by himself and the use of his horse and wagon. The compensation which he received covered not only his own labor but the use of his property. It was remuneration for service, not wages for labor as such. Such payments were not wages for labor under the Workmen's Compensation Act (Laws 1911, c. 751, amended by Laws 1912, c. 571). It is clear that the claimant was not an employee within the meaning of that act. The arrangement which he had with the subscriber is inconsistent with the relation of employer and employee; otherwise he was an employee of every other person for whom he performed similar services. There was nothing in the contract with the Viscol Company that prevented the claimant from sending another driver in his place to carry and deliver goods for the company. Mt. Pleasant Stable Co. v. Steinberg, 238 Mass. 568, 131 N. E. 295, 15 A. L. R. 749. And he was injured in the performance of his contract, which included loading and unloading goods to be carried; the circumstance that he was sometimes assisted by employees of the company did not render him an employee. The fact that he was given directions occasionally by the foreman or shipper of the subscriber respecting the unloading of the wagon does not constitute such control as to warrant a finding that the relation of master and servant existed.

The conclusion reached is not inconsistent with the decision in Scribner's Case, 231 Mass. 132, 120 N. E. 350, 3 A. L. R. 1178, and in Hogan's Case, 236 Mass. 241, 127 N. E. 892. These cases are readily distinguishable in their facts from those in the case at bar. Brackett v. Lubke, 4 Allen, 138, 81 Am. Dec. 694, is not pertinent to the conditions here presented.

The case is covered in principle by numerous recent decisions. Comerford's Case, 224 Mass. 571, 113 N. E. 460; Centrello's Case, 232 Mass. 456, 122 N. E. 560; Winslow's Case, 232 Mass. 458, 122 N. E. 561; Becker's Case, 233 Mass. 577, 124 N. E. 421; Robichaud's Case, 234 Mass. 60, 124 N. E. 890.

It follows that the entry must be:

Decree reversed.

Decree to be entered in favor of the insurer.

LEE'S CASE.

(Supreme Judicial Court of Massachusetts. Suffolk. March 2, 1922.)

134 Northeastern Reporter, 268.

1. MASTER AND SERVANT—INJURY WHILE GOING TO TIME CLOCK HELD RECEIVED IN "COURSE OF EMPLOYMENT" WITHIN COMPENSATION ACT.

Where an employee was injured while going from the building in which he worked to another for the purpose of ringing out his time on

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the time clock when leaving at noon, the injuries were received in the course of his employment within Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 375[2].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

2. MASTER AND SERVANT — INJURY CAUSED BY HORSE PLAY OF FELLOW EMPLOYEES HELD NOT ONE "ARISING OUT OF EMPLOYMENT" WITHIN COMPENSATION ACT.

An injury to an employee knocked down while in the course of his employment as a result of fooling, or horse play, of fellow employees, in which one of the other employees was pushed out of a doorway and against compensation claimant, did not arise out of the employment, as such acts, whether done in a spirit of play or from a malicious motive, are outside the scope of the employment of those causing the injury, and have no relation to the employment.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

Appeal from Superior Court, Suffolk County.

Proceedings under the Workmen's Compensation Act by Francis H. Lee for compensation for injuries, opposed by the Washington & Haywood Chair Company, employer, and the American Mutual Liability Insurance Company, insurer. Compensation was awarded, and decree therefor entered in the superior court, and the insurer appeals. Reversed and decree entered for insurer.

The circumstances under which the injury was sustained are stated in the opinion. The Industrial Accident Board found that the injury arose out of and in the course of the employment; that "the conditions under which the work of registering time was required to be performed called for all employees to ring out at 12 o'clock noon. This meant that a line of employees must form, each anxious to register with the least possible delay. Naturally such a crowd of employees would not look with any appreciable amount of tolerance upon any employee who endeavored to block the line as Wallet did, and a natural incident of such a situation about the time clock was the forcible pushing of Wallet away from his blockading position, and the injury of a fellow employee." One member of the board dissented.

Sawyer, Hardy, Stone & Morrison, of Boston (Gay Gleason, of Boston, of counsel), for insurer.

CROSBY, J. While the employee was on the premises of his employer, and after leaving the building in which he worked was about to enter the one where the time clock was, in order to ring out his time at noon, he was knocked down, by a fellow workman who was pushed out of the doorway of that building by another employee, and received injuries for which he seeks compensation.

The claimant's injuries were the result of fooling or horse play of fellow employees, in which he took no part. The board member found that he "was the innocent victim of a friendly scrap between three other employees, one of whom was thrown out of the doorway, his body striking the claimant and throwing him to the ground, causing the injury to his shoulder and back."

[1, 2] A he was on his way to the time clock during the noon hour to ring out his time, it is obvious that his injuries were received in the course of his employment. The question remains whether the injuries

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arose out of his employment. It has been held by this court that, where an employee is injured as a result of fooling or play by employees in which he participates, such injury does not originate in any risk connected with, and caused by, his employment; and that such injury does not arise out of the employment within the meaning of the Workmen's Compensation Act (Laws 1911, c. 751, amended by Laws 1912, c. 571). Moore's Case, 225 Mass. 258, 114 N. E. 204. The precise question presented by this record is whether an injury received by an employee in the course of his employment, as the result of fooling or play by other employees in which he takes no part, can be said to have arisen out of the employment. While this issue has been decided in other jurisdictions, it has not been directly adjudicated by this court. It is clear that there was no causal connection between the employment and the injury. The injury did not arise because the employee was exposed by the nature of his employment to some peculiar danger, it did not follow as a natural incident of his work, and it does not appear "to have had its origin in a risk connected with the emplpoyment, and to have flowed from that source as a rational consequence." McNicol's Case, 215, Mass. 497, 499, 102 N. E. 697, L. R. A. 1916A, 306. The interpretation of the Workmen's Compensation Act enunciated in the case last cited when applied to the facts in the present case makes it plain that the injury to the claimant cannot be said to have arisen out of his employment. The pushing of Wallet out of the doorway by other employees and against the claimant, assuming it was a wrongful act, was not within the scope of his employment. Such acts, whether done in a spirit of play or from a malicious motive, have no relation whatever to the employment; and they are wholly outside the scope of the employment of those who caused the injury.

The weight of authority in England and in this country is in harmony with the result we have reached. Armitage v. Lancashire & Yorkshire Railway, [1902] 2 K. B. 178; Fitzgerald v, Clarke & Son, 1 B. W. C. C. 197; Craske v. Wigan, 2 B. W. C. C. 35; Wilson v. Laing, 2 B. W. C. C. 118; Blake v. Head, 5 B. W. C. C. 303; Hulley v. Moosbrugger, 88 N. J. Law, 161, 95 Atl. 1007, L. R. A. 1916C, 1203; Federal Rubber Manuf. Co. v. Havolic, 162 Wis. 341, 156 N. W. 143, L. R. A. 1916D, 968; City of Chicago v. Industrial Commission, 292 Ill. 406, 127 N. E. 49, 15 A. L. R. 586; Tarpper v. Weston-Mott Co., 200 Mich. 275, 166 N. W. 857, L. R. A. 1918E, 507; Coronado Beach Co. v. Pillsbury, 172 Cal. 682, 158 Pac. 212, L. R. A. 1916F, 1164; Pierce v. Boyer-Van Kuran Lumber & Coal Co., 99 Neb. 321, 156 N. W. 509, L. R. A. 1916D, 970. See Rayner v. Sligh Furniture Co., 180 Mich. 168, 146 N. W. 665, L. R. A. 1916A, 22, Ann. Cas. 1916A, 386.

The cases of Craske v. Head, supra; Plumb v. Cobden Flour Mills Co., Ltd., 7 B. W. C. C. 1; Simpson or Thom v. Sinclair, 10 B. W. C. C. 220, cited in the majority decision of the Industrial Accident Board, are not at variance with the conclusion which we have reached. Willis v. State Industrial Commission, 78 Okl. 216, 190 Pac. 92, and other cases cited in the decision, so far as they are contrary to the result arrived at in the case at bar, we cannot follow.

Cases which hold that an injury resulting from acts of a fellow employee who was known by the employer as a man of dangerous disposition, or who was known to be given to play or fooling, have no application to the present case. McNicol's Case, supra. See, also, Reithel's Case, 222 Mass. 163, 109 N. E. 951, L. R. A. 1916A, Cranney's Case, 232 Mass. 149, 122 N. E. 266, 15 A. L. R. 584; Marshall v. Baker-Vawter Co., 206 Mich. 466, 173 N. W. 191; William Baird & Co., Ltd., v. McGraw, 13 B. W. C. C. 233.

As the evidence did not warrant a finding that the claimant's injuries arose out of his employment, the decree must be reversed and a decree entered in favor of the insurer.

So ordered.

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GAVROS' CASE.

(Supreme Judicial Court of Massachusetts. Hampden. Feb. 28, 1922.)

134 Northeastern Reporter, 269.

MASTER AND SERVANT — INJURY IN FIGHT BETWEEN OTHER EMPLOYEES HELD NOT ONE "ARISING OUT OF EMPLOYMENT" WITHIN COMPENSATION ACT.

Where employees of different nationalities, working for a construction company, engaged in a fight over the desire of some of the men to use the same tool day after day, and compensation claimant, who took no part in the fight, except to advise some of the men not to fight, was struck on the head and injured, his injury, if arising in the course of his employment, did not arise out of it, as the danger of such injury was not incidental to the employment in the absence of any previous quarrel, and his act in endeavoring to dissuade his fellow workmen from fighting was likewise not incidental to the employment.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

Appeal from Superior Court, Hampden County.

Proceedings under the Workmen's Compensation Act by John Gavros for compensation for injuries, opposed by the New England Construction Company, employer, and the Globe Indemnity Company, insurer. Compensation was denied, and the claim dismissed, and the claimant appeals. Affirmed.

The proceeding was heard by a member of the Industrial Accident Board on an agreed statement of facts from which it appeared that the claimant was employed by a construction company repairing railroad tracks, that some other employees engaged in a fight over the tools desired by different employees, and that the claimant was hit on the head and injured. The member of the board ruled that the injury did not arise out of and in the course of the employment, and his findings and rulings were adopted by the board.

Louis C. Henin, of Springfield, for employee.

Archer R. Simpson, of Springfield, for insurer.

CROSBY, J. This case was heard by a single member of the Industrial Accident Board, on an agreed statement of facts, who found and ruled:

"That employees of different nationalities got into an altercation which resulted in the injury of the claimant. * * * That the injury as a result of the fracas did not arise out of and in the course of the employment."

The board, on review, affirmed the decision of the single member.

It appears from the agreed facts that the claimant, with a large number of other employees, some of whom were Portuguese and some were Greeks, was employed by the New England Construction Company repairing tracks on the Boston & Albany Railroad. The laborers were transported to the place where the work was to be performed, by the railroad company, and upon arrival there they were accustomed to take their tools from the tool car and go to work. On the day the claimant was injured, when the destination was reached a discussion arose as to the possession of certain tools, some of the men desiring to use the same tool day after day. This discussion resulted in a fight in which the claim-

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ant took no part, except that he advised two of the participants not to fight and two other employees struck him on the head, one with a shovel and the other with a sledge hammer. All the tools belonged to the employer. The claimant testified that he did not know of any other quarrels over the tools on any other days, and that the day he was hurt was "the first time he ever saw a fight over the tools and any striking." There is nothing in the record to show that there had been any previous quarrel between the men over the tools.

If we asume without deciding that the claimant was injured in the course of his employment, the question remains whether the injury arose out of it. It is the contention of the claimant that the risk of being assaulted by laborers of different nationalities working on a railroad track who became involved in a quarrel over the use of tools was an ordinary risk of such an employment and was incidental to the work. It is also contended that the claimant's injuries were received in an effort to stop the fight between fellow employees, which effort was in the interest of his employer.

It cannot reasonably be said that the danger of injury was incidental to the employment because men of different nationalities were engaged in the work. The evidence shows that there had been no previous quarrel between the workmen on account of the use of the tools. Ordinarily assault by third persons cannot be considered as incidental to the employment. But where the assault is one which might be reasonabbly anticipated because of the general character of the work, or of the particular duties imposed upon the workman, injuries resulting therefrom may be found to arise out of or in the course of the employment. See cases cited in L. R. A. 1916A, 239. However commendable may have been the claimant's act, in endeavoring to dissuade his fellow workmen from fighting, it cannot be said to have been incidental to his employment; it was no part of the duties imposed upon him, and the assault could not reasonably have been anticipated because of the character of the work. The case is clearly distinguishable from McNicol's Case, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306, where the employee was killed by a drunken fellow workman, who was known to the superintendent in charge of the work to have the habit of drinking to intoxication and when in that condition to be quarrelsome, dangerous and unsafe to work with; and from Reithel's Case, 222 Mass. 163, 109 N. E. 951, L. R. A. 1916A. 304, where the superintendent of a mill, whose duty it was to order from the premises persons who had entered without permission, was shot and killed by a trespasser while he (the deceased) was engaged in the performance of his duty; and from Craney's Case, 232 Mass. 149, 122 N. E. 266, 15 A. L. R. 584, where the head waiter of a hotel was shot and killed by a waiter serving under him whom he had discharged, and who "was made ugly by drinking liquor," was an habitual drinker, and usually carried a pistol, which facts were generally known at the hotel. It is plain that the claimant's injuries were not the result of any special risk incident to his employment; there was no causal connection between the conditions under which his work was required to be performed and his injury. Accordingly he is not entitled to compensation under the act. McNicol's Case, supra; Harbroe's Case, 223 Mass. 139, 111 N. E. 709, L. R. A. 1916D, 933; Moore's Case, 225 Mass. 258, 114 N. E. 204; Francis H. Lee's Case, 238 Mass. —, 134 N. E. 268; Mountain Ice Co. v. McNeil, 91 N. J. Law, 528, 103 Atl. 184, L. R. A. 1918E, 494; Jacquemin v. Turner & Seymoure Manuf. Co., 92 Conn. 382, 103 Atl. 115, L. R. A. 1918E, 496; Armitage v. Lancashire & Yorkshire Railway, [1902] 2 K. B. 178; Blake v. Head, 106 L. T. Rep. 822; 5 B. W. C. C. 303; Mitchinson v. Day Brothers, [1913] 1 K. B. 603.

In view of the conclusion reached, it is unnecessary to consider whether the claimant has elected to rely upon his remedy against a

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third person for damages. St. 1911, c. 751, pt. III, § 15, as amended by St. 1913, c. 448, § 1; G. L. c. 152, § 15.

Decree affirmed.

RAMONDETTA'S CASE.

IN RE EMPLOYERS' LIABILITY ASSUR. CORPORATION, LIMITED.

(Supreme Judicial Court of Massachusetts. Essex. March 2, 1922.)

134 Northeastern Reporter, 249.

1. MASTER AND SERVANT — LOSS OF FINGERS HELD NOT COMPENSABLE AS A SEVERANCE "AT OR ABOVE THE SECOND JOINT."

Under St. 1911, c. 751, pt. 2, § 11, now G. L. c. 152, § 36, cl. "c," providing compensation for 25 weeks for the loss by severance at or above the second joint of two or more fingers, the distal or first joint is the one farthest from the body, and the words "at or above the second joint" mean at or above the middle joint, and a severance between the middle joint and the finger tip is not within this provision of the statute.

(For other cases, see Master and Servant, Dec. Dig. § 385[12].)

2. MASTER AND SERVAST—FINDING OF COMPENABLE LOSS OF FINGERS CONCLUSIVE.

In a compensation proceeding, the place where the complaint's fingers were severed was a question of fact, and where the finding of the single member of the Industrial Accident Board that the claimant had not suffered the loss by severance of two or more fingers at or above the second joint was warranted by the evidence, it must stand.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

3. MASTER AND SERVANT — HAND HELD NOT INCAPABLE OF USE WITHIN COMPENSATION ACT.

The rational inference from a finding of the Industrial Accident Board that the distal phalanges of three fingers and half of the middle phalanges were severed and that the employee was entitled to compensation in a certain amount, being the specified compensation for 12 weeks, was that the employee's hand was not incapable of use, within St. 1911, c. 751, pt. 2, § 11, cl. "e," now G. L. c. 152, § 36.

(For other cases, see Master and Servant, Dec. Dig. § 385[12].)

4. MASTER AND SERVANT — FINDING OF COMPENSABLE LOSS OF USE OF HAND CONCLUSIVE.

Where the distal phalanges and half of the middle phalanges of the second, third, and fourth fingers were severed, the question whether the hand was thereby so injured as to be useless or permanently incapable of use, within St. 1911, c. 751, pt. 2, § 11, cl. "e," now G. L. c. 152, § 36, was one of fact, and where the finding was not unwarranted, the judge's ruling, as a matter of law, that the hand was useless, cannot stand.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

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Appeal from Superior Court, Essex County.

Proceedings under the Workmen's Compensation Act by Annie Ramondetta for compensation for injuries, opposed by the Ayer Mills, employer, and the Employers' Liability Assurance Corporation, Limited, insurer. Compensation was awarded, and the award increased by the superior court, and the insurer appeals from the decree and from orders ruling that the claimant was entitled to 25 weeks' compensation as for loss of a hand and denying a motion to vacate the decree. Reversed and decree entered in accordance with the findings of the Board.

The single member of the Industrial Accident Board who conducted the hearing found that the claimant had not suffered the loss by severance of two or more fingers at or above the second joint; that there was a certain portion of the phalange in each finger left below the second joint; and that, while permanently incapable of use as phalanges they added sufficient to the use of the fingers to preclude a finding that the fingers had been lost at or above the second joint. The full Board awarded compensation for 12 weeks in addition to disability compensation. The court found for plaintiff and entered a decree for $223.25, being compensation for 25 weeks. The insurer moved to revoke the finding and decree, and the court denied the motion to vacate the decree, but revoked the finding, and in lieu thereof made an order ruling, as a matter of law, that the claimant had lost the second joint, that the hand was useless, and that she was entitled to 25 weeks' compensation.

Sawyer, Hardy, Stone & Morrison, of Boston (Gay Gleason, of Boston, of counsel), for appellant.

W. C. & E. J. Ford, of Lawrence, for appellee.

Crosby, J. The claimant, a spinner, employed in the mill of the subscriber, was injured while cleaning the end of the frame, the fingers of her right hand becoming caught between the chain and sprocket gear. As a result of the injury the end, or distal phalanges and one-half of the next, or middle phalanges, of the fore, middle and ring fingers were severed; that is, one and one-half phalanges of each of these fingers are gone. On each the end joint is gone; the next or middle joint remains.

The single member of the Industrial Accident Board found that the claimant was entitled to receive $140.33 for total disability; he further found:

"That this girl has not suffered the loss by severance of two or more fingers at or above the second joint, * * * that there was a a certain portion of the phalange in each finger left below the second joint. These phalanges, * * * while permanently incapable of use as phalanges, are still of such a character that they did sufficient to the use of the several fingers as to preclude a finding that the fingers had been lost at or above the second joint."

The Industrial Accident Board upon review found;

"That total disability ended on July 12, 1918; that compensation should be paid to that date, at the rate of $8.93 per week, or a total of $140.33."

No question arises respecting the correctness of this finding. The Board further found;

"That the distal phalanges of the second, third and fourth fingers, and half of the middle phalanges of these fingers are severed and the employee is entitled to additional compensation, being $107.16. The total sum due under this decision is $247.49."

Thereafter a decree was entered by a judge of the superior court in favor of the employee for $223.25, "minus $107.16 already paid on account of specific compensation. This was the equivalent of twenty-five weeks' additional compensation. A motion to vacate the decree was filed by the insurer, and denied; and the insurer appealed from the decree.

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The judge made the following ruling:

"I rule as a matter of law on the papers before me that the petitioner has lost the second joint, that the hand is useless, and that she is entitled to twenty-five weeks' compensation, * * * being two hundred and twenty-three 25/100 dollars."

The sole issue before the Board upon the question of additional compensation was whether the claimant was entitled to compensation for twelve weeks or for twenty-five weeks. This must be determined under the proper interpretation of St. 1911, c. 751, pt. 2, § 11, now G. L. c. 152, § 36

[1, 2] Clause "c" of that section provides that—

"For the loss by severance at or above the second joint of two or more fingers, * * * of the same hand," the employee is entitled to compensation for a period of twenty-five weeks.

Clause "d" provides that—

"For the loss by severance of at least one phalange of a finger, * * *" the employee is entitled to compensation for a period of twelve weeks.

There was medical testimony that the distal or first joint is the one farthest from the body; and we are satisfied that the act must be so construed. It is plain that the first joint is that nearest to the tip of the finger, and that the words in clause "c" "at or above the second joint" mean at or above the second or middle joint. As the claimant's fingers were severed not "at or above the second joint" but nearer the finger tip than that point, it is clear that she is not entitled to compensation under clause "c." The single member's finding that she had "not suffered the loss by severance of two or more fingers at or above the second joint," was right, and the Board in effect also so found. These findings of fact must stand as they were fully warranted by the evidence. The correct interpretation of clause "c" apart from any evidence is that the second joint is the middle joint, or the second joint counting from the tip of the finger. The place where the fingers were severed was a question of fact; accordingly the ruling that the claimant had lost the second joints of the injured fingers was wrong, and the finding of the Board was right.

[3, 4] The judge further ruled "that the hand is useless" (clause "e"). That ruling cannot stand. The finding of the single member was to the effect that the hand was not so injured as to be useless or permanently incapable of use; the Board on review failed to find such incapacity; and the rational inference to be drawn from the finding is that the hand was not incapable of use. The question was one of fact, and the finding was not unwarranted. Meley's Case, 219 Mass. 136, 106 N. E. 559; Lacione's Case, 227 Mass. 269, 116 N. E. 485; Jakutis' Case, 238 Mass. 308, 130 N. E. 637.

Decree reversed.

Decree to be entered in accordance with the findings of the Industrial Accident Board.

SULLIVAN'S CASE.

(Supreme Judicial Court of Massachusetts. Suffolk. March 4, 1922.)

134 Northeastern Reporter, 393.

1. MASTER AND SERVANT—FINDING OF COMPENSABLE INJURY TO EYE SUSTAINED.

Evidence in a workman's compensation proceeding on the question of causal connection between the slipping of a barrel, which struck employee's knee, and the separation of the retina of his right eye, *held* to

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warrant a finding that the injury arose out of and in the course of his employment.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

2. MASTER AND SERVANT—COMPENSATION INSURER HELD NOT PREJUDICED BY DELAY IN GIVING NOTICE OF CLAIM.

Where the slipping of a barrel, which struck an employee's knee, caused a separation of the retina on September, 9th, but the employee continued to work until September 18th, and did not know until the 21st that the retina was detached, and did not until later associate this injury with the slipping of the barrel, and a fellow employee was at work with him when the barrel slipped, and the employer's superintendent knew, shortly after the employee stopped work, that he had trouble with his eye that was caused in some way by his employment, delay in giving notice *held* not to have prejudiced insurer, within St. 1920, c. 223, § 1, now G. L. c. 152, § 44.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

Appeal from Superior Court, Suffolk County.

Proceeding under the Workmen's Compensation Act by Patrick Sullivan for compensation for an injury to his eye, opposed by the Potter Drug & Chemical Company, employer, and the Royal Indemnity Company, insurer. Compensation was awarded, and decree therefor entered, and the insurer appeals. Affirmed.

The questions before the Industrial Accident Board were whether the statutory notice of injury was given; if not, whether knowledge was conveyed as soon as practicable; whether the employee received a personal injury arising out of and in the course of his employment; the period of incapacity; and whether or not the employee was entitled to specific compensation for the loss of vision in his right eye. The evidence showed a separation of the retina. The only accident shown consisted in the slipping of a barrel, which the employee and another were upending, striking the employee's knee. A member of the Industrial Accident Board found that the employee received an injury in the course of and arising out of his employment; that as the result of the injury he had been totally incapacitated up to the date of a hearing; that the vision of his right eye had been reduced to less than one-tenth of normal vision with glasses as the result of the injury; that notice was not given until on or about October 29th (the injury having been sustained on September 9th); but that the insurer had not been prejudiced by the delay, and the claim was not barred. His findings were adopted by the board, except that the board did not find that all capacity for work had ceased, but reserved the rights of the parties after the date of the hearing for further hearing.

T. H. Calhoun and Edward J. Sullivan, both of Boston, for appellant.

John L. Hurley, of Boston, for appellee.

CARROLL, J. In this proceeding under the Workmen's Compensation Act (St. 1911, c. 751, as amended by St. 1912, c. 571) the employee was awarded compensation; and the insurer appealed, on the ground that there was no causal connection between the alleged accident and the injury claimed, and that the employee has not sustained the burden of proving that the insurer was not prejudiced by the employer's failure to give notice as soon as practicable.

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[1] There was evidence from which it could be found that while engaged in lifting a barrel weighing from 400 to 500 pounds, on or about September 9, 1920, it fell or "skidded on the bottom away from [the employee]," and in falling struck him on the knee, and that the strain of lifting the barrel caused pain in the body. On the night of the accident the employee observed some trouble with his eyes. He saw a physician on the 11th and 18th of September, and on September 21 it was discovered that the retina of the right eye was detached. One physician testified that a separation of the retina is sometimes caused by a sudden or lifting strain, and that a possible cause of the employee's injury was the lifting of the barrel. Another physician testified that in his opinion the alleged accident caused the separation of the retina of the employee's eye. The physician appointed by the Industrial Accident Board to examine the claimant reported that the "occupational incident of September 8th or 9th was the factor which induced the separation," and that such a strain or exertion as was shown in the history of the case would cause the injury to the eye. On this evidence the board were fully warranted in finding that the employee's injury arose out of and in the course of his employment. Pass's Case, 232 Mass. 515, 122 N. E. 642, and cases cited.

[2] The board found that notice of the injury was not given as soon as practicable and adopted and affirmed the finding of the single member that the insurer was not prejudiced by this delay. They refused to find and rule, as requested by the insurer, that—

"The employee has not sustained the burden of proving that the employer and insurer have not been prejudiced by the employee's failure to give a notice as soon as practicable."

By St. 1920, c. 223, § 1, now G. L. c. 152, § 44, it is provided that want of notice shall not bar proceedings under the Workmen's Compensation Act if it be shown that the association, subscriber or agent had knowledge of the injury, "or if it is found that the insurer was not prejudiced by such want of notice." Assuming that the burden of proof is upon the employee—when notice as required by the statute is not given as soon as practicable—to show that the insurer was not prejudiced by such want of notice, in our opinion it could have been found that the insurer was not prejudiced by this failure. The employee continued to work until September 18. He did not know until September 21 that the retina was detached; he did not connect this with the strain of lifting the barrel until asked by his physician if he had had a strain or fall, and later he associated the injury to his eye with the accident. There was also evidence that a fellow employee was at work with him when the barrel slipped. The superintendent of the employer inquired of the foreman a few days after Sullivan stopped work for the reason, and was told he had "soap in eye," and a few days later he telephoned to the employee's physician. Within a week after the accident the superintendent sent the foreman to see Sullivan, and a week or two later he himself visited him. Sullivan testified that to the best of his recollection he notified his employer of his accident about three weeks after it happened. His wife testified that a blank form of notice was received from the employer's superintendent, and that after it was signed by her husband she delivered it to the employer about the last of October. On this evidence it might well have been found that the insurer was not prejudiced by the delay in giving the notice. There is no suggestion that either the employer or insurer was in any way prevented from making the fullest investigation, or embarrassed in its defense, and there was full opportunity to test the good faith of the claimant and offer every contention possible. The employer knew when Sullivan ceased to work or within a very short time thereafter, that he had trouble with his eye and that it was caused in some way by his employment. The superintendent saw the employee and, so far as appears from the record, was given all the

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information desired; although he did not know that the injury was caused by the fall of the barrel until Mrs. Sullivan called on him, he did know that the claimant was unable to work and that in some way he had sustained an injury to his eye while in the course of his employment, and the employer continued to pay the employee his wages until October 29.

Considering the employee's ignorance of the nature of his injury and the exact cause of it, the knowledge of the employer that he was unable to work because of an injury to his eye, and all the other circumstances, the board could have found that the insurer was not prejudiced by the delay in giving the written notice.

Decree affirmed.

SULLIVAN'S CASE.

(Supreme Judicial Court of Massachusetts. Suffolk. March 3, 1922.)

134 Northeastern Reporter, 406.

MASTER AND SERVANT — COMPENSATION AWARD FOR DEATH OF EMPLOYEE FALLING DURING ILLNESS SUSTAINED.

Evidence in a proceeding for compensation for the death of a department store employee that she became ill and lay down on a couch in the employer's rest room or first-aid hospital, and that shortly afterwards a crash was heard and an arm and part of her body was seen protruding through the glass panel of the door, *held* to support findings that her illness caused her to fall and her proximity to the door resulted in the severance of an artery, that her employment exposed her in a special manner to risk of such injury, though the rest room was also used by members of the public, and that the illness was the remote cause, and the fall through the glass door the dominant and proximate cause of the injury.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Appeal from Superior Court. Suffolk County.

Proceeding under the Workmen's Compensation Act (St. 1911, c. 751, amended by St. 1912, c. 571) by Bertha Sullivan for compensation for the death of her daughter, Nellie Sullivan, opposed by the Jordan Marsh Company, employer, and the American Mutual Liability Insurance Company, insurer. Compensation was awarded and decree therefor entered, and the insurer appeals. Affirmed.

The case was heard by a member of the Industrial Accident Board on an agreed statement of facts and testimony introduced. The injury causing death was sustained while the employee was lying down on a couch in the employer's rest room or first-aid hospital. The board found that her illness caused her to fall, and that her proximity to the glass door of the rest room resulted in the severance of an artery with ensuing hemorrhage and death, and that her employment exposed her in a special manner to risk of injury while using the rest room, and that the illness was the remote cause of her death and the fall through the glass door the dominant and proximate cause.

Sawyer, Hardy, Stone & Morrison, of Boston (Gay Gleason, of Boston, of counsel), for appellant.

Paul L. Keenan and John P. Buckley, both of Boston, for appellee.

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BRALEY, J. The case was submitted to the board member upon the following agreed facts:

"The deceased died on May 26, 1919, from injuries received while she was in the employ of the subscriber who owns and maintains a department store in Boston. The employee was employed as a saleslady in the department on the first floor of the subscriber's building. On the morning of May 26, 1919, the employee reported for work. About nine o'clock in the morning the employee was not well so she left her work and went to a department on the fourth floor of the subscriber's building. This department comprises rooms which are conducted as rest rooms and first-aid hospital where the employees of the subscriber may rest and receive medical treatment for injuries or sickness. Customers of the subscriber and others passing through the building of the subscriber, also use these rooms where they may rest, or if taken sick or injured while in the store may receive medical attention. Two nurses and a physician are in attendance in these rooms and they render professional services to employees, customers or others who use the rooms, without charge. After remaining in this rest room or first-aid hospital, the employee left and went to another part of the building, but did not return to her work that morning. About 11:30 o'clock that morning the employee returned, ill, to the rest room, or first-aid hospital, and and was attended by a nurse who advised her to lie down. When the nurse left the employee the latter was lying on a couch. Shortly after noon the nurse was sitting at her desk outside the room in which the employee was last seen lying down. Suddenly the nurse heard a loud crash and looking up from her desk saw an arm and part of a body protruding through the glass panel of the door between the rest room in which the employee had been lying down and the room in which the nurse's desk was located. The body which crashed through the glass panel of the door was identified as that of the employee, Miss Sullivan. She was seen to be very seriously injured. A physician was called and the employee was removed in an ambulance to the Boston City Hospital Relief Station at Haymarket Square. The employee died upon the arrival of the ambulance at the Relief Station. By reason of crashing through the glass panel of the door the employee sustained a severance of an artery in the right arm and the hemorrhage from this severed artery caused her death. The sickness from which the employee suffered the morning of May 26, 1919, prior to her death arose from natural causes and was in no way caused by her employment. It is also agreed that Bertha Sullivan is the mother of the deceased girl."

On review by the Industrial Accident Board the further agreed fact was added that:

"The door with glass panel above referred to was at least eight feet away from the couch where the employee was last seen lying."

It also was agreed at the hearing on review that the board might draw such inferences of fact as the agreed facts warranted. The board with all the evidence before it, found that "the illness of the employee caused her to fall and her proximity to the glass door of the rest room at a time when she was under the care of a nurse under decedents contract of employment with the subscribers resulted in the severance of an artery of the right arm, with ensuing hemorrhage and death. The board find that the decedent's employment exposed her in a special manner to risk of injury while using the rest room furnished by the subscribers for the use of their employees; and the fact that said subscribers, for reasons which are not stated in the record, chose to make the rest room available jointly for the use of both employees and members of the public who came into their store on business does not take the injury without the scope of the decedent's employment. The board find that the illness which caused the fall of the employee was the remote cause of her death, and that the fall through the glass door was the dominant

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and proximate cause of the personal injury which resulted in her death." The case is close. But in the opinion of a majority of the court it cannot be held as matter of law that these findings are wholly unsupported by the record, Callahan v. New England Tel. & Tel. Co., 216 Mass. 334, 103 N. E. 922; Sundine's Case, 218 Mass. 1, 105 N. E. 433. L. R. A. 1916A, 318; Sponatski's Case, 220 Mass. 526, 108 N. E. 466, L. R. A. 1916A, 333; Von Ette's Case, 223 Mass. 56, 111 N. E. 696, L. R. A. 1916D, 641; Dow's Case, 231 Mass. 348, 121 N. E. 19; Hallett's Case, 232 Mass. 49. 121 N. E. 503; White v. E. T. Slattery & Co. 236 Mass. 28, 127 N. E. 597; Fernald's Case, 238 Mass. —, 134 N. E. 347; Sanderson's Case, 224 Mass. 558, 113 N. E. 355 is not in point. The decree awarding compensation, the amount and time of payment of which is not in dispute, should be affirmed.

Ordered accordingly.

ZYGMUNTOWICZ v. AMERICAN STEEL & WIRE CO. OF NEW JERSEY.

(Supreme Judicial Court of Massachusetts. Suffolk. March 3, 1922.)

134 Northeastern Reporter, 385.

1. MASTER AND SERVANT—INJURY BY ASSAULT IN COURSE OF EMPLOYMENT COMPENSABLE.

An injury caused by an assault on an employee which arises out of and in the employment is within the Workmen's Compensation Act, especially in view of G. L. c. 152, § 24, providing that an employee shall be held to have waived his common-law right of action for personal injuries if he shall not have given written notice at the time of his contract of hire that he claimed such right.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

2. MASTER AND SERVANT—INJURY BY ASSAULT HELD TO BE ONE "ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT" WITHIN COMPENSATION ACT.

An assault on an employee who had just been discharged by the employer's superintendent occurred in the course of his employment where he was on the premises of his employer objecting to his discharge, and in the act of getting his identifying check, which enabled him to leave and enter the premises, and, where the entire trouble was incidental to his work, the assault could have been found to have arisen out of his employment, and hence his exclusive remedy was under the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

Exceptions from Superior Court, Suffolk County; John A. Aiken, Judge.

Action by Andrezez Zygmuntowicz against the American Steel & Wire Company of New Jersey, for assault. false imprisonment and malicious prosecution. Verdict for plaintiff. and defendant brings exceptions. Exceptions sustained.

The answer contained a general denial and pleaded self-defense; that plaintiff attacked an employee of defendant and had a loaded revolver and was arrested by an employee of defendant who at the time was a special

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police officer in pursuance of his duty, and no more force was used than was necessary; that if defendant's servants or employees did the acts and things alleged they acted on probable cause, without malice and in performance of their duties as special police officers and not otherwise; and as to the first count that defendant was a subscriber under the Workmen's Compensation Act, had given due notice thereof, and that plaintiff had not prior to such occurrences claimed his rights at common law. Defendant moved for a directed verdict on each count and requested rulings favorable to it and excepted to their refusal and also excepted to the charge as given with reference to counts 2 and 3.

Thomas F. J. Callahan, of Boston, for plaintiff.

Frank F. Dresser and James A. Crotty, both of Worcester, for defendant.

De Courcy, J. The jury found for the plaintiff on each count in the amended declaration; the first being for assault and battery, the second for false arrest and imprisonment, and the third for malicious prosecution. On the evidence most favorable to him the following facts could be found: Zygmuntowicz had been in the employ of the defendant for some years as a stationary engineer. Late in the afternoon of Saturday, June 23, 1918, his superintendent, Edward J. Gilbert, discharged him and told him to take his clothes and go home. The plaintiff protested against his discharge, but took his clothes and walked to the pumphouse, where the numbered brass checks of the employee were hung. It was necessary for a workman to have his check in order to enter, and perhaps to leave the mill premises. When the plaintiff reached for his check, Gilbert, who had followed him, called to Anton Johnson, who was standing by the check rack, not to let the plaintiff have his check, and to hold him. Johnson and Gilbert then seized him, and threw him down. Johnson saw a revolver in the plaintiff's pocket; and either took it out, or picked it up from the doorway where it had fallen. Robert Edwards and Godfrey Nelson, employed as watchmen by the defendant (and who had been duly appointed special police officers by the city of Worcester), took him, put handcuffs on him, carried him to the gate, and sent for the city police patrol wagon. The police officer took him to the police station, where he was confined for some hours. On Monday morning he was tried in the district court upon two complaints, made by the deputy chief of police; one for "disturbing the peace," and the other charging that he "while so disturbing the peace and when so arrested was armed with and had on his person a pistol." Gilbert and Edwards appeared in court as witnesses at the trial. The plaintiff was discharged.

[1] 1. As to the first count, the claim of the defendant, raised by requests for rulings, is that the plaintiff's sole remedy for physical injury, if any, is under the Workmen's Compensation Act. That act (G. L. c. 152, § 24) provides:

"An employee of an insured person shall be held to have waived his right of action at common law to recover damages for personal injuries if he shall not have given his employer, at the time of his contract of hire, written notice that he claimed such right."

As was said in King v. Viscoloid Co., 219 Mass. 420, 422, 106 N. E. 988 (Ann. Cas. 1916D, 1170):

"It was undoubtedly the intention of the Legislature by that statute to take away from employees who should become subject to its provisions all other remedies that they had against their employers for injuries happening in the course of their employment and arising therefrom, and to substitute for such remedies the wider right of compensation given by the act."

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See, also, Panasuk's Case, 217 Mass. 589, 592, 105 N. E. 368; Young v. Duncan, 218 Mass. 346, 349, 106 N. E. 1; White v. George A. Fuller Co., 226 Mass. 1, 114 N. E. 829.

It is settled that injury caused by an assault upon an employee, which arises out of and in the course of his employment, falls within the act. McNicol's Case, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306; Reithel's Case, 222 Mass. 163, 109 N. E. 951, L. R. A. 1916A, 304; Harbroe's Case, 223 Mass. 139, 111 N. E. 709, L. R. A. 1916D, 933; Cranney's Case, 232 Mass. 149, 122 N. E. 266, 15 A. L. R. 584.

[2] It is agreed that at the time of the alleged injury to the plaintiff the defendant was a subscriber under the Workmen's Compensation Act, had insured its liability thereunder, and given due notice thereof; that said insurance was in full force and effect; and that the plaintiff had not reserved his rights at common law. The assault occurred in the course of the plaintiff's employment. He was on the premises of his employer, objecting to his discharge, and in the act of getting his identifying check, with which to enable him to leave and enter the premises. Bell's Case, 238 Mass. 46, 130 N. E. 67, and cases collected. And, on the facts disclosed by this record, it could be found that the assault arose out of his employment. The entire trouble was incidental to his work. Gilbert and Johnson were acting in their capacity of employees; and the jury must have found that they were acting within the scope of their employment, in order to reach their verdict. He was not charged with carrying a concealed weapon under St. 1911, c. 548, § 2 (now G. L. c. 269, § 10). As the injury embraced in the first count arose out of and in the course of the plaintiff's employment, the trial court was in error in denying the defendant's motion for a directed verdict on that count, and the requests for rulings to the same effect.

[3-5] What has been said disposes also of the second count so far as it charges an assault. This count is concerned mainly with the alleged false arrest and imprisonment. As to these the contention of the defendant is that Edwards and Nelson were acting as special police officers. The general rule is that, in the absence of statute, a private person or corporation is not responsible for the acts of a special police officer, appointed by public authority, but employed and paid by the private person or corporation, when the acts complained of are performed in carrying out his duty as a public officer. But where he is acting in performance of the duties for which he is employed, or his movements are actively directed by his employer, in other words, where he represents his employer and not the public, such employer may become liable for his acts. Armstrong v. Stair, 217 Mass. 534, 105 N. E. 442; Clish v. Boston Revere Beach & Lynn Railroad, 219 Mass. 341, 106 N. E. 854, L. R. A. 1915C, 1183, note. It appears that Edwards was sent for by Gilbert. He had been employed by the defendant as a watchman for 35 years, and was head watchman since 1913. He was first appointed a special police officer about 20 years ago; and both he and Nelson were so appointed in January, 1918. It was in testimony that the duties of the watchmen were to patrol the plant, and look out for fires and disorders; and during this war period extra precautions were taken. On the evidence it was a question of fact for the jury whether Edwards and Nelson unlawfully took the plaintiff into custody and restrained his physical liberty; and, if so, whether they were acting as the agents of the defendant, and not representing the public for an injury done to the public at large. Although the evidence tending to prove that the defendant authorized or directed the arrest by its watchmen was meager, we are of opinion that the judge refused to direct a verdict, or to rule that the plaintiff could not recover on the second count. There was error, however, in charging the jury that if Edwards falsely arrested or imprisoned the plaintiff, the defendant was responsible, regardless of whether Edwards acted as

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employee or as public police officer. The exception taken thereto must be sustained.

[6-8] There was evidence that the complaints in the district court were made by McMurray, deputy chief of police of Worcester, upon information furnished to him by said Edwards. The latter also told the city police officer who came with the patrol wagon "what the plaintiff had done"; that there had been a disturbance and that the plaintiff was carrying a revolver. Edwards and Gilbert were at the district court as witnesses. On all the evidence it was for the jury to decide whether Edwards, who was at the head of the force of thirty or forty watchmen employed by the defendant during the war, caused Officer McMurray to institute criminal proceedings against the plaintiff; and whether in so doing he was acting within the scope of his authority. Mason v. Jacot, 235 Mass. 521, 127 N. E. 331; Armstrong v. Stair, supra; Ann. Cas. 1913D, 112, note. Nor can we say as matter of law that the agent or agents of the defendant, in setting in motion the prosecution of the plaintiff acted with probable cause and without improper motives. That issue was for the jury, on conflicting evidence as to the facts. Casavan v. Sage, 201 Mass. 547, 553, 87 N. E. 57. See Desmond v. Fawcett, 226 Mass. 100, 103, 115 N. E. 280. The judge rightly refused to direct a verdict for the defendant on this third count. He was in error, however, in charging that, if Edwards was guilty of malicious prosecution of the plaintiff, then the defendant was responsible therefor, as matter of law. The exception to this instruction must be sustained. Mason v. Jacot, supra; White v. Apsley Rubber Co., 181 Mass. 339, 63 N. E. 885.

[9, 10] No harmful error appears in admitting in evidence the complaints and records of discharge of the plaintiff in the district court. They were not admissible under the count for false imprisonment, because res inter alios. Fitz Gerald v. Lewis, 164 Mass. 495, 41 N. E. 687. But under the count for malicious prosecution an authenticated copy of the record was admissible to prove, among other things, the termination of the prosecution. Beacon v. Towne, 4 Cush. 217; Stone v. Crocker, 24 Pick. 81. See Tillotson v. Warner, 3 Gray, 574.

Exceptions sustained.

LIENAU v. NORTHWESTERN TELEPHONE EXCH. CO.

(No. 22650.)

(Supreme Court of Minnesota. Jan. 27, 1922.)

186 Northwestern Reporter, 945.

(Syllabus by the Court.)

1. MASTER AND SERVANT — INJURY IN ELEVATOR WHILE LEAVING WORK HELD COMPENSABLE.

An employee of a telephone company whose employment was on an upper floor of a building owned by the company and used exclusively by it was injured while descending in an elevator in the building upon leaving work. *Held,* that the Compensation Act applies to the case and a common-law action for damages does not lie.

(For other cases, see Master and Servant, Dec. Dig. § 375[2].)

(Additional Syllabus by Editorial Staff.)

2. MASTER AND SERVANT — EMPLOYEE IS "ABOUT THE PREMISES" WHILE MAKING EXIT ON ELEVATOR AT CLOSE OF DAY'S WORK.

An employee while upon an elevator making her exit from the premises at the close of her days' work was "about the premises," within

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the meaning of Workmen's Compensation Act (Gen. St. 1913, § 8230i), providing for compensation for injuries to workmen "engaged in, on, or about the premises where their services are being performed."

(For other cases, see Master and Servant, Dec. Dig. § 371.)

(For other definitions, see Words and Phrases, First and Second Series, About the Premises.)

3. MASTER AND SERVANT—"DURING THE HOURS OF SERVICE" INCLUDE PERIOD OF PROMPT INGRESS AND EGRESS.

The words "during the hours of service" in Workmen's Compensation Act (Gen. St. 1913, § 8230i), providing for compensation for injuries to workmen injured "during the hours of service," include the period of reasonably prompt ingress and egress while still upon the immediate premises.

(For other cases, see Master and Servant, Dec. Dig. § 371.)

Appeal from District Court, Dakota County; W. L. Converse, Judge.

Action by Laura Lienau against the Northwestern Telephone Exchange Company. Defendant's motion for judgment on the pleadings and on an agreed statement of facts was denied, and the defendant appeals. Order reversed.

E. A. Prendergast and Ernest E. Watson, both of Minneapolis, for appellant.

Mart M. Monaghan, of Minneapolis, for respondent.

HALLAM, J. In 1920 defendant was engaged in the construction of a twelve-story office building in Minneapolis for its exclusive use. While the building was partly finished defendant fitted up for use the eighth floor of the building and installed there one of its departments. Defendant installed and was using an elevator for transporting its employees to and from the eighth floor and for transporting building material. There was also a stairway furnishing means of ingress and egress to and from the eighth floor.

On June 21, 1920, plaintiff was in the employ of defendant in the department installed on the eighth floor. At the close of her day's work on that day, plaintiff with other employees entered the elevator at the eighth floor to descend and leave the building and while they were descending the elevator suddenly dropped and plaintiff was injured. Plaintiff brought this action, alleging that the injury was caused by the negligence of defendant and asking damages predicated on defendant's common-law liability. The case was submitted on defendant's motion for judgment on the pleadings and on an agreed statement of facts. The court denied the motion, holding that recovery might be had at common law. Defendant appeals.

[1] The sole question on this appeal is whether plaintiff's right of recovery is at common law or under the Compensation Act. The trial court held that the Compensation Act did not apply and that the recovery was at common law. With this we cannot agree. The decision depends on a construction of G. S. 1913, § 8230i. This section provides that the Compensation Act "is hereby declared, not to cover workmen except while engaged in, on, or about the premises where their services are being performed, or where their service requires their presence as a part of such service at the time of the injury, and during the hours of service as such workmen." We think that under a fair construction of the act it must be held applicable to a case such as this. In general it may be said that the act was intended to apply in cases where the relation of master and servant exists. It would be indeed confusing to have the act

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apply only part of the time during the existence of such relation. It was part of the master's duty to furnish on its own premises safe ingress and egress to and from the portion where plaintiff was employed. While plaintiff was upon the premises making her exit the relation of master and servant therefore existed with its reciprocal duties and obligations. McDonough v. Lampher, 55 Minn. 501, 57 N. W. 152, 43 Am. St. Rep. 541; Stavros v. C., M. & St. P. Ry. Co., 186 N. W. 942.

[2, 3] We are of the opinion that plaintiff was "about the premises" where her services were being performed. Whether this accident occurred "during the hours of service" is a more difficult question, but we think those words should be construed to include the period of reasonably prompt ingress and egress while still upon the immediate premises. This construction seems to us permissible and to best accord with the beneficient purposes of the act, though a different construction might benefit this particular plaintiff.

In reaching our conclusion we are unable to get much assistance from decided cases, but the decisions tend to sustain our decision.

In State ex rel. Green v. District Court, 145 Minn. 96, 176 N. W. 155, a janitor was injured while going down a flight of stairs to attend a furnace. He was held within the act. The circumstances were of course somewhat different.

Decisions under statutes of other states are in accord with this decision, but they are generally under statutes differing somewhat in language from § 8230i. It has been generally held that preparation for beginning active employment after the place of work has been reached and for leaving the premises after the period of active employment has ended is part of the employment. Rayner v. Sligh Furn. Co., 180 Mich. 168, 146 N. W. 665, L. R. A. 1916A, 22, Ann. Cas. 1916A, 386; City of Milwaukee v. Althoff, 156 Wis. 68, 145 N. W. 238, L. R. A. 1916A, 327; Terlecki v. Strauss, 85 N. J. Law, 454, 89 Atl. 1023, affirmed 86 N. J. Law, 708, 92 Atl. 1087.

The period of employment is generally held to include a period of temporary absence from the workroom in taking lunch on another part of the premises (Boyle v. Columbia Fireproofing Co., 182 Mass. 93, 64 N. E. 726; Sundine's Case, 218 Mass. 1, 105 N. E. 433, L. R. A. 1916A, 318), or going to or from a toilet (Zabriskie v. Erie Railroad, 86 N. J. Law, 266, 92 Atl. 385, L. R. A. 1916A, 315).

The period of employment is generally held to include the period "whilst physically engaged in making his way from the entrance of the master's premises to the place where he works" within a reasonable margin of time before he is due to commence work (Lawless v. Wigan Coal & Ice Co., 124 L. T. J. 532), or while leaving the building by a stairway within such margin of time after his work is ended (In re O'Brien, 228 Mass. 380, 117 N. E. 619; Hoffman v. Knisely Bros., 199 Ill. App. 330; Wabash Railway Co. v. Industrial Commission, 294 Ill. 119, 128 N. E. 290).

Erickson v. St. Paul City Ry. Co., 141 Minn. 166, 169 N. W. 532, and Nesbitt v. Twin City Forge & Foundry Co., 145 Minn. 286, 177 N. W. 131, 10 A. L. R. 165, are not out of harmony with this decision. In each of those cases the men injured were at the time of the injury upon a conveyance furnished by the employer, but a considerable distance from their place of work.

Order reversed.

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TROXCIL v. MORRIS & CO. (No. 22221.)

(Supreme Court of Nebraska, Feb. 16, 1922.)

186 Northwestern Reporter, 978.

(Syllabus by the Court.)

1. MASTER AND SERVANT—DISTRICT COURT'S FINDING IN COMPENSATION CASE CONCLUSIVE.

"A finding of the district court on an issue of fact in a compensation case will not be set aside on appeal, where it is supported by sufficient evidence, or where the evidence is substantially conflicting, unless the find- is clearly wrong." Simon v. Cathroe Co., 106 Neb. —, 184 N. W. 130.

(For other cases, see Master and Servant, Dec. Dig. § 418[6].)

2. MASTER AND SERVANT—COMMUTATION OF COMPENSATION PAYMENT DISAPPROVED.

The spirit and intention of the Compensation Act is to safeguard a compensation award. Commutation to a lump-sum payment should be approved by the courts only for strong and urgent reasons.

(For other cases, see Master and Servant, Dec. Dig. § 385[20].)

Appeal from District Court, Douglas County; Sears, Judge.

Proceeding by George Troxcil for an award for personal injuries, opposed by Morris & Co., employer An award was made by the compensation commissioner, and on an appeal to the district court an award was made for claimant, and over defendant's objection commuted to a lump sum, and the employer appeals Modified and affirmed.

James C. Kinsler of Omaha for appellant.

A. H. Bigelow, of Omaha, for appellee.

Heard before Morrissey, C. J., Rose and Aldrich, JJ., and Raper and Stewart, District Judges.

STEWART, D. J. This is a claim under the Workmen's Compensation Act. On September 11, 1919, George Troxcil was about 21 years of age, and an employee of Morris & Co., as a laborer in appellant's packing house. While in the performance of his duty, he fell and his head was caught between a gatebar and the cage of a descending elevator. The company voluntarily paid compensation at the rate of $15 a week for 19 weeks, ending January 16, 1920, on which date appellee had returned to work. In February, following, a claim for compensation was filed, and later an award was made by the compensation commissioner, and, upon appeal, by the district court, of $6 a week, for 281 weeks, and thereafter at the rate of $4.50 a week during claimant's life. Over appellant's objection, the award was ordered commuted to a lump sum. Morris & Co. appeal.

Appellee contends that his injuries were total and permanent within the meaning of the Workmen's Compensation Act (Laws 1913 c. 198), rendering it necessary for him to fit himself by education for mental rather than physical labor, and making it proper for the court to order commutation to a lump-sum payment.

Appellant insists that disability ceased at the close of appellee's healing period, on January 16, 1920, when he was able to and did return to work at higher wages; also that the court was without power, in the absence of an agreement between the parties, to order commutation.

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The district court in its decree found, among other things:

"The court further finds that said injury resulted in permanent disability, entitling the plaintiff to compensation under subdivision 1 of section 3662 at the rate of $6 a week, during the first 281 weeks, after January 16, 1920, and $4.50 a week for the remainder of his life."

The order overruling the motion for a new trial recites;

"That a special finding is made that the plaintiff has suffered, by reason of his injury to his jaws and head, a 15 per cent. depletion, and it is the 15 per cent. depletion on which the court bases the decision in this case, concluding therefrom that it has by reason of that per cent. unfitted him for the work he was engaged in at the time he received his said injuries to the full extent normal to him in his then employment."

There was evidence at the trial tending to show that, as a result of the accident, the appellee suffered a fracture of the upper jaw, of one prominent bone below the eye, and the nasal bone, part of which was reremoved, leaving the nose permanently disfigured; that two teeth were knocked out and two others broken; that the lateral, or side to side motion of the lower jaw, was entirely and permanently lost, thereby limiting his ability to masticate his food, resulting in permanent impairment of the functions of digestion and nutrition about 30 per cent.; that, since the accident, he frequently suffers from headache and stomach trouble, and that he is physically debilitated about 25 per cent.

About four months after the injury appellee was given three different light jobs by appellant, at the same relative rate of pay he formerly received, and continued to work for about five months, when he was assigned to hard work. Four days later he quit because he could not stand the work and to become a street car conductor at increased wages for longer hours, and to work seven days a week. He continued as a street car conductor for the following year until date of trial. It also appears in the testimony that during the time he worked for the street car company, because of relaxed energy, on about five occasions he arrived too late to make his trip, and on about as many occasions he was absent from duty because of illness, in the aggregate of about 20 days. Practically all of the conflicting evidence was between the expert witnesses in their respective opinions of the condition of appellee's health and the effect of his injuries upon his earning capacity and physical ability to labor.

[1] We are satisfied, except as to the matter of commutation that this case comes within a well-established rule of law of this state:

"A finding of the district court on an issue of fact in a compensation case will not be set aside on appeal, where it is supported by sufficient evidence, or where the evidence is substantially conflicting, unless the finding is clearly wrong." Simon v. Cathroe Co., 106 Neb. —, 184 N. W. 130, and cases cited.

In its decree the trial court, so far as it is pertinent to quote, found as follows:

"The court further finds that the nature of plaintiff's injury requires a change in vocation to one making less demands upon his physical strength, and for that purpose that the payments to be made should be commuted to one lump sum in the method provided by law."

The above finding seems to have been based mainly, if not entirely, upon the opinions of the medical expert witnesses that the appellee's condition required a change of vocation. Neither the appellee nor his wife testified upon the subject. The record shows he reached the eighth grade in school, and that his career has always been that of a farmer or laborer. No emergency is shown, and it is purely problematical whether he would be helped or hurt by getting immediate possession of his money.

[2] The spirit and intention of the compensation act is to safeguard a compensation award. Commutation to a lump-sum payment should be approved by the courts only for strong and urgent reasons.

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In Perry v. Huffman Automobile Co., 104 Neb. 214, 179 N. W. 502, this court said:

"The Workmen's Compensation Act does not contemplate the payment of large sums of money to improvident employees or dependents who may lose it and become a charge on the public, but as a general rule requires employers to pay injured employees compensation in small periodical payments at short intervals."

The evidence being ample to sustain the judgment, issues of fact determined will not be disturbed, except as to the manner of making payments.

The judgment of the district court is modified to require weekly payments instead of awarding a lump sum, and, as modified, is affirmed.

Affirmed, as modified.

SCHOLTZHAUER ET AL. v. C. & L. LUNCH CO ET AL.

(Court of Appeals of New York. Feb. 28, 1922.)

134 Northeastern Reporter, 701.

1. MASTER AND SERVANT — COMPENSABLE "INJURY" DEFINED.

To justify an award under the Workmen's Compensation Law, the injury must have arisen out of and in the course of the employment, and it must have been received while the employee was doing the work for which she was employed, and must have been a natural incident to the work, and the result of a risk connected therewith and growing therefrom as a natural consequence.

(For other cases, see Master and Servant, Dec. Dig. § 371.)

(For other definitions, see Words and Phrases, First and Second Series, Injury.)

2. MASTER AND SERVANT—MURDER OF WAITRESS BY REJECTED COEMPLOYEE HELD NOT "ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT."

Where a waitress, engaged in her work, was shot and killed by a coemployee, a negro, because she had declined an invitation to go out with him, the murder, while it arose during the "course of the employment," did not arise out of it, but because of her refusal to accept the negro's invitation and his anger by reason thereof, and did not justify an award of compensation under the Workmen's Compensation Law, since an award cannot be made where the accident results from the chances of life in general to which the injured person was exposed in common with all mankind, rather than as an employee.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

Crane, J., dissenting.

Appeal from Supreme Court, Appellate Division, Third Department.

Proceeding by Bertha Scholtzhauer and others under the Workmen's Compensation Law for compensation for the death of Irma D. Scholtzhauer, opposed by the C. & L. Lunch Company, employer, and the Zurich General Accident & Liability Insurance Company, insurance carrier.

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Award for named claimant by the Industrial Board was affirmed by the Appellate Division (— App. Div. —, 188 N. Y. Supp. 949), and the employer and insurance carrier appeal. Order of Appellate Division and determination of the Industrial Board reversed and claim dismissed.

See, also, — App. Div. —, 189 N. Y. Supp. 954.

Charles B. Sullivan, of Albany, and Alfred W. Andrews, of New York City, for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aikèn, of Albany, of counsel), for respondents.

McLaughlin, J. On the 28th of June, 1919, Irma D. Scholtzhauer, daughter of the claimant, was employed as a waitress by the C. & L. Lunch Company, at 2246 Broadway, New York City. There was employed at the same time, by the same company a colored dishwasher by the name of Arthurs. About 6 o'clock in the afternoon of the day named Arthurs invited the daughter to go out with him that evening. She declined the invitation and stated to another employee that she would not go out with a negro. Her statement to this effect having been repeated to Arthurs, made him very angry. Shortly thereafter, when the daughter took some dishes to the place where Arthurs was working and pushed them through an opening in the partition between the restaurant and the kitchen, he drew a pistol and shot her, and immediately ran from the kitchen to the restaurant, again shot her, and she died shortly thereafter. Claims for compensation were filed by the mother and two sisters of the deceased, on the ground that they were dependents. The claims of the sisters were not allowed, but that of the mother was. An appeal was taken by the employer and insurance carrier to the Appellate Division, Third Department, where the determination of the Industrial Board was unanimously affirmed. Permission was thereafter given to appeal to this court.

[1, 2] To justify the State Industrial Board in making an award, the injury complained of must have arisen both out of and in the course of the employment. It must have been received while the employee was doing the work for which he was employed, and in addition thereto such injury must be a natural incident to the work. It must be one of the risks connected with the employment, flowing therefrom as a natural consequence and directly connected with the work. Heitz v. Ruppert, 218 N. Y. 148, 112 N. E. 750, L. R. A. 1917A, 344. An award cannot be made where the accident results from the chanees of life in general to which the injured person was exposed in common with all mankind rather than as an employee. Heitz v. Ruppert, supra, 218 N. Y. 152, 112 N. E. 750, L. R. A. 1917A, 344; Craske v. Wigan, [1909] L. R. 2 K. B. 635; Thom v. Sinclair, [1917] App. Cas. 137; Dennis v. White & Co., [1917] App. Cas. 479; Rayner v. Sligh Furniture Co., 180 Mich. 168, 146 N. W. 665, L. R. A. 1916A, 22, Ann. Cas. 1916A, 386.

The authorities cited by the respondent are not in point. The injury in such cases all arose over some dispute as to the work to be done by the employee or in some other way were directly traceable to and connected with the employment. Here the injury to the daughter, while it arose during the course of, did not arise out of, the employment. The only suggestion that the employment had any bearing on the injury was that the employment brought the two persons together. The murder, however, arose not out of the employment, but because the deceased refused to accept Arthurs invitation, and his anger by reason thereof. The fact that the murder took place on the employer's premises was a mere incident. It might equally well have happened on the sidewalk in front of the building, or while the daughter was on her way home, or at any other place where Arthurs had chanced to meet her. Had Arthurs made

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the proposal to the daughter while she was away from the place of employment, and after her rejection of it had killed her, it could not with any reason be contended that a claim could arise under the Compensation Law (Consol. Laws, c. 67).

The order of the Appellate Division and the determination of the Industrial Board are therefore reversed, and the claim dismissed, with costs against the Industrial Board in this court and the Appellate Division.

Hiscock, C. J., and Hogan, Cardozo, Pound, and Andrews, JJ., concur.

Crane, J., dissents.

Order reversed, etc.

TALLON v. INTERBOROUGH RAPID TRANSIT CO.

(Court of Appeals of New York. Jan. 24, 1922.)

134 Northeastern Reporter, 327.

MASTER AND SERVANT—INJURY WHILE RIDING TO WORK ON PASS HELD NOT COMPENSABLE AS "ARISING OUT OF EMPLOYMENT."

Where an employee of an interborough railway company was furnished a pass entitling him to ride free to the place he began employment, the fact he was riding on such pass did not make an accident resulting in his death, which occurred before he reached the place where his employment began and before the time for which he was to be paid, one arising out of his employment within Workmen's Compensation Law, so that his representative could recover damages for his death in an action based on the theory he was a passenger.

(For other cases, see Master and Servant, Dec. Dig. § 375[2].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

McLaughlin, J., Hiscock, C. J., and Pound, J., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Annie Tallon, as administratrix of the goods. chattels, and credits of James P. Tallon, deceased, against the Interborough Rapid Transit Company. A judgment of the Trial Term entered upon a verdict of the jury was reversed by the Appellate Division; two justices dissenting (193 App. Div. 772, 184 N. Y. Supp. 588), and plaintiff appeals. Judgment of the Appellate Division reversed, and that of Trial Term affirmed.

John C. Robinson, of New York City, for appellant.

James L. Quackenbush, of New York City (Martin E. Burke, of New York City, of counsel), for respondent.

CRANE, J. James P. Tallon was in the employ of the defendant as a guard on one of its trains. On the 21st day of October, 1919, he was on his way to work. being in full uniform, riding in one of the defendant's passenger trains, having gained entrance thereto by means of a pass which he had received at the time of his employment. He lived at 469 East 146th street, in the borough of Manhattan, city of New York, and it was his duty to report for work at the defendant's station at 177th street and

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Third avenue at 6:43 a. m. and to start out as guard on a train leaving that station, at 6:53 a. m. At 175th street a collision occurred in which Tallon was killed.

His wife, the plaintiff and administratrix, brought this action to recover damages for the negligence causing his death, claiming that the deceased was a passenger upon the defendant's train and not an employee within the meaning of the Workmen's Compensation Law (Consol. Laws, c. 67). The defendant insisted by its answer and on the trial that Tallon was injured in an accident arising out of and in the course of his employment and that this action could not be maintained. The trial judge ruled as a matter of law that the deceased was a passenger and, the negligence being admitted, left to the jury solely the question of damages. The judgment for the plaintiff entered upon the verdict of the jury has been reversed by the Appellate Division and the complaint dismissed on the ground that the only relief for the plaintiff and her children is under the Workmen's Compensation Law, as Tallon at the time of the accident was within the terms and provisions of the law, i. e., that he was injured in an accident arising out of and in the course of his employment. Two of the justices of the Appellate Division dissented from this view.

Tallon was riding to his work. His actual employment did not begin until he had arrived at 177th street and Third avenue. His time for reporting was 6:43 a. m., and his pay did not begin until then. At 6:30 a. m. he was killed at 175th street, two blocks away from the place where he was to report for work, and 13 minutes before his reporting time. Under ordinary conditions and circumstances, Tallon's actual employment did not commence until he had reported at the place where he was to commence work. The defendant claims that Tallon's employment commenced when he boarded its passenger train on his way to go to work and that the collision, occurring while he was thus riding, was an accident arising out of and in the course of his employment. The point, if any, of this claim of the defendant is the fact that Tallon had received a pass upon which he was riding and had not paid a cash fare.

The passenger trains of the defendant were public conveyances. Anybody and everybody had a right to ride in them upon paying the fare. Tallon was not obliged to use these trains in going to his work under any agreement with the defendant. He could have traveled by any other conveyance or could have walked. I take it that if he had entered the train as other passengers and paid his 5-cent fare, the defendant would not claim that his employment had commenced. What change in relationship is created by the alleged agreement that the pass was part of the compensation paid to Tallon for his services? It was not part of his compensation for riding to his work. It at most would be compensation for doing his work after he had arrived at 177th street and Third avenue. Suppose that the defendant, instead of issuing a pass, had paid to Tallon extra compensation of 10 cents a day for his carfare. Would this have caused the employment to commence when he boarded a car to go to work if it were a car or vehicle belonging to a stranger? If not, what difference would it make that the train or car taken by Tallon belonged to the defendant? The cardinal underlying fact is that Tallon's employment did not actually begin until he reported for work at 177th street and Third avenue. He had to get there, and get there on time, and to facilitate his arriving on time the defendant gave him the right to ride in its passenger trains free of charge, but I cannot see how this in any way changes the reality, the existing fact, that the employment commenced at 177th street and Third avenue at the time of reporting. It would cause no such change, had Tallon paid his fare on defendant's train or had ridden in another conveyance, the defendant paying his fare. The pass alone, even though it be part of his compensation, cannot create a fictitious relationship.

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Now this case differs materially from those cases where the employer, in order to get his employees to and from their work, provides conveyances exclusively for their use which in no sense are public conveyances and in which the employees undertake to ride as part of their contract of employment in going to and from their work.

Such a case was Matter of Littler v. George A. Fuller Co., 223 N. Y. 369, 371, 119 N. E. 554, 555. In the opinion it was said:

"The vehicle was provided by the employer for the specific purpose of carrying the workmen to and from the place of the employment and in order to secure their services. * * * The day's work began when he [this employee] entered the automobile truck in the morning and ended when he left it in the evening. * * * The case would be different if at the time of the accident claimant had been on the railroad train on his way to or from Great Neck."

Matter of Kowalek v. N. Y. Cons. R. R. Co., 229 N. Y. 489, 492, 128 N. E. 888, is in accordance with the principles here expressed. In that case the deceased was permitted to ride to and from his work upon the cars or trains of the claimant without charge: Such fact, however, was not a controlling incident. It was but an incident of the case. The controlling element in the case was the point whether or not the deceased, at the time he fell from the platform, was actually in the employ of the railroad company or had ceased and terminated his work for the night. Judge Collin there said in reference to the pass:

"In enjoying or exercising the permission he adopted his own will and choice and served his own convenience. The company was indifferent as to the way or means by which he reached the place where the day's work began. It did not contract that he should ride to and from work or pay him for the time through which he was riding. The transportation was not an incident of the employment. The employment continues throughout the transportation in case the parties by their contract of hiring positively or inferentially so stipulate. If they do not so stipulate, the employee when he enters into the process of the transportation is not under the hiring or control or in the employment of the employer and is not the employee."

In line with the ruling which we are here making, I also find the cases of Pierson v. Interborough Rapid Transit Co., 184 App. Div. 678, 172 N. Y. Supp. 492, affirmed 227 N. Y. 666, 126 N. E. 920; Matter of McInerney v. Buffalo & S. R. R. Corp., 225 N. Y. 130, 121 N. E. 806; Matter of Schultz v. Champion Welding & Mfg. Co., 230 N. Y. 309, 130 N. E. 304; Langley v. Boston Elevated Ry. Co., 223 Mass. 492, 112 N. E. 79; Stewart & Son v. Longhurst, Law Reports, [1917] A. C. 249.

I am therefore of the opinion that the accident which resulted in Tallon's death did not arise out of and in the course of his employment within the meaning of the Workmen's Compensation Law, and that the plaintiff therefore has no remedy under its provisions.

The judgment of the Appellate Division must be reversed, and that of the trial court affirmed, with costs in this court and in the Appellate Division.

McLaughlin, J. (dissenting). I am of the opinion that at the time of the collision Tallon, occupied the status of an employee, and therefore relief should have been sought under the Workmen's Compensation Law.

At the time of the accident he was riding on a pass which entitled him to free transportation to and from his work. Such transportation was an incident of the employment. It was a part of the contract of employment and enforceable by him as such.

The facts bring the case directly within the principle laid down in Matter of Littler v. George A. Fuller Co., 223 N. Y. 369, 119 N. E. 554. There a bricklayer was injured in an accident to an automobile truck

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which was furnished by his employer to carry him and other workmen from a railroad station to and from a building which they were constructing It was held the injury arose out of and in the course of his employment and that—

"The day's work began when he entered the automobile truck in the morning and ended when he left it in the evening."

It is sought to distinguish that case from this by reason of the fact that the automobile had been furnished for the specific purpose of carrying the workmen to and from the place of employment, while here others beside Tallon were permitted to ride in the coach in which he was at the time of the accident. But what possible difference can it make, if free transportation be an incident of the employment, whether others are permitted to ride in the same conveyance? The underlying feature in each case is that free transportation is an incident of the employment. The transportation is the same whether it be in a private or public conveyance.

The case is much like Donovan's Case, 217 Mass. 76, 104 N. E. 431, Ann. Cas. 1915C, 778. There Donovan was employed by one McGreevy in cleaning out catch-basins about two miles from his home. It had been and was his custom, in common with other employees, and with the knowledge and consent of his employer, to ride to and from the vicinity of the catch-basins in a wagon furnished by his employer; the wagon meeting the employees on the street at the beginning of the day. It was also at the service of the employees at the end of the day, that they might ride in it back to the employer's barn if they wished. Donovan was injured while so riding in this wagon at the end of his day's work. It was held the transportation was incidental to the employment, and therefore arose "out of and in the course of said employment."

The decisions in the Littler and Donovan Cases are in harmony with the English decisions. In Holmes v. Great Northern Ry. Co., [1900] 2 Q. B. 409, an engine cleaner who had been employed by the railway company at one of its stations was directed by his employer to work in a new engine shed some distance away, to which place workmen were conveyed by the railway company free of charge in one of its trains, reaching the station where they were to work a short time before the hour of commencing, and at the close of the day's work being taken back free of charge. It was held the employment of the workman commenced when he got into the train to be conveyed to his work, and not on his arrival at the place where he was to work, and that the accident arose out of and in the course of his employment.

In Stewart & Son v. Longhurst, Law Reports, [1917] A. C. 249, a carpenter who was employed in repairing a barge, after finishing his day's work, started to walk along the quay to the dock gates, fell therefrom, and was drowned. The dock was private property, but the employees had permission to pass through it, free of charge, on their way to and from the barge. It was held that, inasmuch as the employee was on the premises by virtue of his contract of service, the accident arose out of and in the course of his employment.

In Cross, Tetley & Co. v. Catterall (unreported), cited with approval by Lord Finlay in Stewart & Son v. Longhurst, supra, the colliery in which the employee was engaged was approached by a bridge built by the employers over a canal for the convenience of the workmen, and the workman fell into the canal from the bridge, while going to work. Lord Halsbury said in giving his opinion:

"I do not agree that his employment only begins at the moment he strikes the coal with his pick. I think the man was really in the employment the moment he reached the bridge He was doing something on his master's behalf; that is to say, he was on his way to the colliery for the purpose of working."

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In Cremins v. Guest, Keen & Nettlefolds, Law Reports, [1908] 1 K. B. 469, colliers who resided some six miles away from the colliery where they were employed were conveyed every morning by a train composed of carriages belonging to the employers, but driven by the railway company, to a platform a quarter of a mile away from the colliery. The platform was erected by the employers, on land belonging to the railway company, for the use of the colliers. The colliers walked from the platform along the highroad to the colliery. In the evening a similar train conveyed the colliers from the platform to their homes. The colliers were conveyed free of charge, and it was an implied term of the contract of service that colliers should have the right to travel to and fro without charge. One of the colliers was knocked down and killed while waiting on the platform for the return train. It was held the accident arose out of and in the course of the employment.

Nor do I think Pierson v. Interborough Rapid Transit Co., 184 App. Div. 678, 172 N. Y. Supp. 492, affirmed 227 N. Y. 666, 126 N. E. 920, or Matter of Kowalek v. New York Cons. R. R. Co., 229 N. Y. 489, 128 N. E. 888, upon which appellant chiefly relies, at all in conflict with the views above expressed.

In the Pierson Case, Pierson was a guard on one of defendant's passenger cars. On arriving at a terminal station he was relieved and another guard took his place. He then had two hours before resuming work. On reaching the terminal he walked out of the train of which his car had been a part, up to the front car, boarded it, sat down, and remained until the accident occurred. He was at the time of the accident, on his way to keep a personal appointment with his dentist. Obviously, the injury to him did not arise out of or in the course of his employment.

In the Kowalek Case the decedent was an employee of the elevated railway company, had finished his work for the day, went out upon a station platform for the purpose and with the intention of taking a passenger train to his home. The company permitted him to ride to and from his work upon trains or cars without charge, although it was not obligated to transport him; in other words free transportation was not incidental to his employment. He went upon the platform, not as an employee, but as a prospective passenger. He was found dead upon the tracks a short distance from the platform, at a point where the general public or passengers had no right to be. His death was caused by coming in contact with the electric rail. It was held his death did not arise out of or in the course of his employment. But Judge Collin, in that case, took pains to point out, in the course of the opinion delivered by him, that if the transportation had been an incident of the employment a different result might have been obtained. He said:

"The contract of employment did not obligate the company to transport him.. * * * It did not contract that he should ride to and from work or pay him for the time through which he was riding. The transportation was not an incident of the employment. The employment continues throughout the transportation in case the parties by their contract of hiring positively or inferentially so stipulate. If they do not so stipulate the employee when he enters into the process of the transportation is not under the hiring or control or in the employment of the employer and is not an employee." 229 N. Y. 492, 128 N. E. 889.

Here, as I have pointed out, the transportation was an incident of the employment. It was a part of the contract of hiring. This being so, it seems to me the employment commenced when the decedent entered the car to go to the place where he was to work.

I therefore dissent and vote to affirm the order of the Appellate Division.

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Hogan, Cardozo, and Andrews, JJ., concur with Crane, J.

McLaughlin, J., reads dissenting opinion, and Hiscock, C. J., and Pound, J., concur.

Judgment reversed, etc.

KATZ v. A. KADANS & CO. ET AL.

(Court of Appeals of New York. Jan. 24, 1922.)

134 Northeastern Reporter, 330.

1. MASTER AND SERVANT — INJURY FROM STREET RISKS COMPENSABLE.

The Workmen's Compensation Law protects an employee passing along the streets when on his master's business if the work itself involves exposure to perils of the street, strange, unanticipated, and infrequent though they may be, and such injury necessarily arises out of the employment.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

2. MASTER AND SERVANT—INJURY TO CHAUFFEUR STABBED BY INSANE PERSON HELD COMPENSABLE AS RESULTING FROM STREET RISK.

Where a dairyman's chauffeur while driving his employer's car on the street after delivering some cheese was stabbed by an insane man, the accident arose out of a street risk within protection of the Workmen's Compensation Law.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

3. MASTER AND SERVANT—THAT STREET RISK IS COMMON TO ALL DOES NOT DEFEAT COMPENSATION.

The fact that the risk is one to which every one on the street is exposed does not itself defeat compensation for injury within the Workmen's Compensation Law, the question being whether the employment exposes the workman to the risks by sending him on the street, common though such risks may be to all on the street.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

Hiscock, C. J., and McLaughlin and Andrews, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, Third Department.

Proceedings by Louis Katz for compensation under the Workmen's Compensation Law (Consol. Law, c. 67), opposed by A. Kadans & Co., employer, and the Travelers' Insurance Company insurance carrier. From an order of the Appellate Division (198 App. Div. 962, 189 N. Y. Supp. 946) affirming an award by the State Industrial Commissioner, the employer and insurance carrier appeal. Affirmed.

See, also, 198 App. Div. 980, 190 N. Y. Supp. 933.

E. C. Sherwood, Wiliam B. Davis and Benjamin C. Loder, all of New York City, for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, of counsel), for respondent.

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POUND, J. This is a workmen's compensation case. Louis Katz, the claimant, was a dairyman's chauffeur. On May 7, 1920, when he was driving his employer's car west on Canal street after delivering some cheese, an insane man stabbed him. A lot of people were running after the insane man and he stabbed any one near him. The question is whether claimant's injuries arose out of his employment.

[1] If the work itself involves exposure to perils of the street, strange, unanticipated, and infrequent though they may be, the employee passes along the streets when on his master's occasions under the protection of the statute. This is the rule unequivocally laid down by the House of Lords in England:

"When a workman is sent into the street on his master's business. * * * his employment necessarily involves exposure to the risks of the streets and injury from such a cause [necessarily] arises out of his employment." Finlay, L. C., in Dennis v. White, [1917] L. R. App. Cas. 479.

So we have to concern ourselves only with the question whether claimant's accident arose out of a street risk.

[2] Cases may arise where one is hurt in the street, but where the risk is of a general nature, not peculiar to the street. Lightning strikes fortuitously in the street; bombs dropped by enemy aircraft do not expose to special danger persons in a street as distinguished from those in houses. Allcock v. Rogers, [1918] House of Lords 11 B. W. C. C. 149. The danger must result from the place to make it a street risk but that is enough if the workman is in the place by reason of his employment, and in the discharge of his duty to his employer. The street becomes a dangerous place when street brawlers, highwaymen, escaping criminals, or violent madmen are afoot therein as they sometimes are. The danger of being struck by them by accident is a street risk because it is incident to passing through or being on the street when dangerous characters are abroad.

Particularly on the crowded streets of a great city, not only do vehicles collide, pavements become out of repair, and crowds jostle, but mad or biting dogs may run wild, gunmen may discharge their weapons, police officers may shoot at fugitives fleeing from justice, or other things may happen from which accidental injuries result to people on the streets which are peculiar to the use of the streets and do not commonly happen indoors.

[3] The risk of being stabbed by an insane man running amuck seems in a peculiar sense a risk incidental to the streets to which claimant was exposed by his employment. Matter of Heidemann v. Am. Dist. Tel. Co., 230 N. Y. 305, 130 N. E. 302, does not hold that where the street risk is one shared equally by all who pass or repass, whether in or out of employment, it should be shown that the employment involves some special exposure; that the night watchman is exposed by his employment to the risk of being shot by accident as he nears a sudden brawl which it is his duty to investigate, while the night clerk whose business brings him on the street, but whose duty is not to seek danger, is not so exposed. We decided the case before us and no other, dwelling naturally upon those features of the situation which emphasized the connection between the risk and the employment. But the fact that the risk is one to which every one on the street is exposed does not itself defeat compensation. Members of the public may face the same risk every day. The question is whether the employment exposed the workman to the risks by sending him on to the street, common though such risks were to all on the street. Moran's Case, 234 Mass. 566, 125 N. E. 591; Dennis v. White, supra.

The order should be affirmed, with costs.

Hogan, Cardozo, and Crane JJ. concur.

Hiscock C. J., and McLaughlin and Andrews, JJ., dissent.

Order affirmed.

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PEOPLE v. DONNELLY.

(Court of Appeals of New York. Jan. 24, 1922.)

134 Northeastern Reporter, 332.

2. MASTER AND SERVANT—VIOLATION OF COMPENSATION LAW PUNISHABLE AS MISDEMEANOR UNDER PENAL LAW.

Workmen's Compensation Law, § 52, providing that failure to secure payment of compensation shall constitute a misdemeanor and have the effect of enabling the injured employee to maintain an action for damages as prescribed by section 11. makes such failure a misdemeanor punishable as provided by Pen. Law, § 1937, relating to punishment of misdemeanors when not fixed by statute, and does not limit the punishment to enabling the injured employee to maintain an action for damages.

(For other cases, see Master and Servant, Dec. Dig. § 391½, New, vol. 7A Key-No. Series.)

Appeal from Supreme Court, Appellate Division, Second Department.

Albert E. Donnelly was convicted of failure to secure payment of compensation to an employee as provided under the Workmen's Compensation Law. An order in arrest of judgment was affirmed by the Appellate Division (198 App. Div. 296, 190 N. Y. Supp. 502). and the People appeal. Reversed.

John E. Ruston, Dist. Atty., of Brooklyn (Harry G. Anderson, Asst. Dist. Atty, and Floyd H. Wilmot, Deputy Atty. Gen., both of Brooklyn, of counsel), for the People.

William G. Cooke and Howard O. Wood, both of New York City, for respondent.

CRANE, J. The Workmen's Compensation Law (Consol. Laws, c. 57) § 50, requires an employer to secure compensation to his employees in one of three ways: (1) By insuring in the state fund; (2) by insuring with an insurance company; (3) by furnishing satisfactory proof to the Commission of his financial ability to pay such compensation for himself. For failure to comply with this law, certain penalties or punishments are prescribed. By this same section it is said:

"If an employer fail to comply with this section he shall be liable to a penalty during which such failure continues of an amount equal to the pro rata premium which would have been payable for insurance in the state fund for such period of noncompliance to be recovered in an action brought by the commission."

Section 52 prescribes another effect of the employer's failure to secure compensation. It reads:

"Failure to secure the payment of compensation shall constitute a misdemeanor and have the effect of enabling the injured employee, or in case of death, his dependents or legal representatives, to maintain an action for damages in the courts, as prescribed by section 11 of this chapter."

Section 11 enacts that, if any employer fail to secure payment of compensation for his injured employees, the latter may elect to maintain an action in the courts for damages on account of an injuryy received, and in such an action it shall not be necessary to plead or prove freedom from contributory negligence, nor may the defendant plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee.

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On October 2, 1920, the district attorney of Kings county, by information properly laid, accused the defendant in the court of special sessions of the crime of failure to secure compensation to an employee in that he, the defendant, on the 5th of October, 1918, in the county of Kings, being an employer of labor and engaged in the business of painting, a hazardous employment as defined in group 42 of section 2 of the Workmen's Compensation Law, failed to secure compensation to Frank Keightley, an employee, for injuries sustained by not insuring and keeping insured the payment of such compensation in the state fund, or insuring and keeping insured the payment of such compensation with an insurance company, or furnishing satisfactory proofs to the State Industrial Commission of his financial ability to pay such compensation for himself.

The defendant thereafter was tried and found guilty as charged, but the court granted the defendant's motion in arrest of judgment and discharged him upon the ground that the court had no jurisdiction as the defendant was not amenable to prosecution in the courts of criminal jurisdiction This order of the Special Sessions has been affirmed by the Appellate Division (198 App. Div. 296, 190 N. Y. Supp. 502) by a divided court, and permission given to the people of the state to bring the case here for review.

It has been held by the courts below that sections 50 and 52 of the Workmen's Compensation Law, as quoted above, do not make it a crime punishable by fine or imprisonment for the employer to fail to secure payment of compensation as required. The only penalty, it is said, which is imposed in the case of such failure, is the penalty to be sued for by the Commission, as stated in the last paragraph of section 50 and the effect of enabling the injured employee to maintain an action for damages in which the employer will be barred from making certain defenses as prescribed in section 11, above referred to. In other words, although section 52 makes the failure to secure payment of compensation a misdemeanor, yet the punishment of such a misdemeanor is prescribed by the section and consists in the barring out of the defenses as stated in section 11 and which the employer would otherwise have at common law.

[1] It is the law that, where a statute creates a new offense by making that unlawful which was lawful before, and prescribes a particular penalty and mode of proceeding, that penalty alone can be enforced. People v. Stevens, 13 Wend. 341. This rule, however, is deemed to be expressive of legislative intent and gives way to words and provisions indicating that other or additional penalties may also be enforced. It is always a question of legislative intent. Behan v. People, 17 N. Y. 516.

It would have been perfectly competent and legal for the Legislature to have provided the three consequences following a failure of an employer to secure payment of compensation as required by section 50: (1) The recovery of a penalty to be sued for by the Commission; (2) the striking out of certain defenses known to the common law in an action to be brought by the injured employee; (3) prosecution as for a misdemeanor, and upon conviction by punishment of fine or imprisonment. People v. Meakim, 133 N. Y. 214, 30 N. E. 828.

[2] The question is: Has the Legislature by the above enactments and provisions of the Workmen's Compensation Law actually prescribed all of these three things as the effect of a failure to secure payment of compensation, or has it only prescribed the first two? I am inclined to the opinion that the Legislature has made the failure a misdemeanor to be punished as provided in section 1937 of the Penal Law (Consol. Laws, c. 40); i. e., by imprisonment in a penitentiary or county jail for not more than one year, or by a fine of not more than $500. or by both. I do not consider that the words of section 52 reading, "and have the effect of enabling the injured employee * * * to maintain an action for damages in the courts, as prescribed by section 11 of this chapter." is the

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punishment, penalty, or penal discipline for the misdemeanor created by that section. There might be much force in the position taken by the defendant if it were not for the amendments made to this law as originally enacted. Section 52 of chapter 41 of the Laws of 1914 did not contain the words "constitute a misdemeanor." The section then read:

"Sec. 52. Effect of failure to secure compensation. Failure to secure the payment of compensation shall have the effect of enabling the injured employee or his dependents to maintain an action for damages in the courts, as prescribed by section 11 of this chapter."

By chapter 622 of the Laws of 1916, section 52 was amended so as to read as follows, the words put in italics being those added by the amendment:

"Sec. 52. Effect of failure to secure compensation. Failure to secure the payment of compensation shall *constitute a misdemeanor and* have the effect of enabling the injured employee, *or in case of death*, his dependents or *legal representatives*. to maintain an action for damages in the courts, as prescribed by section 11 of this chapter."

Prior to the amendment, therefore, the Workmen's Compensation Law provided that, where the employer failed to secure payment of compensation, a penalty could be recovered in an action by the Commission, and the employee could maintain a common-law action in which certain defenses were barred to the employer. All of these are in the present law, but there is the addition made by the above amendment that the failure to secure payment of compensation shall constitute a misdemeanor. Why were these words put in the section if it were not intended to add another punishment or effect to the failure of the employer? These words could give no additional force to the provision regarding the penalty or that regarding the maintenance of an action. They were meaningless unless they brought to section 52 something more than had previously been in it, and that something more could only be and must be that which the words themselves, state, namely, that a failure to secure payment of compensation would constitute a misdemeanor. The punishment for a commission of this misdemeanor was left, as in any other instances, to section 1937 of the Penal Law, which provides:

"Sec. 1937. Punishment of misdemeanors when not fixed by statute. A person convicted of a crime declared to be a misdemeanor, for which no other punishment is specially prescribed by this chapter, or by any other statutory provision in force at the time of the conviction and sentence, is punishable by imprisonment in a penitentiary, or county jail, for not more than one year, or by a fine of not more than five hundred dollars, or by both."

For the reasons here expressed, the orders of the Appellate Division and the Special Sessions must be reversed.

Hiscock, C. J., and Hogan, Cardozo, Pound, McLaughlin and Andrews, JJ., concur.

Orders reversed.

DORIS v. JAMES BUTLER, INC., ET AL.

(New York Supreme Court, Appellate Division, Third Department. December 28, 1921.)

192 New York Supplement, 515.

1. MASTER AND SERVANT—LOSS OF THUMB NOT COMPENSABLE AS LOSS OF "FINGER."

The loss of the use of a thumb cannot be considered the loss of a finger within Workmen's Compensation Law, § 15, subd. 3, providing that

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where injury results in the loss of more than one finger compensation therefor may be awarded for the proportionate loss of the use of the hand occasioned thereby.

(For other cases, see Master and Servant, Dec. Dig. § 385[12].)

2. MASTER AND SERVANT — COMPENSATION AWARD FOR PROPORTIONATE LOSS OF HAND REVERSED AND MATTER REMITTED FOR REHEARING.

An award for proportionate loss of use of hand based on injuries to two fingers will be reversed and remanded for further consideration, where it is not clear from the evidence that claimant suffered injury other than that to the thumb and where the findings are not plain that the condition of the middle fingers resulted from the injury to the thumb, from an operation upon the thumb, or from the accident.

(For other cases, see Master and Servant, Dec. Dig. § 417[9].)

Appeal from State Industrial Commission.

Claim by Patrick Doris for compensation under the Workmen's Compensation Law opposed by James Butler, Incorporated, employer, and the Travelers' Insurance Company, insurance carrier, and from an award of the Industrial Commission, for the proportionate loss of the use of applicant's left hand, the employer and insurer appeal. Award reversed, and matter remitted to the Board for further consideration.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, H. T. Kellogg, and Van Kirk, JJ.

Benjamin C. Loder, of New York City (E. C. Sherwood and William B. Davis, both of New York City, on the brief), for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for respondent.

PER CURIAM. [1] It is not clear from the evidence and the findings that the claimant has suffered injury other than that to the thumb and middle fingers. The use of the thumb was substantially lost, but that cannot be considered as the loss of a finger within the provision of subdivision 3 of section 15 of the Workmen's Compensation Law (as amended by Laws of 1917, c. 705 [Consol. Laws, c. 67]), which provides that where the injury results in the loss of more than one finger, compensation therefor may be awarded for the proportionate loss of the use of the hand thereby occasioned, etc.

[2] If, in addition to the injuries to the fingers, it had been found that there was a resulting partial loss of the use of the remainder of the hand, compensation might be awarded therefor, considering all the injuries together. But the evidence is not very satisfactory upon that subject and the determination does not cover it. The stiffness in the two fingers was first discovered when the claimant returned to work some months after the accident. The findings do not make it clear that the condition of the fingers resulted from the injury to the thumb, or the operation upon the thumb, or the accident. The award should therefore be reversed, and the matter remitted to the Commission for further consideration.

Award reversed, and matter remitted to the Board for further consideration.

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HAMMONDS v. ROCK PLASTER CORPORATION ET AL.

(New York Supreme Court, Appellate Division, Third Department. December 28, 1921.)

192 New York Supplement, 552.

MASTER AND SERVANT — WORKMEN'S COMPENSATION AWARD REVERSED, AND MATTER REMITTED FOR ABSENCE OF EVIDENCE AND FINDING ON ISSUE OF MARITIME EMPLOYMENT.

An award to a laborer injured while in a plaster mill should be reversed and the matter remitted to the State Industrial Board for further consideration, where it appears he trucked plaster rock and plaster to and from boats docked at a pier and when not so employed was engaged as a general laborer in the mill, but there was no finding upon the subject, and the evidence was not clear, and it could not be determined from the evidence in the absence of any finding whether or not claimant was engaged in a maritime employment at the time of the injury.

(For other cases, see Master and Servant, Dec. Dig. § 417[9].)

Appeal from State Industrial Commission.

Claim by William Hammonds for compensation under the Workmen's Compensation Law, opposed by the Rock Plaster Corporation, employer, and the Employers' Liability Assurance Corporation, Limited, insurance carrier. From an award of the Industrial Board entered in its office on May 19, 1921, the employer and insurer appeal. Award reversed, and matter remitted for further consideration.

Bertrand L. Pettigrew, of New York City (Walter L. Glenney, of New York City, of counsel), for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for respondent.

PER CURIAM. The question whether the claimant was engaged in a maritime employment at the time of the injury was raised and litigated before the Board, but has not been decided by it. It is a close question under Matter of Keator v. Rock Plaster Mfg. Co., 224 N. Y. 540, 120 N. E. 56, and Matter of Newham v. Chile Exploration Co., 232 N. Y. 37, 133 N. E. 120. Whether his employment was maritime or not cannot definitely be determined from the evidence, in the absence of any finding. He was a common laborer, working in and about the mill. When injured he was in the mill tying up bags filled with plaster. When boats were in with plaster rock, he usually assisted in trucking the rock from the boat to the pier. When boats were being loaded with plaster from the mill, usually trucked the plaster from the mill to the boat. Boats with rock did not come in to the pier every day; plaster was loaded onto the boats nights, and some nights he did not assist in that work. Presumably, when not trucking to and from the boat, he was engaged as a general laborer in and about the mill; but there is no finding upon the subject and the evidence is not clear. The award should be reversed and the matter remitted to the Board for further consideration.

Award reversed and matter remitted to the Board for further consideration.

John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Van Kirk, JJ., concur.

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OLSON v. HEMSLEY.

(Supreme Court of North Dakota. Jan. 5, 1922. Rehearing Denied Feb. 17, 1922.)

187 Northwestern Reporter, 147.

1. STATEMENT OF FACTS.

Plaintiff brought an action against defendant to recover damages for the death of his son, alleged to have been caused by the negligence of the defendant. Defendant operated a grocery store and soft drink parlor at Walhala, N. D., and in the conduct of the business he employed, with others. plaintiff's son Clifford Olson, age 16 years 6 months and 12 days. and another boy, Herbert Clements, age 13 years and 3 months. The latter, while about to cash a check from one of the money drawers in the store, called Clifford Olson to assist him, and, while the latter was doing so, the Clements boy took from the drawer a loaded revolver, placed there by the defendant. rested it upon the drawer and it was discharged, the bullet entering the abdomen of Clifford Olson, killing him.

2. STATEMENT OF CAUSE OF ACTION.

This action is to recover damages against the defendant for his negligence in keeping a loaded revolver where it was kept, and where he knew it was accessible to the Clements boy, who was known to him to be careless and reckless. A second cause of action is based on failure of defendant to comply with the Workmen's Compensation Fund (chapter 162, Sess. Laws 1919). The plaintiff was required at the trial to elect on which cause of action he relied, and elected to rely on the first.

(Syllabus by Editorial Staff.)

4. MASTER AND SERVANT — ACTION FOR DEATH OF EMPLOYEE MAINTAINABLE BY DEPENDENT FATHER AGAINST EMPLOYER NOT COMPLYING WITH COMPENSATION ACT.

Where employer had not complied with Workmen's Compensation Act, §§ 6, 7, the dependent father of the deceased employee *held* entitled to bring an action for the employee's death under Comp. Laws 1913, § 8321, and section 8323, as amended by Sess. Laws 1917, c. 106, as against contention that Workmen's Compensation Act, § 11, confined the right to bring such action to the personal representative of the deceased employee, since the employer, not having complied with the Workmen's Compensation Act, was not entitled to the benefits thereof, under section 11. (Per Grace, C. J., and Birdzell, J.)

(For other cases, see Master and Servant, Dec. Dig. § 355.)

5. MASTER AND SERVANT — ACTION FOR DEATH OF EMPLOYEE MAINTAINABLE BY DEPENDENT FATHER AGAINST EMPLOYER NOT COMPLYING WITH COMPENSATION ACT.

Where employer had not complied with Workmen's Compensation Act, §§ 6, 7, the dependent father of deceased employee *held* entitled to sue for employee's death under Comp. Laws 1913, § 8321, and section 8323 as amended by Sess. Laws 1917, c. 106, as against contention that the Workmen's Compensation Act, § 11, confined the right to bring such action to the personal representative of the employee; the maintenance of such a suit by a dependent of the employee not being excluded, under section 20, in view of sections 1, 6, 9, 10. (Per Bronson, J.)

(For other cases, see Master and Servant, Dec. Dig. § 355.)

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6. MASTER AND SERVANT — ACTION FOR DEATH OF EMPLOYEE MAINTAINABLE BY DEPENDENT FATHER AGAINST EMPLOYER NOT COMPLYING WITH COMPENSATION ACT.

Where employer had not complied with Workmen's Compensation Act, §§ 6, 7, the dependent father of deceased employee *held* entitled to sue for employee's death under Comp. Laws 1913, § 8321, and section 8323, as amended by Sess. Laws 1917, c. 106, as against contention that the Workmen's Compensation Act, § 11, confined the right to bring such action to the personal representative of the employee, the right of a dependent of the employee to maintain such action being recognized by section 11. (Per Christianson, J.)

(For other cases, see Master and Servant, Dec. Dig. § 355.)

Robinson, J., dissenting.

Appeal from District Court, Pembina County; A. G. Burr, Judge.

Action by O. L. Olson against G. L. Hemsley. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

J. F. T. O'Connor and C. F. Peterson, both of Grand Forks, for appellant.

Gray & Myers, of Grafton, for appellee.

GRACE, C. J. This is an appeal from a judgment in favor of defendant. A concise statement of the material facts will give a clearer understanding of the issues.

[1] The defendant, when Clifford Olson was injured in the manner hereinafter stated, and of which injuries he died, was operating a grocery store and soft drink establishment at Walhalla, N. D. Among others, he employed at such place of business one Herbert Clements, age 13 years and 3 months, and Clifford Olson, age 16 years 6 months and 12 days, who discharged the usual duties incident to their employment in the store. They were in charge of the store when defendant was not present. In the store there were three money drawers, where they were authorized to get change. In one of the drawers for about 15 years defendant had kept a 32-caliber revolver, which, for a year or more prior to the time of the injury resulting in death, was loaded.

On the 10th day of August, 1920, and while the defendant was temporarily absent from the store, Herbert Clements went to the money drawer in which the loaded gun lay, and opened that drawer for the purpose of cashing a check. After he had opened the drawer he called Clifford Olson to cash the check. This was the first time that young Clements had opened the drawer, though he was authorized to use it. While Olson was engaged in cashing the check from the money in this drawer, the Clements boy took the loaded revolver out of the cash drawer, rested it on the edge of the drawer, and it went off, the bullet entered the abdomen of Clifford Olson, who was standing nearby; he died a few minutes later as a result of the injury.

Defendant knew the gun was in the drawer, and had warned Clifford Olson about it, but not Herbert Clements, and knew that the Clements boy was somewhat careless and reckless. The Olson boy was in good health, was in the second year high school at Walhalla, and during vacation was earning $40 per month, which was contributed to the support of his parents and the family. The plaintiff is the father of Clifford Olson, and besides Clifford there were two other children, whose ages were 11 and 3 years respectively.

[2] Paintiff's first cause of action is based upon the alleged negligence of the defendant in carelessly and negligently permitting a loaded revolver to remain in one of the cash drawers in his store where he

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employed two young boys within whose reach, in one of the cash drawers, was the loaded revolver. and, further, that the defendant was negligent in employing a reckles and careless servant, the Clements boy.

For his second cause of action plaintiff alleges a failure of defendant at any time prior to the 10th day of August, 1919, to apply to the Workmen's Compensation Bureau of the state of North Dakota for classification as an employer, and his failure to comply with the provisions of law in that respect, which is chapter 162 of the Session Laws of 1919, and further sets out his failure to pay a premium as a member of the Compensation Fund to be applied in compensation of injured workmen while engaged in hazardous employment, and further avers that Clifford Olson was killed while engaged in the performance of his duty, and while within the course of business of his employer.

There is one assignment of error only that requires any consideration. It is that the court erred in granting defendant's motion made at the close of appellant's case, that the jury be directed to return a verdict in defendant's favor for a dismissal of the action. Plaintiff bases his right to maintain the action on section 8323, C. L., as amended by chapter 106 of the Session Laws of 1917, which gives him that right where there is a cause of action under section 8321. But one of the principal questions in the case is whether the right of action under 8321 is abolished by the enactment of the Workmen's Compensation Act.

That the plaintiff is the father of Clifford Olson is not controverted, and neither are the facts relative to the injury which caused the death of Clifford Olson. Taking all evidence into consideration, and assuming it to be true, and assuming for the present that plaintiff had a right of action under chapter 39, and under sections 9 and 11 of the Compensation Act, can it be said that the trial court did not err in holding that the defendant, as a matter of law, was not negligent where the proof shows that he permitted a loaded revolver to remain in a cash drawer in his store, which was in charge of Clifford Olson and young Clements during his absence, and where the defendant knew the revolver was loaded, and that it had been loaded for a year or two prior to the fatal shot and injury, and further, where he knew that young Clements was somewhat careless and negligent, and where he knew, or must be held to have known, that a firearm, a revolver, when loaded, is a dangerous instrumentality to leave in any location where it would be accessible to boys of as tender years as these. He knew, or should have known, that their curiosity would have been aroused, and that to boys of their ages a gun or firearm of any kind is usually very attractive—they have an almost uncontrollable desire to handle, examine, and experiment with the same—and we think the testimony is sufficient to show that the defendant knew these things, and that he told Clifford Olson about the gun, and warned him, but did not tell young Clements about the gun, or give him any warning.

[3] We are of the opinion that the court could not say, as a matter of law, in the circumstances in this case, the defendant's acts did not constitute actionable negligence where injury resulted to one by the discharge of the revolver while in the hands of one of the youths, and, further, where it appears the defendant reasonably should have apprehended the consequences which ensued. As was said in the case of Sullivan v. Creed, 2 British Ruling Cases, 163:

"All third party cases are difficult, because, in tracing the claim of cause and effect, circumstances often make it almost impossible to distinguish between a flaw and a break, or to say whether the intervention of the third party has not so far predominated in bringing about the injury as to make it right to say that the act of an original party was not an effective cause of the ultimate result."

Likewise, in the case at bar, the shot fired which injured and killed Clifford Olson was not fired by the defendant, but by young Clements, a

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third party; but he could not have fired the fatal shot if the plaintiff had not carelessly and negligently permitted the loaded revolver to be where it was, and where young Clements, who was known to defendant to be careless and reckless, had access to it. The carelessness and negligence of the defendant in this respect was in reality the proximate cause of the injury.

The facts above stated are wholly undisputed, and it seems that the defendant should have apprehended that it was dangerous to the public to keep a loaded revolver where this was, knowing that it was a dangerous instrumentality, which, even in the hands of one experienced in its use, must be handled with great care in order to have due regard to the safety of others, and knowing further that instinctively the ordinary youth is attracted to it.

We are of the opinion that there is sufficient evidence of defendant's negligence in the respect hereinbefore stated as to require that question to be submitted to a jury, and that it was for it to determine under all the evidence whether the defendant was negligent, or if he should have apprehended the consequences which did result by his having placed the loaded revolver where he did place it, which, in fact, was in a place where the two youths would be expected at times to resort in the discharge of their duties—that is, in the cash drawer.

At the commencement of the trial defendant objected to the introduction of any evidence on the ground that sufficient facts were not stated in the complaint to constitute a cause of action, for the reason that section 11 of chapter 162 of the Session Laws of 1919 is exclusive, and that it conferred no right on the father, but only on the personal representatives of the deceased, to bring an action. The court overruled the objection, and permitted the trial to proceed, but required plaintiff to elect on which cause of action he based his right to recover. Plaintiff elected to proceed under the first cause of action.

The trial court, at the conclusion of plaintiff's case, found, as a matter of law, that there was insufficient evidence to establish negligence on the part of the defendant, and directed a verdict in his favor. This, we think, was reversible error.

[4] Section 11, in so far as necessary to be here set out at length, provides:

"Employers subject to this act, who shall fail to comply with the provisions of sections six and seven hereof, shall not be entitled to the benefits of this act during the period of such noncompliance, but shall be liable to their employees for damages suffered by reason of injuries sustained in the course of employment, and also to the personal representatives of such employees where death results from such injuries."

The defendant did fail to comply with sections 6 and 7, and hence was not entitled to the benefits of the act during the period of noncompliance. He thus became liable in an action at law for damages occasioned by his negligence, if any, and that action would be such as provided by section 8321, C. L. 1913.

If it be so conceded, as we think it must, that such right of action against the employer in the conditions mentioned in section 11 still remains, we think the action may be brought in the manner provided by section 8323, C. L., as amended by chapter 106 of the Session Laws of 1917. In other words, the right of action being preserved, so are the remedies to enforce it: hence we think the father was the proper party to maintain the action.

We are of the opinion that plaintiff's first cause of action is a proper one, that he has legal right to maintain it, and that the question of defendant's negligence, under the evidence, is a question of fact for the jury.

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The judgment from which appeal was taken is reversed, and the case is remanded for a new trial. Appellant is entitled to his costs and disbursements on appeal.

Birdzell, J., concurs.

BRONSON, J. (concurring specially). [5] Section 1, c. 162, Laws 1919 (Workmen's Compensation Fund), provides as follows:

"The state of North Dakota, exercising herein its police and sovereign powers, hereby declares that the prosperity of the state depends in a large measure upon the well-being of its wage workers, and, therefore, for workmen injured in hazardous employments, and their families and dependents, sure and certain relief is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished except as in this act provided."

Section 11 provides as follows:

"Employers subject to this act who shall fail to comply with the provisions of sections six and seven hereof shall not be entitled to the benefits of this act during the period of such noncompliance but shall be liable to their employees for damages suffered by reason of injuries sustained in the course of employment, and also to the personal representatives of such employees where death results from such injuries, and in such action the defendant shall not avail himself or itself of the following common-law defenses:

"The defense of the fellow-servant rule, the defense of the assumption of risk or the defense of contributory negligence."

Section 20 provides as follows:

"When an injury or death for which compensation is payable under this act shall have been sustained under circumtances creating in some other person than the North Dakota workmen's compensation fund a legal liability to pay damages in respect thereto, the injured employee, or his dependents, may, at his or their option, either claim compensation under this act or obtain damages from or proceed at law against such other person to recover damages."

It is the contention of the defendant that the Compensation Act abrogates all remedies and causes of action theretofore existing by statute, for death by unlawful act, and permits only the remedies and causes of action stated in such act; that section 11 of this act denominates only the personal representative as the proper party to maintain an action for death of the employee, against the employer. It may be conceded that the personal representative is a proper party to maintain such action. However, pursuant to the terms of the statute, is the maintenance of an action by one of the dependents excluded? I am of the opinion, pursuant to section 20 thereof, that the maintenance of an action by a dependent of the employee is not excluded, but, on the contrary, is specifically permitted. In this case the father is a dependent, and, pursuant to the evidence introduced, was, in fact, a dependent of his deceased son.

From the record it appears that the defendant, a storekeeper, had in his employ the deceased son, 16 years of age, and another boy, 13 years of age. These boys at times were left in charge of the store. The loaded revolver was left, or permitted to be left, by the employer in a cash drawer to which the boys were directed to resort when necessary in trading operations. There it had not been casually placed; there it had been for years. Assuredly the inference of fact might be drawn that it was there for purposes of the employer's business. The employer had warned the deceased son about this revolver. He gave no warning to the other boy. On the day when plaintiff's son was killed, then, for the first time, the other boy knew of the presence of this revolver in such cash

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drawer. It appears in the evidence that the employer knew and stated that this other boy was a little careless and reckless. In view of the relation of master and servant existing between the storekeeper and the boys, and the duties thereby imposed upon such master, may it be said, as a matter of law, upon this record that the master was free from negligence in the performance of his duties? I am of the opinion that it was for the jury to find, as a matter of fact, whether the master, in the performance of his legal duties, exercised reasonable care, in view of the circumstances and the youth of the boys, in permitting such revolver to be left in such cash drawer, accessible to such boys, without warning or instruction to each of the boys knowing the careless and reckless characteristics of the younger boy. See 40 Cyc. 873; Ewing v. Lanark Fuel Co., 65 W. Va. 726, 65 S. E. 200, 29 L. R. A. (N. S.) 487; Southern Pacific Co. v. Hetzer, 135 Fed. 272, 68 C. C. A. 26, 1 L. R. A. (N. S.) 288; 18 R. C. L. 565–572. The judgment should be reversed, and a new trial granted.

CHRISTIANSON, J. (concurring specially). [6] As indicated in the opinion prepared by the Chief Justice and Mr. Justice Bronson, one of the two controlling questions presented on this appeal is whether the Workmen's Compensation Act bars the plaintiff from maintaining an action for the death of his son. Both opinions make reference to section 11 of the Workmen's Compensation Act. That section reads as follows:

"Employers subject to this act, who shall fail to comply with the provisions of sections six and seven hereof, shall not be entitled to the benefits of this act during the period of such noncompliance, but shall be liable to their employees for damages suffered by reason of injuries sustained in the course of employment, and also to the personal representatives of such employees where death results from such injuries, and in such action the defendant shall not avail himself or itself of the following common-law defenses:

"The defense of the fellow-servant rule, the defense of the assumption of risk or the defense of contributory negligence.

"And such employers shall also be subject to the provisions of section eight.

"*Any employee whose employer has failed to comply with the provisions of section six and seven hereof, who has been injured in the course of his employment, wheresoever such injury has occurred, or his dependents in case death has ensued, may, in lieu of proceedings against his employers by civil action in the court,* file his application with the Workmen's Compensation Bureau for compensation in accordance with the terms of this act, and the Bureau shall hear and determine such application for compensation in like manner as in other claims before the Bureau; and the amount of the compensation which said Bureau may ascertain and determine to be due to such injured employee, or to his dependents in case death has ensued, shall be paid by such employer to the person entitled thereto within ten days after receiving notice of the amount thereof as fixed and determined by the Bureau; and in the event of the failure, neglect or refusal of the employer to pay such compensation to the person entitled thereto, within said period of ten days, the same shall constitute a liquidated claim for damages against such employer in the amount so ascertained and fixed by the Bureau, which with an added penalty of fifty per cent., may be recovered in an action in the name of the state for the benefit of the person or persons entitled to the same."

Laws 1919, c. 162, § 11.

The contention of the defendant is that, by virtue of section 1 of the Compensation Act, all rights of action formerly existing were abolished; that such rights of action, and such only, now exist as are prescribed by that act; that, by virtue of section 11 of the act, the personal repre-

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sentative alone may maintain an action in case the injury results in death. It seems to me that the last contention ignores the portion of section 11 which I have italicized. That portion clearly recognizes that the dependents may maintain an action in case of death. See 25 R. C. L. p. 979. The complaint in this case alleges, and the proof shows, that the father was a dependent of his deceased son within the purview of the Workmen's Compensation Act. In other words, the complaint alleges, and the proof shows, that the action is brought by one whom the Compensation Act expressly recognizes as having the right to maintain such action.

I also agree with my Associates that, under the evidence in this case, it is a question for the jury whether the death of Clifford Olson was caused by the negligence of the defendant.

ROBINSON, J. (dissenting). In this case there is no occasion for passing the "buck" to the jury. The facts are not in dispute. Defendant kept a loaded revolver in a desk where he had a perfect right to keep it. One of two employees wrongfully took the revolver, and by accident shot the other, a son of the plaintiff. It was purely an accident.

On Petition for Rehearing.

BRONSON, J. The defendant has filed an able petition for rehearing. Among other things he earnestly contends that the writer, in his specially concurring opinion, has misconstrued the meaning and application of section 20, quoted in such opinion. He contends that section 20 confers a right of action upon dependents only in case of an injury or death for which compensation is payable under the act, not in cases where compensation is provided in the act; that compensation is payable under the act only in cases where the employer has contributed his assessment to the Compensation Fund; that, under section 10 of the act, it can only be disbursed to such employees of employers as have paid into the fund the premiums applicable; that this section, therefore, refers to that class of cases where the employer has paid his assessment, and, by reason thereof, compensation has become payable to the employee or his dependents, and, where an injury having occurred through the willful act or negligence of some other person, a right of action for damages is given against such other person. The contentions are not without merit, and require, by their able presentation, consideration. However, technical reasoning should not override the intent and purview of the act to allow a remedy for a wrongful act. If the defendant had complied with the terms of the Compensation Act, manifestly compensation would have been payable under the act to the dependents of the deceased boy. Section 6 of the act requires every employer to contribute to the fund. It relieves such employer, so contributing, from all liability for personal injuries or death sustained by his employees, and the persons entitled to compensation under the act shall have recourse therefor only to the North Dakota Compensation Fund, and not to the employer. Section 9 of the act likewise relieves employers who comply with the provisions of said section 6 from liability to respond in damages at common law or by statute for injury or death of any employee, wherever occurred, with the exception that it does not apply to minors employed in violation of law, in which case both remedies shall be applicable. These sections are followed by section 20, quoted in the special concurring opinion. This section 20 provides that, when death for which compensation is payable under the act shall have been sustained under circumstances creating in some other person than the Compensation Fund a legal liability to pay damages in respect thereto, his dependents may at their option, either claim compensation under the act or obtain damages from, or proceed at law against, such other person to recover damages. It is clear that

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under the act the defendant is that other person against whom there exists a legal liability to pay damages; that legal liability is provided under the terms of sections 6, 9, and 11. The only reason why compensation under the act is not payable, if not payable in fact, is because the defendant failed to comply with the terms of the act. In law, compensation is payable under the act because it was a duty of the defendant to comply with the terms thereof. It is unnecessary to determine the liability of the Compensation Fund because it is not involved in the instant case. I therefore adhere to the conclusion that the maintenance of an action by the dependent of the employee is not excluded by the act.

Petition for rehearing should be denied.

INDUSTRIAL COMMISSION v. DRAKE. (No. 16849.)

(Supreme Court of Ohio. Dec. 20, 1921.)

134 Northeastern Reporter, 465.

(Syllabus by the Court.)

1. MASTER AND SERVANT — AMOUNT OF COMPENSATION TO PARTLY DEPENDENT PERSONS DISCRETIONARY.

Section 1465—82, General Code, classifies dependent persons into two classes, to wit, those wholly dependent and those partly dependent. By the provisions of that section a discretion is lodged in the Industrial Commission permitting an award to partly dependent persons equal to the maximum award allowed to wholly dependent persons, provided that in the case of partly dependent persons the award does not exceed the maximum of $5 000. The classification necessarily contemplates that the maximum award should be made to partly dependent persons only, in especially meritorious cases.

(For other cases, see Master and Servant, Dec. Dig. § 386.)

2. MASTER AND SERVANT—DISCRETION AND DUTY VESTED IN INDUSTRIAL COMMISSION DEVOLVES UPON COURT OR JURY ON APPEAL.

Upon appeal the same discretion and duty which were originally lodged in the Commission devolve upon the court or jury hearing the appeal.

(For other cases, see Master and Servant, Dec. Dig. § 417[5].)

Hough, Robinson, and Matthias, JJ., dissenting in part.

Error to Court of Appeals, Mahoning County.

Proceedings under the Workmen's Compensation Law by Charles L. Drake for compensation for death of his father, Charles Drake, opposed by the American Railway Construction Company, employer. Award for claimant by court of common pleas on appeal from order of Industrial Commission denying compensation, affirmed by the Court of Appeals, and employer brings error. Judgments of court of common pleas and of the Court of Appeals reversed, and cause remanded to court of common pleas, with instructions.

Charles Drake, prior to March 16, 1918, was employed by the American Railway Construction Company, and on or about that date, while engaged in the course of the duties of his employment as a section man and

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construction worker, was injured and killed. The American Railway Construction Company had complied with the Workmen's Compensation Law (Gen. Code, §§ 1465—37 to 1465—108) by paying the required premium into the state insurance fund. The accident being reported to the Industrial Commission, the Commission found that the deceased was injured and killed in the course of his employment and ordered that the medical and funeral expenses be paid. Thereafter Charles L. Drake, a son of the deceased, filed an application for compensation on account of the death of his father; said application being filed on or about April 6, 1918. The application was heard by the Commission August 23, 1918, and was denied on the ground that Charles L. Drake was not dependent upon the deceased at the time of his injuries and death. Thereupon an appeal was entered and the cause came on for trial in the court of common pleas of Mahoning county. Certain facts were stipulated as follows: That the son was not residing with the father at the time of the father's death and had not ben residing with him for two years prior thereto, but was residing during all of that time with his grandmother in the state of Indiana; that during the year 1916 the decedent, Charles Drake, contributed toward the support of the son the sum of $250; that during the year 1917 up to August of that year $200 had been contributed; and that nothing was contributed thereafter. In addition to the agreed facts the undisputed evidence discloses that the wife of the decedent obtained a divorce more than two years before his death; that although there was no court order requiring the father to support or maintain the child, the custody of the child was awarded to the mother; and that there was an indefinite promise made by the father to pay something toward the support and maintenance of the child if permitted to visit him. Charles L. Drake, the son, was 12 years old at the time of the hearing, and the decedent was 43 years old at the the time of his death. His earnings averaged $17.92 per week. It does not appear that the mother contributed anything to the support of the child, but that the support which the child received, over and above the contributions from the father, was contributed by the grandmother with whom the child was living.

Upon trial of the case no jury was demanded, and the cause was heard by the court, who awarded compensation in the sum of $11.94 per week for a period of 416 weeks from the date of the injury, and also the costs of the proceeding, and made an allowance of $1,250 as attorney fees to the attorneys for the claimant.

John G. Price, Atty. Gen., H. H. Hull, Pros. Atty., of Youngstown, and R. R. Zurmehly, of Columbus, for plaintiff in error.

McKain & Ohl and Carl Armstrong, all of Youngstown, for defendant in error.

MARSHALL, C. J. Although the claim was refused in toto by the Commission, it is only contended in this court that the judgment rendered in favor of the claimant is excessive and exceeds the amount allowed by law, and that the attorney fees taxed against the Commission are exorbitant.

The court of common pleas made a finding that the claimant was only partially dependent upon the deceased at the time of his death, but nevertheless made an allowance equal to the maximum allowance which could have been allowed if the finding had been that the claimant was wholly dependent. We are cited to the provisions of section 1465—82, General Code (107 O. L. 450), and especially to paragraphs 2 and 3 of that section, as follows:

"2. If there are wholly dependent persons at the time of the death, the payment shall be sixty-six and two-thirds per cent. of the average weekly wages, * * * and to continue for the remainder of the period

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between the date of the death and eight years after the date of the injury and not to amount to more than a maximum of five thousand dollars, nor less than a minimum of two thousand dollars.

"3. If there are partly dependent persons at the time of the death, the payment shall be sixty-six and two-thirds per cent. of the average weekly wages, * * * and to continue for all or such portion of the period of eight years after the date of the injury, as the board in each case may determine, and not to amount to more than a maximum of five thousand dollars."

It will be seen by reference to the above-quoted section that the amount of the weekly payment in each instance will be the same and that the only difference is that pertaining to the period over which the payment shall extend, and it is specifically provided that it shall "continue for all or such portion of the period of eight years after the date of the injury, as the board in each case may determine, and not to amount to more than a maximum of five thousand dollars."

[1, 2] Although the difference in compensation between cases of persons wholly dependent and persons partly dependent is confined to one feature, it nevertheless clearly appears that the Legislature has created two separate and distinct classes in the same enactment, under paragraphs separately stated and numbered, and the conclusion is therefore irresistible that the classification was not intended to be a vain and meaningless thing. It necessarily follows that the Legislature intended that certain distinctions should be made, and although a discretion was reposed in the Commission, it cannot be held to be an arbitrary discretion, but rather a judicial discretion, and therefore the product of a careful consideration of all the facts in each case, keeping clearly in mind the distinction between persons wholly dependent and those partly dependent, and also keeping clearly in mind all the other sections of the chapter pertaining to the same subject, including the provisions of section 1465—68, General Code, which are in substance that the compensation awarded shall be "for loss sustained on account of such injury or death."

This cause was heard by the court of common pleas upon appeal from an adverse order of the Commission, the case being heard by the court without any jury having been demanded, and upon the evidence submitted the court of common pleas made a finding that the claimant was only partially dependent upon the deceased at the time of his death. This court may not properly inquire into the consideration which caused the court of common pleas to reach the conclusion of partial dependency. The question before this court is whether upon the finding of fact of a condition of partial dependency the court of common pleas was justified in making an order that the claimant was entitled to receive the full maximum allowance to partial dependents, which is equivalent to the maximum allowance to persons wholly dependent.

Naturally, if the classification made by paragraphs 2 and 3 of section 1465—82, General Code, is to be observed, and the distinctions therein made between persons wholly dependent and those partly dependent are to have any practical effect, the undisputed facts must be looked to to determine whether a sound discretion has been exercised. The undisputed facts in this case are that a boy in his teens, sound in mind and body, was being only partly maintained by the decedent, the greater portion of his support being contributed by his maternal grandmother. It therefore clearly appears that the "loss sustained" is far less than two-thirds of the weekly wage of the decedent. Therefore the legal question presented is whether in the exercise of a sound discretion the court could properly award the full maximum allowance payable to persons wholly dependent. This court cannot help wondering what allowance would have been made by the court of common pleas if the decedent had left a widow and a number of small children with whom he was living at the time of his death.

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In cases where a discretion is lodged, the maximum award should not be made unless the case is especially meritorious. If the court of common pleas had found as a fact that the claimant was wholly dependent, a question of greater difficulty would be presented; but having found that the claimant was only partly dependent, and the legislative intent being clear that some distinction was intended to be drawn between persons wholly dependent and persons partly dependent, the maximum allowance should be reserved for cases more meritorious than the undisputed facts of this case disclose.

[3] The Industrial Commission evidently rejected the claim on the ground that the decedent, at the time of the divorce proceedings, did not become obligated to the support of his son, and that he had never in fact fully supported and maintained him. In this the Commission undoubtedly erred because it has been held by this court in the case of State v. Stouffer, 65 Ohio St. 47, 60 N. E. 985, that the obligation of the father is not excused on the ground that the custody of a child has been awarded to a divorced wife in a suit where no order was made for allowance and support of children. The court of common pleas was therefore justified in making an award.

This court is of the opinion that the award of the maximum allowance is not justified under the facts of this case, and yet it is not the proper province of this court to fix the amount. But the cause should be remanded to the court of common pleas to be reheard and a proper award made, which, upon a consideration of the evidence, and in the true spirit of the sections of the statutes above quoted, will properly reflect the "loss sustained."

It must at all times be borne in mind, and it is proper to remark in disposing of this case, that the Workmen's Compensation Law involves the collection and disbursement of funds for the equal and ratable benefit of claimants, and that a successful administration of the law demands that every claimant should receive all that he is fairly entitled to; but it is equally important that no claimant should be awarded a sum in excess of that to which he is fairly entitled. The state insurance fund is in the nature of a trust fund to be administered for the benefit of workmen who suffer injury, and for the dependents of those who suffer death, in the course of employment. The disbursements pursuant to awards made by the Industrial Commission, and judgments rendered in favor of claimants upon appeal from the orders of the Commission, are in the nature of a distribution of the trust funds under the control of the Commission among those entitled thereto. No one would contend that the awards and judgments are full in compensation for losses sustained. Pain and suffering are not compensated. Neither can punitive damages be awarded. The purpose of the acts is to only partly reimburse for the impairment of earning capacity, on the theory that such partial reimbursement without expense or delay and without the uncertainties of litigation is more desirable than the opportunity of full compensation for all loss and damages at the hands of courts and juries, with the attendant delays, risks, and expenses. While the fund is created by premiums paid by employers, it must not be assumed that such fund can be made to meet the payment of unjust claims without an injustice being done to just claimants as well as to all workmen who may never make claims. While the premium is paid by employers, in the last analysis it amounts to a deduction from the wages due the workmen to create a fund to be administered for their benefit. It is stated in the title of the act wherein the state insurance fund was created that the fund is created for the benefit of injured and dependents of killed employees, and to provide for the administration of such fund. It is not a pension or a bounty or charity, but in the strictest sense a mutual insurance in which benefits are payable out of a fund created by contributions from a large number of possible beneficiaries, where it is hoped and expected that only a few

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will become actual beneficiaries. Insurers and insured are members of the same class, and all are similarly and equally interested in a fair and equitable adjustment of claims. This can be brought about only by strict uniformity of administration, and, in those cases where a discretion is lodged, by such discretion being soundly and judicially exercised. Any unjustified generosity in favor of one claimant must operate as an injustice to all other claimants, because the fund is to that extent improperly depleted. It is therefore very necessary that trial courts and juries, as well as the Industrial Commission, shall exercise the utmost caution and care in making awards of compensation.

It is further claimed as error in this case that there was an abuse of discretion by the court of common pleas in the award of an excessive allowance of compensation for services of legal counsel. While this court will recognize the fact that the trial court has better means of forming a judgment of the value of attorneys' services, yet the record discloses that very little testimony was introduced and very little time consumed, either in the preparation or presentation of the case, and without attempting to fix the value of the services this court is of the opinion that the amount awarded was greatly in excess of a just and reasonable allowance.

For the foregoing reasons the judgments of the court of common pleas and of the Court of Appeals will be reversed, and the cause remanded to the court of common pleas for further proceedings in accordance with this opinion.

Judgments reversed.

Johnson, Wanamaker, and Jones, JJ., concur.

Hough, Robinson and Matthias, JJ., concur in propositions 2 and 3 of the syllabus, but not in the judgment.

McALESTER COLLIERY CO. v. STATE INDUSTRIAL COMMISSION ET AL. (No. 12471.)

(Supreme Court of Oklahoma. Jan. 17, 1922. Rehearing Denied Feb. 14, 1922.)

204 Pacific Reporter 630.

(Syllabus by the Court.)

1. MASTER AND SERVANT—COMPENSATION LAW LIBERALLY CONSTRUED.

The Workmen's Compensation Law is remedial legislation and is for the benefit of the workmen and the state, and should, at all times, be broadly and liberally construed so as to effectuate its purpose.

(For other cases, see Master and Servant, Dec. Dig. § 348.)

2. MASTER AND SERVANT—FINDINGS OF FACT IN COMPENSATION CASE CONCLUSIVE.

Under section 10 of the act this court must accept the facts as found by the Commission, but from the facts thus found it may draw its own conclusions of law.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

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3. MASTER AND SERVANT—MOTION FOR ADDITIONAL FINDING IN COMPENSATION CASE PERMISSIBLE.

If, however, the facts found by the Commission are not in accord with the judgment of either party as to what the findings of fact should be, or is not as full as desired, either party may, by motion or petition, request of the Commission a further and additional finding.

(For other cases, see Master and Servant, Dec. Dig. § 412.)

4. MASTER AND SERVANT—COMPENSATION PROCEEDINGS INCLUDED IN RECORD.

The record upon which the cause must be determined in this court is a certified copy of the award or decision of the Commission attached to the petition of the complainant, and the pleadings filed, if any, by the defendant to the petition and the Industrial Commission.

(For other cases, see Master and Servant, Dec. Dig. § 417[4¼].)

5. MASTER AND SERVANT—COURT CANNOT WEIGH EVIDENCE IN COMPENSATION CASE.

The decision of the State Industrial Commission is final as to all questions of fact, and this court has no authority to weigh the evidence upon which any finding of fact is based.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Appeal from the State Industrial Commission; Baxter Taylor, Chairman.

Proceeding by Leonard Darby under the Workmen's Compensation Law for an award for personal injuries, opposed by the McAlester Colliery Company, employer. From an award of the Industrial Commission, the employer appeals. Affirmed.

C. C. Null, of Hartshorne, for petitioner.

E. C. Marianelli, of McAlester, for respondent Darby.

JOHNSON, J. This is an appeal to this court to review an award of the State Industrial Commission.

[1] In 1915 the Legislature enacted what is known as the Workmen's Compensation Law (Laws 1915, c. 246). Legislation of similar character has been enacted by many of the states, they coming to recognize that persons employed in hazardous undertakings where liability to injury is great are entitled to a more speedy and effectual remedy for redress of their injuries than that ordinarily provided by the rules of regular court procedure, and that numerous strictures of the common law should be removed. This legislation is remedial, and is for the benefit of the workmen and the state, and should at all times be broadly and liberally construed so as to effectuate its purpose. Scott's Case, 117 Me. 436, 104 Atl. 794; Fidelity & Guaranty Co. v. Wickline, 103 Neb. 21, 170 N. W. 193, 6 A. L. R. 1267; Holt Lumber Co. v. Ind. Com., 168 Wis. 381, 170 N. W. 366; Rish v. Iowa Portland Cement Co., 186 Iowa, 443, 170 N. W. 532; Elks v. Conn, 186 Iowa, 48, 172 N. W. 173; Pater v. Superior Steel Co., 263 Pa. 244, 106 Atl. 202; Am. Ind. Co. v. Dinkins (Tex. Civ. App.) 211 S. W. 949; Mahowald v. Thompson-Starrett Co., 134 Minn. 113, 158 N. W. 913, 159 N. W. 565; Appeal of Hotel Bond Co., 89 Conn. 143, 93 Atl. 245; Packett v. Mooretown Creamery Co., 91 Vt. 97, 99 Atl. 638, L. R. A. 1918F, 173.

[2] The act at page 593 also creates what is known as the State Industrial Commission, which has exclusive original jurisdiction in all cases arising under it. Sections 10, 11, and 13 of article 2 provide:

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"Sec. 10. The decision of the Commission shall be final as to all questions of fact, and except as provided in section 13 of this article, as to all questions of law.

"Sec. 11. In any proceeding for the enforcement of a claim for compensation under this act, it shall be presumed in the absence of substantial evidence to the contrary:

"1. That the claim comes within the provisions of this act.

"2. That sufficient notice thereof was given.

"3. That the injury was not occasioned by the willful intention of the injured employee to bring about the injury of himself or of another.

"4. That the injury did not result solely from the intoxication of the injured employee while on duty.

"5. That the injury did not result directly from the willful failure of the injured employe to use a guard or protection against accident furnished for his use pursuant to any statute or by order of the Labor Commissioner."

"Sec. 13. The award or decision of the Commission shall be final and conclusive upon all questions within its jurisdiction between the parties, unless within 30 days after a copy of such award or decision has been sent by said Commission to the parties affected, an action is commenced in the Supreme Court of the state to review such award or decision. Said Supreme Court shall have original jurisdiction of such action, and is authorized to prescribe rules for the commencement and trial of the same. Such action shall be commenced by filing with the clerk of the Supreme Court a certified copy of the award or decision of the Commission attached to the petition by the complainant, wherein the complainant or petitioner shall make his assignments or specifications as to wherein said award or decision is erroneous and illegal. Said proceeding shall be heard in a summary manner and have precedence over all other civil cases in such court, except preferred Corporation Commission appeals. The Commission shall be deemed a party to such proceeding and the Attorney General, without extra compensation, shall represent the Commission therein. Such action shall be subject to the law and practice applicable to other civil actions cognizable in said court. Upon the final determination of said action in which the award or decision of the Commission is sought to be reviewed, the Commission shall make an order or decision in accordance with the judgment of said court."

On the 24th day of June, 1921, the State Industrial Commission, in accordance with the provisions of the law and the power conferred upon it thereby, made an award in the case at bar, and found and decided as a fact that the claimant herein was injured on the 4th day of November, 1920, while in the course of and growing out of his emloyment with the respondent; that said injury was accidental, and as a result thereof the claimant sustained the loss of his left arm, and one-half of his second finger, and the third finger of the right hand; and that his wages at the time of his injury amounted to $7.50 per day, and drew from said findings of fact the legal conclusion that the claimant is entitled to compensation for 250 weeks for the loss of his left arm; for 15 weeks for the loss of one-half of his second finger, and for 20 weeks for the loss of his third finger at the rate of $18 per week, together with all medical and hospital expenses incurred by reason of the injury.

To review said award, petitioner on the 18th day of July, 1921, filed his petition in this court, with certified copy of said award attached, and assigns only one specification of error, which is as follows:

"Your petitioner would further show the court that the said order and judgment of the said State Industrial Commission is not supported by the facts and is contrary to law."

Under section 10, art. 2, of the act this court must accept the facts as found by the Commission, but from the facts thus found it may draw its

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own independent conclusions of law. It cannot weigh the evidence to ascertain whether or not it supports the facts found by the Commission. The finding of fact by the Commission is binding upon this court where there is competent evidence to support it. Whether the facts found constitute a cause of recovery is a question of law to be decided by this court.

In discussing this question, the court, in the case of Choctaw Portland Cement Co. et al. v. Lamb et al., 79 Okl. 109, 189 Pac. 750, in an opinion by Mr. Justice Rain y, said:

"The decision of the [State Industrial] Commission is final as to all questions of fact, and this court is not authorized to weigh the evidence upon which any finding of fact is based."

The same rule has been announced in Board of Commissioners of Cleveland County v. Barr et al., 173 Pac. 206; Stephenson v. State Industrial Commission et al., 79 Okl. 228, 192 Pac. 580; Raulerson v. State Industrial Commission et al., 6 Okl. 8, 183 Pac. 880 Booth & Flinn v. Cook et al., 79 Okl. 280, 193 Pac. 36; Mullen v. Mitchell, No. 11627, 197 Pac. 171, not officially reported; the Board of County Commisioners of Okmulgee County, Okl., v. State of Oklahoma, upon relation of W. C. Jackson et al., No. 11,914, 201 Pac. 998, filed the 1st day of November, 1921, and not yet officially reported.

[3] If, however, the facts found by the Commission are not in accord with the judgment of either party as to what the finding of fact should be, or is not as full as desired, either party may, by motion or petition, request of the Commission a further and additional finding.

[4-6] While this court is a court of original jurisdiction under the act yet it is only for the purpose of reviewing the award and decision of the Commission, and this review shall be by filing with the clerk of the court a certified copy of the award or decision of the Commission attached to the petition of the party complaining, in which shall be set forth the errors of the Commission of which he complains.

The Commission shall be deemed a party, represented by the Attorney General, to defend its action. It may file an answer or their pleading, as it chooses; if it does not do so its defense will be treated as though it and its action necessarily and on purpose presented the defense of the defendant to the petition for review, although he may plead independently if he so desires.

Upon the record as thus made in this court, the decision or award of the Commission must be reviewed. Rule 6 of the rules prescribed for review of cases arising under this act provides for bringing up the records of the Commission for review.

The award of the State Industrial Commission is affirmed, and the cause remanded, to be proceeded with in accordance with this opinion.

Pitchford. V. C. J., and Kane, McNeill, Nicholson, Elting, and Kennamer, JJ., concur.

WHITEHEAD COAL MINING CO. ET AL. v. STATE INDUSTRIAL COMMISSION ET AL. (No. 12347.)

(Supreme Court of Oklahoma. Feb. 14, 1922.)

204 Pacific Reporter 905.

(Syllabus by the Court.)

1. MASTER AND SERVANT—TERMINATION OF DISABILITY MUST APPEAR ON MOTION TO DISCONTINUE COMPENSATION.

Where an employee has been injured in the course of his emloyment and is granted an award by the State Industrial Commission under the

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Workmen's Compensation Act (Laws 1915, c 246), it is not error for the State Industrial Commission to overrule a motion to discontinue such compensation, when it appears from the evidence that the disability has not finally terminated.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

2. MASTER AND SERVANT—REFUSAL TO DISCONTINUE COMPENSATION SUSTAINED.

The evidence examined, and *held,* that it supports the order of the State Industrial Commission.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

Appeal from State Industrial Commission.

Proceeding by Lee Williams for an award under the Workmen's Compensation Act, opposed by the Whitehead Coal Mining Company, employer, and the Consolidated Underwriters, insurer, and from an order of the Industrial Commission making the award, the employer and insurer appeal. Affirmed.

Simpson, Hummer & Foster, of Henryetta, and Breck Moss, of Oklahoma City, for appellants.

R. E. Wood, Asst. Atty. Gen., for appellees.

MILLER, J. This is an appeal from an order of the State Industrial Commission, made on the 5th day of May, 1921, overruling the motion of the Whitehead Coal Mining Company, a corporation, and Consolidated Underwriters, to discontinue the compensation allowed to Lee Williams. The Whitehead Coal Mining Company, a corpoation, and Consolidated Underwriters have appealed from the order of the State Industrial Commission overrfuling their motion, and appear here as petitioners.

Lee Williams operated a cutting machine in the coal mine of the Whitehead Coal Mining Company. On the 22d day of June, 1920, while in the employ of said coal mining company, in the course of his employment he was injured by some rock falling upon him which rendered him unconscious for several hours. The most apparent injury was to his hand. He was awarded compensation at the rate of $18 per week, to be computed from the 22d day of June, 1920, the date of the injury, and continue said weekly payments until the final termination of the disability, or until otherwise ordered by the Commission.

In October, 1920, the petitioners in this court filed a motion with the State Industrial Commission to discontinue said payments. Thereafter a hearing was had, testimony taken, and on the 5th day of May, 1921, the State Industrial Commission made its order, which in part reads as follows:

"That the claimant's disability had not terminated due to the injury that he received on the 22d day of June, 1920, while in the employ of the Whitehead Coal & Mining Company. The Commission further finds:

"That the motion to discontinue compensation should be overruled.

"It is therefore ordered: That the motion of the respondent and insurance carrier to discontinue compensation be overruled and the award heretofore made on the 9th day of August, 1920, recorded in Journal 42, page 268, be and the same shall remain in full force and effect."

The petitioners contend that the order of the Commission continuing the compensation of the respondent is not based upon any evidence and that the Commission has no power to make a finding without competent evidence.

[1] We have examined the record in this case, and the record fails to show that Lee Williams has ever fully recovered from the injury he received in the course of his employment on the 22d day of June, 1920. It.

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is admitted that he was injured, and until the disability caused by such injury terminates, the State Industrial Commission has no authority to discontinue the compensation except by the lapse of time provided for in the statute according to the particular disability.

[2] The order of the State Industrial Commission overruling the motion of petitioners to discontinue the compensation is fully sustained by the evidence, and is hereby affirmed.

Pitchford, V. C. J., and McNeill, Elting, Kennamer, and Nicholson, JJ., concur.

FERDISKO v. W. F. TRIMBLE & SONS CO. ET AL.

(Supreme Court of Pennsylvania. Jan. 3, 1922.)

116 Atlantic Reporter, 142.

MASTER AND SERVANT—COMMUTED COMPENSATION TO WIDOW ON REMARRIAGE FOR BENEFIT OF HERSELF AND MINOR CHILDREN.

Workmen's Compensation Act art. 3, § 307, as amended by Act June 26, 1919 (P. L. 642, § 2, par. 7; Pa. St. 1920, § 22000), requiring employer to pay widow on remarriage "the then value of the compensation payable to her during one-third of the" balance of compensation, period does not require employer to pay widow, on her remarriage, a commuted sum for her own use, and pay the children during the balance of the compensation period from the date of such remarriage, but merely provides for payment of weekly compensation to wife during one-third of the balance of the period, for the support of herself and children, and for payment to children from time of the last payment to wife.

(For other cases, see Master and Servant, Dec. Dig. § 386[4].)

Appeal from Court of Common Pleas, Allegheny County; Stephen Stone, Judge.

Proceedings under the Workmen's Compensation Act by Annie Ferdisko for compensation for death of John Ferdisko, her husband, opposed by the W. F. Trimble & Sons Company, employer, and the Ætna Life Insurance Company and the Travelers' Insurance Company, insurance carriers. Award for claimant approved by the court of common pleas and employer and insurance carriers appeal. Order of common pleas modified.

Argued before Moschzisker, C. J., and Frazer, Walling, Kephart, Sadler, and Schaffer, JJ.

John M. Reed and Frank P. Martin, both of Pittsburgh, for appellants.

William D. Grimes and Austin L. George, both of Pittsburgh, for appellee.

SADLER, J. John Ferdisko was killed while engaged in the regular course of business of the Trimble & Sons Company, leaving to survive him a widow and five minor children. In December of the same year a claim petition was presented, the wife having in the meantime remarried. An award of compensation was made to begin as of June 28, 1920. To the widow was given 60 per cent. of the wages, not exceeding $20, this being the rate fixed by the Act of 1915 (June 2, 1915; P. L. 736), as amended by Act June 26, 1919, § 307, par. 4 (P. L. 642; Pa. St. 1920,

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§ 21999). The allowance was directed to be paid until November 25, 1920, the date of the remarriage. An additional award was made to her of 40 per cent. for one-third of the remaining 300 weeks, under the proviso in paragraph 7 of section 307 of the Act of 1919 (section 22000), and of 60 per cent. from the same date to the minor children, until the end of the 300-week period, the allowance being then reduced in accordance with the terms of this act, continuing, however, in each case until the age of sixten was reached. An appeal was taken from this ruling of the board to the court of common pleas, which approved the finding. This decision we are asked to review.

The difficulty which has arisen is due to the amending Act of 1919. Under the terms of the earlier legislation the widow became entitled to compensation for 300 weeks. This sum was for the support of herself and children, and not exclusively for her own benefit. If the award to her was commuted, the minor children were entitled to protection, for their interests were likewise affected. In Lovasz v. Carnegie Steel Co., 266 Pa. 84. 86, 109 Atl. 601, we said:

"While the compensation payable as stated intervals is given to the widow, this does not vest in her the absolute right to squander the money and deprive the children of the support intended by the law, as the State, acting through one of its designated agencies, will, when called upon, see that the fund is properly applied. It is, therefore, an incorrect statement to say she can refuse to spend the money for care and maintenance of the children and leave them without such attention."

If she remarried, the payment to her ceased at once, and was applied thereafter for the benefit of the minors alone; it being apparently assumed that the new relationship would interfere with the furnishing of proper support to the children.

This legislative policy was modified by the Act of 1919 (section 307, par. 7), which now directs:

"Provided, however, that upon the remarriage of any widow, other than an nonresident alien widow, the employer shall pay to such widow the then value of the compensation payable to her, during one-third of the period during which compensation then remains payable but not exceeding one hundred weeks, calculated in accordance with the provisions of section three hundred sixteen of this article."

The learned court below was of the opinion that this gave to the widow a commuted sum for her own use, and continued at the same time the full compensation for the children during the balance of the 300-week period, and thereafter at different rates until the age of 16 was reached. To so hold would subject the employer to an additional financial burden, brought about through no fault of his own. The language of the amending act does not justify the inference that such was the purpose. Additional words would have to be added to reach that conclusion, and this will not be done unless necessary to carry out a plain legislative intent. Catlin v. Pickett & Co., 262 Pa. 351, 105 Atl. 503.

Under the earlier law, the compensation ceased entirely upon remarriage. The result was to discourage the widow from such action, and encourage in place thereof the formation of illicit relationships, so that the payments should not be lost. It was to remedy this situation that the new plan was devised. Instead of having all payments withdrawn from her, though presumably her minor children will still be in her care, a commuted sum was provided for assistance, it may be, in forming the new household. It is to be kept in mind that the original compensation was not for her sole benefit, but for the joint support of the family. She had but a fractional interest in the payments, though receiving them all. Originally, she lost even that portion when she remarried, but now is permitted to retain part for a limited period of time. The care of the children must continue as well, and the moneys paid must be used also for their maintenance. Paragraph 7, further amending the Act of 1915,

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permits the board to appoint a guardian when necessary to protect them, or to direct payments to the surviving parent, requiring a bond, with an accounting of receipts and disbursements, to insure proper application of the fund.

The doubt which has arisen in this case, as to the effect of the proviso, is largely caused by the language of the sentence following it, which reads:

"If the compensation payable under this section to any person shall, for any cause, cease, the compensation to the remaining persons entitled thereunder shall thereafter be the same as would have been payable to them had they been the only persons entitled to compensation at the time of the death of the deceased."

The use of the word "thereafter" has been taken by the court below as conclusively indicating that the award to the minors shall begin as of the date of the remarriage, and the making of the commuted payment to the widow; but the section as a whole must be considered in searching for the legislative purpose. The clause in question is the same as that appearing in paragraph 9, § 307, of the Act of 1915. When there used it was appropriate, for all interest of the widow ceased with the remarriage, and the children acquired from that date the right to the entire award. Here, the situation differs, for the widow receives a sum for a further period, but for use of the entire family, as if she had not remarried. A contrary construction would lead to increased burdens upon the employer, which the act shows no purpose to assess.

It follows that the final order of the common pleas must be modified as to the amounts awarded; therefore it is now decreed that Annie Ferdisko is to be paid compensation, at the rate of 60 per cent. of $20 per week, from June 28, 1920, to November 25, 1920, with interest; and a like sum for $92^{19}/_{21}$ weeks thereafter, for the support of herself and children, calculated in accordance with the provisions of section 316 of the Workmen's Compensation Act of 1915 (Pa. St. 1920, § 22013). From the expiration of this period, September 14, 1922, at the rate of 60 per cent. of $20, or $12, to Mary, Catherine, John, Rosa, and Anthony Ferdisko, to December 5, 1924, when Mary becomes 16 years of age; then at the rate of $10 to the other children, until March 27, 1926, the end of the 300-week period. From that date, compensation is awarded to Catherine, John, Rosa, and Anthony, at the rate of 45 per cent. of $20, or $9, per week until May 28, 1927, when Catherine becomes 16; then to the remaining three at 35 per cent., or $7 per week, until July 10, 1929, when John reaches the age of 16; then to Rosa and Anthony at 25 per cent. of $20 per week, or $5, until December 11, 1931, and from that date at the rate of 15 per cent., or $3, to Anthony, until March 15, 1933, when he attains the age of 16.

MILLERS' INDEMNITY UNDERWRITERS v. GREEN ET AL.

(No. 1899.)

(Court of Civil Appeals of Texas. Amarillo. Feb. 1, 1922. Rehearing Denied March 1, 1922.)

237 Southwestern Reporter 979.

1. MASTER AND SERVANT—"DEPENDENT PARENTS" WITHIN COMPENSATION LAW INCLUDES THOSE PARTIALLY DEPENDENT.

In proceedings by parents to recover compensation for the death of their son, involving the issue as to whether they were "dependent" parents within Workmen's Compensation Law (Vernon's Ann. Civ. St. Supp. 1918,

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art. 5246—16), it was proper to submit the issue in language calling for a finding as to whether they were "dependent wholly or in part" on his labor, instead of a finding as to whether they were "dependent" upon him.

(For other cases, see Master and Servant, Dec. Dig. § 388.) Series, Dependent.)

3. MASTER AND SERVANT—COMPENSATION AWARD OF LUMP SUM RESTS IN DISCRETION OF TRIAL COURT.

Under Workmen's Compensation Law (Vernon's Ann. Civ. St. Supp. 1918, art. 5246—33), authorizing an award of a lump sum settlement in special cases where, in the judgment of the board, manifest hardship and injustice would otherwise result, the decision of the question is committed to the judgment of the board or to that of the district court in case of transfer of the proceedings, and the court's submission of the question to the jury will not be reviewed unless there is a manifest abuse of discretion.

(For other cases, see Master and Servant. Dec. Dig. § 418[5].)

4. MASTER AND SERVANT—ISSUE AS TO COMPENSATION AWARD IN LUMP SUM HELD PROPER.

Under Workmen's Compensation Law (Vernon's Ann. Civ. St. Supp. 1918, art. 5246—33), authorizing an award of a lump sum in special cases where, in the judgment of the board, manifest hardship and injustice would otherwise result, the submission of the issue as to whether the failure to pay a lump sum would work a manifest hardship and injustice on the claimants was not erroneous in failing to include in the submission of the issue the question as to whether it was a "special case."

(For other cases, see Master and Servant, Dec. Dig. § 417[5].)

6. MASTER AND SERVANT—OBJECTION TO COMPUTATION OF COMPENSATION HELD NOT AVAILABLE.

In proceedings brought to the district court under the Workmen's Compensation Act, the objection in the motion for new trial that the judgment did not follow the pleadings nor the verdict, and was not in accordance with the law, was not sufficient to call the court's attention to an error in computing the lump sum awarded as compensation, and the objection was not available on appeal.

(For other cases, see Master and Servant, Dec. Dig. § 418[3].)

Appeal from District Court, Moore County; W. I. Gamewell, Special Judge.

Proceeding by Robert F. Green and others against the Millers' Indemnity Underwriters before the Industrial Accident Board for an award. Case transferred to the district court, from whose judgment, awarding Robert F. Green and wife compensation, the Millers' Indemnity Underwriters appeals. Affirmed.

Neth L. Leachman and H. P. Lawther, both of Dallas, for appellant.

Engelking & Dotson, of Electra, for appellees.

BOYCE, J. This is an appeal by the Millers' Indemnity Underwriters from a judgment awarding Robert F. Green and his wife, Ora E. Green, compensation under the Workmen's Compensation Law of this state (Vernon's Ann. Civ. St. Supp. 1918, arts. 5246—1 to 5246—91) for the death of their son, Robert Lee Green.

Only two issues of fact were made in the trial: (1) As to whether the appellees were "dependent parents" within the meaning of that term as used in the law (article 5246—15, Vernon's Texas Civil Statutes, 1918

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Supp.); (2) as to whether the appellees were entitled to a lump sum settlement. Both of these issues were submitted to a jury and decided in appellee's favor. Appellant contends that it was entitled to a peremptory instruction in its favor as to these two issues of fact, and we make the following statement to be considered in connection with our disposition of these contentions:

[1] Robert Lee Green, at the time of his death on May 25, 1920, was driving a truck near Amarillo, Tex. The record does not show definitely just what his age was, but we infer that he was somewhere about 18 to 21 years old. His parents, at the time of his death, were living at Electra, and were engaged in running a confectionery and restaurant at such place. The father was at the time about 47 years old, and the mother 42. There were two children, boys, one 14 years old and the other 10. For about 13 years prior to 1920 the family had lived in Runnels County on a farm consisting of 110 acres, which they owned, and which was worth about $5,000. During the early part of the year 1919 Robert Lee Green was away from home at work, and sent his parents about $30 per month out of his wages. In April, 1919, the father took pellagra, and deceased returned to the farm, worked the crops, and harvested them. While not busy on the home farm he worked out for wages, and his wages were paid to his father. About $1,500 was realized from the crops made on the farm, and this money was applied in payment of debts, leaving the father an indebtedness of about $200. In January, 1920, the mother went to Electa and arranged to buy a confectionery and restaurant business. She made a rash payment on the purchase price of the business by using the proceeds of the sale of Robert Lee Green's cattle and some cattle and other personal property owned by the parents, but the embarkation in this business left the parents considerably in debt. About the first of December, 1919, deceased went to work at Wichita Falls, and during that month sent his mother $25. He helped the family move in January, 1920, and paid some of the expenses of the moving. In March he again sent his mother $25, and during the latter part of March went to Amarillo to work. Before leaving he bought some groceries for the family, and told his mother that when the business opened up he would return and help her with it. The Greens did not get possession of the said business until May 21, 1920. From February, 1920, to such time Mrs. Green and her children ran a little milk station, and Mrs. Green worked in the confectionery store without compensation for the purpose of learning the business. The father was sick during all the year 1919, with pellagra. He was getting some better when he took the "flu" about February, 1920, and was unable to do work of any consequence up to the time of the son's death, and has never fully regained his health. For a few months after it was opened the confectionery and restaurant business prospered, but at the time of the trial, and for several months before that, it had not been making expenses, and, according to appellees' testimony, their debts were increasing. At the time of the trial they owed about $4,500 on this business; $2,500 of this was past due, and the creditors were calling for their money.

Appellant's brief contains an interesting history of the development of the Compensation Law, and reference to a great many decisions that have dealt with such laws and applied them to facts analogous to those presented by this case. The question as to the construction of the term "dependency," as used in such laws, has been frequently before the courts, and two of the Court of Civil Appeals of this state have already had occasion to consider this very provision of our own statute. Southern Insurance Co. v. Hibbs, 221 S. W. 303; Lumbermen's Reciprocal Association v. Warner, 234 S. W. 545. We therefore omit any extended discussion of such question. In the case first cited the court said:

"The question of dependency is one of fact rather than a question of law, and each case must rest on its own facts. The test of dependency is not, whether the family could support life without the services or con-

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tributions of the deceased but whether they depended upon them as part of their income or means of living. Bradbury, Workmen's Compensation, pp. 571 to 573. All the cases seem to hold that partial dependency is all that is required, and a mere temporary intermission in the performance of services or the making of contributions will not destroy dependency."

This statement seems to be well sustained by the authorities. Note, Ann. Cas. 1913E, 481; Ann. Cas. 1918B, 750, 761; Honnold on Workmen's Compensation, §§ 71-77; 28 R. C. L. p. 770; and, in addition, authorities cited in the two cases above referred to. Appellees' evidence shows that they had in the past received from their son material and needed contribution to their suport, both in labor and money. They testified that they expected to receive and depended on receiving such aid in the future; and the jury were warranted in finding that their expectations were well founded. The authorities cited sustain the action of the trial court in submitting the issue in this case to the jury. The court submitted the issue of dependency in this language:

"Were the defendants Robert F. Green and Ora E. Green, as parents of Robert Lee Green, deceased, dependent wholly or in part upon the labor of the deceased, Robert Lee Green?"

The appellant's third proposition complains of this method of submitting the issue, and the fourth proposition asserts that the court erred in not submitting appellant's requested issue as follows:

"Were the defendants, Robert F. Green and Ora E. Green, taking into consideration their condition and circumstances in life, whatever you may find that and those to be, dependent upon Robert Lee Green at the time of his death?"

If it be true that the law intended by the word "dependent" to include not only those who were wholly dependent, but also those partially dependent, as has been held in the authorities already cited, we can see no good reason to hold that it would be error for the court to put the issue as stated; otherwise a jury would be left to conjecture as to such matter. In both the Texas cases cited the issue as to partial dependency was submitted, as in this case, though no objection appears to have been made by the appellants in those cases on that account. We overrule these two propositions.

[2] The second proposition is that the court erred in refusing to submit this issue:

"Were the amounts that Robert Lee Green gave to his parents, if any, prior to his death, voluntary gifts?"

This requested issue called for a finding of an evidentiary fact, and there was no error in refusing it. R. C. S. art. 1985.

[3, 4] The fifth proposition assigns error in the submission of issue No. 5, which was as follows:

"Would a failure of the plaintiff, Millers' Indemnity Undewriters, to make a lump sum settlement with the defendants of the compensation, if any, owing them on account of the death of the said Robert Lee Green, work a manifest hardship and injustice to the defendants, Robert F. Green and Ora E. Green?"

Two grounds of error are urged under this proposition; First, that, under the undisputed eivdence, no award of a lump sum settlement would be authorized; second, that "said issue does not submit the question if this is a 'special case' where, in the judgment of the jury, manifest hardship and injustice would otherwise result unless the association were compelled to redeem its liability in a lump sum." The statute authorized the award of a lump sum settlement in case of death or total permanent disability "in special cases where, in the judgment of the board, manifest hardship and injustice would otherwise result." Vernon's Texas Statutes, 1918 Supp. art. 5246—33. The decision as to the question is committed to the "judgment of the board" or to that of the district court in case of

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transfer of the proceedings to such court. Texas Employers' Insurance Association v. Downing, 218 S. W. 120 (11); Lumbermen's Reciprocal Association v. Behnken, 226 S. W. 157 (5); Texas Employers' Insurance Association v. Boudreaux, 213 S. W. 674. This provision vests the trial court with large discretionary powers, and the appellate courts should not attempt to review their action on such matters unless there is manifest abuse of such discretion. We think there is no such abuse shown in this case. Auhorities already cited, and McMullen v. Gavette Construction Co., 207 Mich. 586, 175 N. W. 120; Stephenson v. State Industrial Commission (Okl.) 192 Pac. 580. As to the second ground of objection to this issue, we do not think there was any error in the failure of the court to include in the submission of the issue the inquiry as to whether it was a "special case." The Legislature prescribed what constituted such special cases, and "where, in the judgment of the board, manifest hardship and injustice would otherwise result," such a special case is presented.

[5] The sixth proposition complains that the court refused to grant appellant a continuance on the ground of surprise caused by new allegations contained in the second amended answer of the appellees. The allegations which are claimed to have caused this surprise are only more detailed statemetns of facts which had already been alleged in appellees' first amended answer, and which we think would have permitted them to introduce all the evidence which they would have been permitted to introduce under the allegations of the second amended answer. The appellant had already announced ready for trial on the issues made by the allegations of the first amendeed answer, so we do not think the court committed any error in this matter.

[6] It is contended under the seventh propostion that the judgment is excessive in the sum of $42.04. This contention is based on the claim of incorrect calculations made by the court in arriving at the amount of discount to be allowed in computing the lump sum to be paid in lieu of weekly payments. We do not think we would be authorized to say as a matter of law that there is any such error in the judgment. Workmen's Reciprocal Association v. Behnken, 226 S. W. 157, 158.

We are inclined also to think that the assignment itself is not sufficient to present this point. The assignment is that:

"The court erred in rendering the judgment which it did render herein, said judgment neither following the pleadings in the case nor the verdict of the jury, nor is the same in accordance with the law with reference to the Workmen's Compensation Act."

This was the objection made in the motion for new trial. If appellant's counsel had in mind the objection which he now urges under the assignment, the language of his objection was not calculated to call it to the attention of the trial court, and such objections made for the first time on appeal are not regarded with favor. Schuster v. Frendenthal, 74 Tex. 53, 11 S. W. 1051.

[7] It is also contended that there was fundamental error committed in the election of W. I. Gamewell, who acted as special judge at the term of court at which this case was tried and presided over its trial. It appears that the regularly elected district judge of Moore county was not present on the day fixed by law for the convening of the term of the court at which this case was tried, but sent word that he would not be present at such term, and a special judge would have to be elected. There were only four lawyers present at the time fixed for the convening of the court, the district attorney, W. I. Gamewell, and the two opposing attorneys in this case. The said Gamewell attended court "for the purpose of acting as special judge" at such term. The election was regularly held, and the said Gamewell elected as special judge. The appellant's attorney did not participate in the election. The objection raised to the proceeding is that the election of the said Gamewell was forced; that the district attorney could

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not act; the two attorneys who expected to try this case were disqualified, and were necessarily confined to the election of the said Gamewell, so that the "plaintiff had no choice in the selection of a special judge, as contemplated by law. We do not think there is anything in this contention. The election was for a special judge for the term; other business was to be transacted besides the trial of this one case. There was no legal obstacle to the election of any one of the attorneys in attendance upon the court except possibly the district attorney. Of course the election of one of the attorneys in this case would have meant his disqualification to try this particular case, but the fact that he was such attorney did not disqualify him from being elected as special judge for the term.

This disposes of all of the propositions advanced by the appellant. We find no reversible error presented, and the judgment will be affirmed.

CONSOLIDATED UNDERWRITERS v. SEALE ET AL. (No. 759.)

(Court of Civil Appeals of Texas. Beaumont. Jan. 17, 1922. Rehearing Denied Feb. 15, 1922.)

237 Southwestern Reporter, 642.

1. MASTER AND SERVANT—NOTICE OF COMPENSABLE INJURY MAY BE WAIVED FOR "GOOD CAUSE."

The statutory notice of injury to be given under the Workmen's Compensation Act, pt. 2, § 4a (Vernon's Ann. Civ. St. Supp. 1918, art. 5246—43) must be given before any proceeding for compensation can be maintained, except that in meritorious cases for "good cause" it may be waived, and all that should be required of an injured employee is that he prosecute his claim with that degree of diligence that an ordinary man situated as he is would exercise under the same or similar circumstances.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

(For other definitions, see Words and Phrases, First and Second Series, Good Cause.)

2. MASTER AND SERVANT—GOOD CAUSE FOR FAILURE TO GIVE NOTICE OF COMPENSABLE INJURY HELD FOR JURY.

Whether good cause existed excusing injured employee for not giving notice of his injury within 30 days after happening thereof, under Workmen's Compensation Act, pt. 2, § 4a (Vernon's Ann. Civ. St. Supp. 1918, art. 5246—43), *held* for the jury.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Appeal from Tyler County Court; Grover C. Lowe, Judge.

Proceeding by L. J. Seale under the Workmen's Compensation Act to obtain compensation for personal injuries, opposed by the Lodwick Lumber Company, the employer, and the Consolidated Underwriters, insurance carrier. There was an award of compensation, and the insurance carrier appeals. Affirmed.

C. A. Lord, of Beaumont, for appellant.

J. E. Wheat, of Woodville, for appellees.

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WALKER, J. This is an appeal from a judgment of the county court of Tyler county, awarding compensation to L. J. Seale, appellee, under the provisions of the Texas Workmen's Compensation Act, as amended in 1917. Seale was injured on the 28th day of May, 1920, while in the due course of his employment with the Lodwick Lumber Company. This company was a subscriber under the Workmen's Compensation Act, carrying its indemnity insurance with appellant. The only question raised by this appeal is the sufficiency of the evidence to raise an issue of "good cause" in appellee's favor, excusing him for not giving notice of his injury to appellant or the Lodwick Lumber Company within 30 days after the happening thereof. This issue was submitted to the jury by the following question.

"Do you find from the evidence that a good cause is shown for the failure to give notice within 30 days?"

to which he jury answered: "Yes." On this issue appellee, Seale, testified as follows:

"I was scaling logs on May 28, 1920. Late in the afternoon, * * * while I was walking along by the side of a log which I was scaling, I struck my foot against a knot or projection of some kind. * * * This caused a right sharp pain at the time, but it subsided in a few minutes and I went on, finished my work, and thought no more about it for several days. It did not cause any soreness, and I paid no further attention to it; in fact, the entire matter passed out of my mind.

"But early in the morning of June 2d I woke up with a rather severe pain in that foot. * * * My foot was still hurting me when I got up. I looked at it, and it was a little red around that joint (indicating the large joint above mentioned). I put on my shoe and went to breakfast, and then walked to the train and went on to the woods with the rest of the men. * * * By the time I got to the woods I saw that I would not be able to work that day, as my foot was hurting so bad, and I waited until the first train went back to the mill, and I went in. I was still able to walk. but my foot was getting worse all the time.

"When I got back to the mill I went to see Dr. Selman, the Lodwick Lumber Company's regular doctor, and he examined my foot and asked me a good many questions about it, and particularly asked me if I had hurt my foot any way. I told him that I had not, and at that time I could not remember striking it on the knot a few days before. At that time I did not connect the condition of my foot with that injury at all.

"I stayed at the mill two days longer, and Dr. Selman treated my foot several times. Mr. Bird, the superintendent of the Lodwick Lumber Company, visited me several times and discussed my condition with me.

"On June 4th, I think it was, I discussed the matter with Dr. Selman and Mr. Bird, and we all decided that I would have to go to the hospital, as my foot was getting worse all the time and there wasn't any one at the hotel where I was staying to wait on me. * * * That day I was carried to the hospital at Beaumont, and called in Dr. Wier according to Dr. Selman's instructions, and gave him a letter Dr. Selman had written to him. Dr. Wier examined my foot, and treated it as long as I was in the hospital. I stayed there 32 days. * * * After Dr. Wier examined my foot he asked me if I had hurt my foot anywhere, and I told him that I could not remember. But during the night, the first night I was in Beaumont, I think, I felt a sharp pain strike my foot that reminded me of the incident I mentioned a while ago. It felt just like it did when I hit it against that knot. The first morning When Dr. Wier came I told him about it. * * *

"I did not give them (referring to the Lodwick Lumber Company) any formal notices but they knew as much about my trouble as I did."

On cross-examination the appellee Seale testified:

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"I did tell Dr. Selman all the time that I had received no injury while in the employ of the Lodwick Lumber Company, and he asked me particularly about that. The only injury that I had ever received in the course of my employment and while working for this company was the slight blow which I have described in striking my foot against a knot or something on a log on the 28th of May. * * *

"No; I did not give any notice to the Lodwick Lumber Company that I had received an injury while in its employ, and I did not really think that I had received such injury, and I told the company's doctor, Dr. Selman, that I had received no injury. After it occurred to me, while I was in the hospital, on or about the 6th day of June, that I had struck this foot against the knot, I could have written to the Lodwick Lumber Company, and notified of this injury, but I did not do so. Yes; I could have gotten writing material, and I know how to write, and I could have thus given notice of the injujry of which I now complain. Yes; there were telephones in the hospital, and I could have phoned the Lodwick Lumber Company, and thus given notice, but I did not do so. I suffered considerable pain for the first two weeks in the hospital, and after that I did not suffer so much, and after that I was about the building on crutches, and I was under no disabilities, mental or physical, that would have prevented me from writing or phoning to the company, and I did not do so. The reason I did not give such notice was that I did not know it was necessary, and I did not know that there was any particular time within which notice had to be given. That is why I did not give the notice.

"After remaining in the hospital 32 days I returned to Hicksbaugh with Mr. Bird, the company's manager, and on the way home, it occurs to me, I told Mr. Bird about having stumped my foot on the log and about the dislocation of the joint, but I would not say now for sure that I told him that. I remember talking to him some about the dislocation as we went along home, but I would not want to testify that I told him or gave him any notice of the injury for which compensation is now sought. * * * If I did, that was not within 30 days after receiving the injury, but after I had been in the hospital 32 days, and I went to the hospital on the 4th of June, and I struck my foot on the log on the 28th of May.

"* * * Neither did I give the Consolidated Underwriters any notice of the injury for which I am claiming compensation at any time. On the 12th day of August, 1920, I gave written notice to the Lodwick Lumber Company that I claimed compensation for my injury and on the same day I gave it written notice of my injury of which I now complain. These notices were given on the printed blanks sent me by the Industrial Accident Board. I know that these are the only notices I have ever given concerning my injuries. Yes; the paper you show me dated August 12, 1920, was signed by me. It is directed to the Lodwick Lumber Company, and it is the claim for compensation for injury. Yes; the other paper you show me is the notice of injury, dated August 12, 1920, and signed by me, and directed to the Lodwick Lumber Company. These are the notices that I have testified about."

On redirect examination the appellee Seale further testified:

"When I went to the hospital I did not know what was the cause of my trouble. Dr. Selman and Mr. Bird knew as much about my foot being sore as I did. They knew also that I was in the hospital with it. I did not write them anything about it after I found out the cause of the trouble, because I did not think it was necessary. And I thought all the time after about the first two weeks that I would be back in Hicksbaugh in a few days. I did not think it necessary to write them what they already knew."

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Appellant attacks this finding of the jury by the following assignment of error, which is submitted as a proposition, to wit:

"The finding of the jury in response to special issue No. 3 as submitted by the court, to the effect that a good cause is shown for the failure to give notice of the injujry for which compensation is claimed within 30 days, has no support in the evidence, and is wholly contrary to the evidence, since the evidence conclusively shows that the defendant, L. J. Seale, was under no mental or physical disability that would have prevented him from giving notice; and because the evidence conclusively shows that there was a telephone in the hospital, and that by means of which he could have readily communicated with the subscriber and with the associaion, and the testimony conclusively shows that he was able to use such telephone, and that in this way the notice could have been communicated; and the evidence conclusively shows that he was able to write, and was under no disability preventing him from writing, and that means of writing were at hand, so that he could have readily communicated the notice required in writing either to the association or to the subscriber. There is nothing whatever in defendant's failure to give notice; on the contrary he testified himself that he could have telephoned the notice or he could have written the notice, and that he was not disabled in any way, mentally or physically, from giving notice by one of these means, and that the only reason why he did not give the notice was because he did not think it was necessary under the law, and that he did not know that he was required to give any notice within 30 days. It follows that the finding of the jury in response to special issue No. 3 is wholly without support in the evidence."

This issue is covered by article 5246—43, Texas Complete Statutes, which is as follows:

"Unless the association or subscriber have notice of the injury, no proceeding for compensation for injury under this act shall be maintained unless a notice of the injury shall have been given to the association or subscriber within thirty (30) days after the happening thereof and unless a claim for compensation with respect to such injury shall have been made within six (6) months after the occurrence of same; or, in case of death of the employee or in the event of his physical or mental incapacity within six (6) months after the death or the removal of such physical or mental incapacity. Provided that for good cause the board may, in meritorious cases, waive the strict compliance with the foregoing limitations as to notice, and the filing the claim before the board."

[1] This statutory notice must be given before any proceeding for compensation can be maintained except in meritorious cases for good cause it may be waived. The Legislature did not define the meaning of the term "for good cause," but left it as an issue of fact for the board, and, on appeal from its decision, for the trial courts.

[2] Appellant under its assignment of error would give this article a strict construction; that is, as appellee could have given the notice and did not, his claim is barred. But all the courts of this state give the terms of this act a liberal construction. Following these decisions and construing liberally the expression "for good cause," we think all that is required of an injured employee is that he prosecute his claim for compensation with that degree of diligence that an ordinary man, situated as he was, would have exercised, under the same or similar circumstances; that is to say, if an ordinary man, situated as appellee was, would have given notice of his injujry to the insurance company or the subscriber within 30 days after the happening thereof, then this claim was barred; but if an ordinary man, situated as appellee was would not have given such notice, this claim was not barred. We think the facts of this record raise that issue, and that it was properly submitted to the jury. Appellee did not know of the provision of the Workmen's Compensation Act (Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246h–5246

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zzzz), requiring notice to be given of his injury within 30 days after the happening thereof. Of course, he was presumed to know the law, but, in fact, he was ignorant of that duty. He had the 30 days in which to acquaint himself with the conditions of his compensation and comply therewith. For 9 days of that time he had forgotten his injury—it seemed to him so slight—and did not associate the condition of his foot therewith. When he did remember the accident, he was in the hospital, suffering severe pain, and under the care of surgeons. He was kept there 32 days. In view of these facts, it seems to us that the issue was clearly raised that appellee acted as an ordinary man would have acted under the same or similar circumstances.

These facts were reviewed by the board, and by making an award in favor of appellee they necessarily found that good cause was shown for not giving the notice within 30 days. On a trial to a jury the issue was again found in appellee's favor. After carefully reviewing the facts, we are unwilling to say that the issue of good cause was not raised. As sustaining us in this conclusion, see Indemnity Co. v. Zyloni, 212 S. W. 183; Indemnity Co. v. Dinkins, 211 S. W. 949; Home Life & Accident Co. v. Orchard, 227 S. W. 705; Home Life & Accident Co. v. Cobb, 220 S. W. 132.

Believing that no error was committed in the trial of this case, the judgment of the trial court is in all things affirmed.

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HALL v. INDUSTRIAL COMMISSION OF COLORADO ET AL.
(No. 10269.)

(Supreme Court of Colorado. March 6, 1922. Rehearing Denied April 3, 1922.)

205 Pacific Reporter, 527.

1. MASTER AND SERVANT—BURDEN OF PROOF ON COMPENSATION CLAIMANT.

In compensation cases the burden of proof is upon claimant.

(For other cases, see Master and Servant. Dec. Dig. § 403.)

2. MASTER AND SERVANT—COMPENSATION; COMMISSION'S FINDING ON EVIDENCE CONCLUSIVE.

The findings of the Industrial Commission on conflicting testimony is conclusive upon the courts.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

3. MASTER AND SERVANT—HEARSAY PROPERLY EXCLUDED IN COMPENSATION CASE.

In proceeding for compensation for employee's death, opposed on the ground that the death was from disease, not accidental injury, evidence proffered by the applicant, consisting of a wholly unidentified written statement of the employer respecting a claim of decedent as to the accident, dependent's notice of the accident and claim for compensation, and statements made by decedent at various times long subsequent to the alleged accident, was properly excluded; the rule against hearsay being not technical, but vitally substantial.

(For other cases, see Master and Servant, Dec. Dig. § 404.)

4. MASTER AND SERVANT — COMPENSABLE INJURY NOT SHOWN.

In a death claim case, findings of the Industrial Commission denying recovery on the ground that accidental injury was not proved *held* supported by the evidence.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

5. MASTER AND SERVANT—COMPENSATION NOT AWARDED ON HEARSAY ALONE.

Compensation may not lawfully be awarded upon hearsay evidence alone.

(For other cases, see Master and Servant, Dec. Dig. § 405[1].)

En Banc.

Error to District Court, City and County of Denver; Charles C. Butler, Judge.

Proceeding under the Workmen's Compensation Law (Laws 1919, p. 700) by Augusta Olson Hall to recover compensation for the death of her husband, John Olson, employee, opposed by the Up-the-Divide Theatre Company, employer, and the Continental Casualty Company, insurance carrier. Action of the Industrial Commission in denying recovery was affirmed by the district court, and claimant brings error. Affirmed.

See, also, 69 Colo. 518, 194 Pac. 212.

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David B. Graham and William H. Gabbert, both of Denver, for plaintiff in error.

Victor E. Keyes, Atty. Gen., and John S. Fine, Asst. Atty. Gen., for Industrial Commission.

Dana, Blount & Silverstein, of Denver, for Up-the-Divide Co. and Continental Casualty Co.

BAILEY, J. This cause is here a second time. Upon the former review it was remanded to the Commission for fuller and more specific findings. At the first hearing recovery by claimant was denied. Upon further findings compensation was again denied. The first award was reviewed by the District Court and affirmed. After further findings by the Commission again the cause was taken to the District Court and the action of the Commission in denying compensation was there again upheld. It is to review that judgment that claimant now brings the cause here.

The essential facts are that claimant's decedent, John Olson, died at a hospital on October 12th, 1918. The record shows that he claimed to have fallen from a ladder while at his work for the Theatre Company on June 9th, 1918. His widow and beneficiary claimed that the accident occurred on June 15th, 1918, but for the purposes of this decision the discrepancy in date is not important.

There is no direct proof of the accident. The claimant supports her case wholly with certain reports; and alleged conversations said to have taken place with Olson at various times subsequent to the supposed accident, at his home and at the hospital where he died. There is not a scrap of competent testimony to show that there ever was an accidental injury at all.

[1] It is elementary in compensation cases, as in other actions, that the burden of proof is upon the party asserting the claim. It was the duty of claimant to show that the death of her husband was the proximate result of an accident arising out of and in the course of his employment. The alleged fall from the ladder took place either on June 9th, or June 15th, 1918. The decedent was then upwards of sixty years of age. For approximately four months after the accident he was under the care of at least three physicians, who apparently discovered no evidence whatever of his having met with an accident. Each of them treated him for an organic disease. After his death an autopsy was held, which disclosed at least one serious chronic ailment, that another was developing, and that none of these conditions, in the opinion of physicians, was likely to have resulted from a fall, either recent or remote. On the contrary, the medical testimony was practically unanimous that decedent died from pericarditis and hypostatic pneumonia.

[2] There is some testimony which tends to show that there was a possibility of the pericarditis having resulted from an external injury. The only effect of this testimony, however, is to furnish a conflict, and the findings of the Commission, on conflicting testimony, is conclusive upon the courts. The rule as to fact findings is laid down in Passini v. Industrial Commission, 64 Colo. 349, 171 Pac. 369, as follows:

"This court may consider only the legal question of whether there is evidence to support the findings, and not whether the Commission has misconstrued its probative effect. The award is conclusive upon all matters of fact properly in dispute before the Commission, where supported by evidence, or reasonable inference to be drawn therefrom."

See also Prouse v. Industrial Commission, 69 Colo. 282, 194 Pac. 625; Industrial Commission v. Johnson, 66 Colo. 292, 181 Pac. 977; Globe Co. v. Industrial Commission, 67 Colo. 526, 186 Pac. 522; Industrial Commission v. London, etc., Co., 66 Colo. 575, 185 Pac. 344.

[3] Error is assigned upon the refusal to admit in evidence an wholly unidentified written statement of the employer respecting a claim of Olson as to the accident; and also because of the exclusion of dependent's

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notice of the accident and claim for compensation. Also to the exclusion of statements made by the deceased at various times long subsequent to the alleged accident. These offers were properly excluded. It is true that the Workmen's Compensation Statutes of most of the states provide that Industrial Commissions shall reach their conclusions without regard to technical rules of evidence. It is manifest, however, that the rule against hearsay is not technical, but vitally substantial, and may not properly be disregarded under such statutory provisions without grave danger of collusion, imposition and injustice. If a claimant be permitted to make out a case upon the essential facts of accidental injury upon hearsay testimony alone there is no limit to the frauds and wrongs that may be encouraged and made possible.

In Reck v. Whittlesberger, 181 Mich. 463, 148 N. W. 247, Ann. Cas. 1916C, 771, the court in speaking to this question said at page 469 of 181 Mich. at page 249 of 148 N. W. (Ann. Cas. 1916C, 771):

"Coming directly to this line of testimony as applied to Workmen's Compensation cases, it is said in Boyd on Workmen's Compensation, p. 1123:

"'The statements made by an injured man as to his bodily or mental feelings are admissible, but those made as to the cause of his illness are not to be received in evidence. The rule applies to statements made by a deceased workman to a fellow workman as to the cause of his injury.'

"And more fully in Bradbury on Workmen's Compensation, p. 403, as follows:

"'The statements made by an employee in the absence of his employer, by a deceased man, as to bodily or mental feelings are admissible in evidence, but those made as to the cause of his illness are not admissible in evidence and when there is no other evidence of an accident arising out of and in the course of the employment than statements made by a deceased employee in the absence of his employer, an award cannot be sustained.'"

The following English and American cases announce and support this rule: Gilby v. Great Western Ry., Butterworth's W. C. C., 135; Smith v. Hardman, Ltd., Butterworth's W. C. C. 719; McCauley v. Imp. Woolen Co., 261 Pa. 312, 104 Atl. 617; Belcher v. Carthage Machine Co., 224 N. Y. 326, 120 N. E. 735; Englebretson v. Industrial Com., 170 Cal. 793, 151 Pac. 421; Employers' Assur. Corp. v. Industrial Commission, 170 Cal. 800, 151 Pac. 423. In any event the so-called evidence upon the question of whether the accident actually occurred and its effect upon the physical condition of the decedent, which was rejected, was cumulative merely and could not alter the conclusion.

Also we fail to see how the fact that the accident occurred on June 9th rather than on June 15th could in any way affect the result of the proceeding. Neither is it apparent how informal statements of the deceased, made long after the alleged accident, and therefore manifestly not within the res gestæ rule, should be considered as having weight, even if admitted, as against the direct, positive and satisfying testimony of the attending physicians who performed, and others who assisted at, the autopsy.

[4, 5] We have examined with the most painstaking care, the whole record, and it is apparent that if all matters tendered in evidence by claimant and refused had been admitted, the sole and only effect thereof would have been simply to have made the conflict a trifle more pronounced. There still would have been an utter failure, as matter of law, to make out a case that would have justified an award in her favor. As to the alleged accidental injury all evidence offered was heresay, and compensation may not be lawfully awarded upon that class of testimony alone.

There was ample competent evidence to support the findings of the Commission. Under such circumstances, bearing carefully in mind the

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settled rule that the fact findings of the Commission, based upon conflicting testimony, are conclusive on review, the judgment is affirmed.

Judgment affirmed.

MARLOW v. MAYOR & ALDERMAN OF CITY OF SAVANNAH.

(No. 13124.)

(Court of Appeals of Georgia, Division No. 1. March 9, 1922.)

110 Southeastern Reporter, 923.

(Syllabus by the Court.)

1. MASTER AND SERVANT — POLICEMAN NOT "EMPLOYEE" WITHIN COMPENSATION ACT.

The term "employee," in section 2(b) of the Workmen's Compensation Act (Ga. Laws 1920, p. 167), which provides that the term "employee" shall include "every person * * * in the service of another under any contract of hire," etc., does not apply to a policeman of a municipality. The relation of employer and employee does not exist between a municipality and a policeman so as to create a liability and benefits under the act; for a policeman is a public officer.

(For other cases, see Master and Servant, Dec. Dig. § 364.)

(For other definitions, see Words and Phrases, First and Second Series, Employee.)

2. AWARD PROPERLY SET ASIDE.

Under the agreed statement of facts in this case, the court did not err in holding that a policeman of the city of Savannah is not an employee under a contract, express or implied, and in reversing and setting aside the award against the mayor and aldermen of the city of Savannah by the commission acting under the Workmen's Compensation Act.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Proceeding under the Workmen's Compensation Act by M. D. Marlow for compensation for the death of Walter H. Marlow, opposed by mayor and aldermen of the city of Savannah, alleged employer. Compensation was awarded, but the award was reversed by the superior court, and the claimant brings error. Affirmed.

Geo. M. Napier, Atty. Gen., Seward M. Smith, Asst. Atty. Gen., and Howard Stevens, all of Atlanta, and Thomas L. Hill, of Savannah, for plaintiff in error.

Shelby Myrick and Edwin A. Cohen, both of Savannah, for defendant in error.

LUKE, J. This case was tried upon an agreed statement of facts as follows:

"It is hereby agreed by and between the parties to the above-stated case that the following statement is a true and correct one of the facts in this case:

"'City Ordinances Appointing Policemen.

"'Sec. 556. All appointments to the police force and promotions therein (other than chief) shall be made by the mayor upon the recommendation of the chief of police, and the approval of the committee on police.

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"'Sec. 557. The mayor and the said committee on police are authorized to make and enforce regulations touching the discipline, control, and government of the said police force.'

"'Sec. 565. It shall be the duty of the privates of the police force to report for duty regularly and punctually at the time and place designated by the chief of police or officer in command. They shall place upon the information docket the names of all persons violating any of the existing ordinances; they shall arrest and take into custody all felons and rioters, all disorderly or suspected persons who may be found misbehaving themselves or in any manner disturbing the public peace, and all persons who may in any way assault, oppose, or resist them in the discharge of their duties.'

"'Sec. 573. The officers and privates before entering upon their duties of their office shall take and subscribe to the following oath: "I do solemnly swear (or affirm) that I will during my continuance in office, to the best of my skill and ability, faithfully discharge all the duties which may be required of me; and that I will in all cases conform to the ordinances of the city, and its police regulations, and forthwith report all violations of the ordinances which may come to my knowledge."

"'And a bond for the faithful discharge of his duties shall be required of the chief of police with security to be approved by the mayor in the sum of $4,000, and of each sergeant and private in the sum of $500. And the mayor shall order printed copies of such oath or affirmation to be made in a book, wherein such dependent or affirmant shall subscribe before the mayor or acting mayor, and the same shall be kept among the records of council.'

"Appointment of Walter H. Marlow as a Policeman.

"Walter H. Marlow was 31 years of age, duly and legally married to claimant, Mildred Walker Marlow, on January 14, 1915, in Savannah, Ga., and Clare Mona Marlow, the child of claimant, was born on October 2, 1920, at 312 Habersham street in the city of Savannah, Ga. Walter H. Marlow was appointed a policeman of the city of Savannah on recommendation of the police committee of council, by the mayor, on March 10, 1921, at a salary of $125 per month, and was killed by an unknown person on March 27, 1921, while said Policeman Marlow was on duty and in the discharge of his duty. The city of Savannah contributed $50 towards the funeral expenses of Policeman Marlow; and, in addition to the funeral benefit allowance, claimant has received the sum of $720 in monthly installments, which sums so paid by consent of all parties is to be allowed on a credit on the award by the Industrial Commission to the claimant Mrs. Mildred Walker Marlow. It is further understood and agreed that the policemen of the city of Savannah are not under any civil service rules, and that they can be discharged at any time by the mayor of the city of Savannah, with or without cause; and that Policeman Marlow was employed under these conditions by the mayor and aldermen of the city of Savannah, as a policeman of the city of Savannah."

[1, 2] The plaintiff in this case contended that her deceased husband, who was a policeman on the force of the city of Savannah, was an employee of the mayor and aldermen of the city, and was entitled to be classed as such, and that she was entitled to the benefits of the Georgia Workmen's Compensation Act (Ga. L. 1920, p. 167). It was contended by the plaintiff that under section 2(b), her deceased husband was an employee. The particular part of section 2(b) pertinent here is as follows:

"Employee shall include every person, including a minor, in the service of another under any contract of hire or apprenticeship, written or implied."

The sole question presented here for determination is whether this policeman was an employee or a public officer. The Supreme Court of Appeals of Virginia, upon a statute almost identical with the Georgia

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act, has held that a policeman is a public officer, and not such an employee as is contemplated by the act. Mann v. City of Lynchburg (Va.) 106 S. E. 371. Indeed, the Georgia precedents, where the question whether a policeman was an employee or an officer has been considered in actions of tort against municipalities, are uniform that a policeman is a peace officer, whose duties are connected with the public peace, and is a public officer. The deceased policeman in this case was not an employee under contract, express or implied. Under the provision of the act here, the relation of employer and employee must exist in order to sustain the award. Without hesitation we conclude that the provisions of the Workmen's Compensation Act do not include the plaintiff's deceased husband, and the court did not err in setting aside the award made to her by the commission.

Judgment affirmed.

Broyles, C. J., and Bloodworth, J., concur.

ILLINOIS GLASS CO. v. INDUSTRIAL COMMISSION ET AL.
(No. 14093.)

(Supreme Court of Illinois. Feb. 22, 1922. Rehearing Denied April 5, 1922.)

134 Northeastern Reporter, 712.

1. MASTER AND SERVANT—COMPENSATION ACT PERMITS ONE EXTENSION OF TIME FOR FILING TRANSCRIPT OF PROCEEDING BEFORE ARBITRATOR.

Under Compensation Act, § 19, par. (b), the Commission may grant only one extension of 30 days from the time allowed by the act for filing with the Commission the stenographic report of the proceedings before the arbitrator, to obtain a review of the arbitrator's report, and, if the report is not filed within the time as first extended, and the objection is not waived by the appearance before the Commission of the objector, the award of the arbitrator automatically becomes the decision of the Commission.

(For other cases, see Master and Servant, Dec. Dig. § 414.)

2. MASTER AND SERVANT.— OBJECTION TO DELAY IN FILING TRANSCRIPT IN COMPENSATION PROCEEDING WAIVED BY APPEARANCE.

The objection that the stenographer's report of the proceedings before the arbitrator was not filed with the Industrial Commission within the time required by statute can be waived, and is waived where the parties appear before the Commission and participate in the proceedings.

(For other cases, see Master and Servant, Dec. Dig. § 418[3].)

Error to Circuit Court, Madison County; J. F. Gillham, Judge.

Proceedings under the Workmen's Compensation Act by Walter McLain and others, to recover compensation for the death of Robert McLain, opposed by the Illinois Glass Company, employer. An award of compensation by the Industrial Commission was affirmed by the circuit court, and the employer brings error. Reversed and remanded, with directions.

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Burroughs & Ryder, of Edwardsville (R. J. Balch, of St. Louis, Mo., of counsel), for plaintiff in error.

C. C. Ellison, of Granite City, for defendants in error.

DUNCAN, J. October 14, 1919, Robert McLain was killed while in the employ of the Illinois Glass Company. His parents claimed compensation on the ground that they were dependent upon the earnings of the deceased. A hearing was had before an arbitrator appointed by the Industrial Commission, and he filed his decision January 15, 1920, finding that the parents, defendants in error, were not dependent upon the earnings of their deceased son, and awarded them $150 for burial expenses in accordance with the provisions of paragraph (e) of section 7 of the Compensation Act. Laws of 1919, p. 540. The decision of the arbitrator was filed with the Industrial Commission, and due notice of the decision was received by defendants in error February 19, 1920. A petition for review was duly filed by defendants in error March 3, 1920, and on the same day an order was entered by the Commission extending the time 30 days for filing the stenographic report of the proceedings. On April 6, 1920, a further extension of 30 days was granted. April 23, 1920, the stenographic report was filed with the Industrial Commission. On April 6, 1920, the Commission gave notice to the parties of a hearing on review by it at East St. Louis on June 17, 1920, at 9 o'clock a. m., at the city hall. On July 15, 1920, the Commission entered its order in the case reversing the finding of the arbitrator, and found that Anna McLain, mother of deceased, was dependent upon his earnings, and made an award in her favor of $1,650 under paragraph (c) of section 7 of the Compensation Act, payable weekly. No additional evidence was taken by either of the parties, and the award of the Commission was made on the evidence before the arbitrator. The order of the Commission recites that no one appeared before it in behalf of either party, and the record of the Commission does not show an appearance before it by plaintiff in error at any time after the arbitrator had made his award.

Plaintiff in error makes the contention that the Commission was without jurisdiction to reverse the finding of the arbitrator and to enter its order for two reasons: (1) Because the notice for hearing on review at East St. Louis on June 17, 1920, given on April 6, 1920, was without authority, and void; (2) that the plaintiff in error was not bound to answer such notice, and that the petition for review should have been dismissed for failure to prosecute.

[1] Paragraph (b) of section 19 of the Compensation Act provides that, unless the party petitioning for review shall, within 20 days after receipt by him of the copy of the arbitrator's decision, or within such further time, not exceeding 30 days, as the Commission shall allow on cause shown, file with the Commission an agreed statement of facts or a correct stenographic report of the proceedings before the arbitrator, then the decision of the arbitrator shall become the decision of the Industrial Commission, and, in absence of fraud, such decision is conclusive. The Commission had no authority, under the statute, to extend the time for filing the stenographic report for more than 30 days, and the Commission lost jurisdiction of the case for failure of defendants in error to file such stenographic report within the time required by the statute. People v. Andrus, 299 Ill. 50, 132 N. E. 225. The Commission was therefore without authority to review the award of the arbitrator, which became automatically the decision of the Commission after it had so lost jurisdiction of the case.

[2] The objection that the stenographic report was not filed in time is one that could have been waived by the plaintiff in error, and would have been waived had it entered its appearance before the Commission, and made no objection to the Commission to its proceeding in the cause for such want of jurisdiction. Pocahontas Mining Co. v. Industrial Com.

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(No. 14332) 134 N. E. 160. As there was no appearance in the case before the Commission by plaintiff in error at any time after the decision of the arbitrator was filed with it, it had no jurisdiction of the person of the plaintiff in error, and consequently no jurisdiction of the case, and its decision was a nullity for the reasons given in the case just cited

On review the circuit court of Madison county in the certiorari proceeding quashed the writ of certiorari, and confirmed the decision of the Industrial Commission. This was error. The record of the Commission should have been quashed for the reason that the Industrial Commission had lost jurisdiction of the case, and had no jurisdiction of the person of the plaintiff in error.

The judgment of the circuit court is reversed, and the cause is remanded to that court, with directions to set aside the award of the Industrial Commission, and to remand the cause to the Commission with directions to enter an order that the award of the arbitrator stand as the order of the Industrial Commission.

Reversed and remanded, with directions.

JACKSON v. INDUSTRIAL COMMISSION ET AL. (No. 14013.)

(Supreme Court of Illinois. Feb. 22, 1922. Rehearing Denied April 5, 1922.)

134 Northeastern Reporter, 749.

1. MASTER AND SERVANT—PAYMENTS FOR MEDICAL SERVICES HELD "PAYMENTS OF COMPENSATION" WITHIN LIMITATION OF COMPENSATION ACT.

Payments by employer for medical services for injured employee were payments of compensation within Workmen's Compensation Act 1917, § 24, requiring employee to make claim for compensation within 6 months after the accident, or, in the event that payments have been made, within 6 months after such payments have ceased.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

(For other definitions, see Words and Phrases, First and Second Series, Payment.)

2. MASTER AND SERVANT—COMPENSATION FOR INJURIES BARRED BY DELAY.

One who made no claim for compensation within 6 months after the accident, or within 6 months after payments of compensation had ceased, as required by Workmen's Compensation Act 1917, § 24, and who did not file notice of claim with Industrial Board within 18 months after he returned to his employment, as required by section 8, par. (d), could not recover compensation.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

3. MASTER AND SERVANT—PROVISION OF COMPENSATION ACT FOR REVIEW ON GROUND OF INCREASED DISABILITY INAPPLICABLE TO ORIGINAL APPLICATION.

Workmen's Compensation Act, § 19, par. 8, authorizing review of an agreement or award within 18 months on the ground that the disability has increased, *held* not to entitle employee, who had signed settlement for injury to an eye which became blind to maintain an original applica-

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tion for compensation filed after the expiration of the time allowed by section 8, par. (d), and section 24; such statute being inapplicable on such original application.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

4. MASTER AND SERVANT — OBJECTION TO JURISDICTION OF COMMISSION TO REVIEW COMPENSATION PROCEEDING HELD WAIVED BY APPEARANCE.

Employer, by appearing and participating in Workmen's Compensation proceeding before the Industrial Commission on injured employee's petition to review award of arbitrator without objecting to the proceeding because of employee's failure to file transcript of proceedings before arbitrator within the time required by Workmen's Compensation Act, § 19, par. (b), waived such objection.

(For other cases, see Master and Servant, Dec. Dig. § 418[3].)

5. MASTER AND SERVANT — DELAY IN DEMANDING COMPENSATION WAIVED BY FAILURE TO RAISE QUESTION BEFORE INDUSTRIAL COMMISSION.

In Workmen's Compensation proceeding, employer would have waived employee's failure to file written demand for compensation within required time by failure to raise the question before the Industrial Commission.

(For other cases, see Master and Servant, Dec. Dig. § 417[4].)

Error to Circuit Court, Cook County; Oscar M. Torrison, Judge.

Proceedings under the Workmen's Compensation Act by Alfred T. Richter for compensation for injuries, opposed by William J. Jackson, receiver of the Chicago & Eastern Illinois Railroad Company, employer. Award for employee confirmed by the circuit court, and employer brings error. Reversed and remanded, with directions.

Edward W. Rawlins and Charles O. Fowler, both of Chicago (Homer T. Dick and Kenneth B. Hawkins, both of Chicago, of counsel), for plaintiff in error.

I. J. Franklin, of Chicago, for defendant in error.

DUNCAN, J. On December 24, 1917, defendant in error, Alfred T. Richter, was injured while employed by plaintiff in error, William J. Jackson, receiver of the Chicago & Eastern Illinois Railroad Company, and while rebuilding or repairing the end of a car, for which purpose he was using a rivet-reaming machine. The injury was caused by a piece of steel shaving striking him in the eye. He notified the foreman of his injury, who sent him to Dr. Weidner, the company's doctor, who removed two foreign substances from the eye. As this doctor was only a general practitioner he sent Richter to Dr. Mundt, the company's eye specialist, who examined and treated his eyes the same evening of the accident. Richter returned to work December 26, 1917, and continued in the service of the same employer until August 16, 1918, when he left that employment and entered the service of another employer. He testified that the sight of his injured right eye began to fail immediately after the accident, becoming quite noticeable in January and February, 1918. May 22, 1918, he again went to Dr. Mundt, who treated his eye until May 27, 1918. On the latter day he called on the claims attorney for plaintiff in error, and told him that Dr. Mundt said the trouble with his eye was not due to any injuty, but advised him to see if the railroad company would do anything for him. The attorney verified Richter's statement by telephoning Dr. Mundt, who advised an operation, and said it would cost $150, including hospital services. The attorney then gave Richter a check

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for $75 for payment on operation, which recited that it was in full settlement of all claims, demands, or causes of action, against plaintiff in error, at common law or under any state or federal statute, arising out of personal injuries to claimant on or about December, 1917, or May, 1918. On the same day, May 27, 1918, Richter and the attorney on behalf of plaintiff in error, signed an agreement, wherein plaintiff in error agreed to pay Richter said sum as the sole consideration, and without any other promise or agreement, and Richter agreed to accept said sum in full settlement and satisfaction of all claims, demands, and causes of action against plaintiff in error, at common law or under any state or federal statute, arising from personal injury received by him at or near Yard Center, Ill., on or about December, 1917, and May, 1918. Richter testified that in August, 1920, he discovered that he had completely lost the sight of his right eye, and that his eye was perfect before he received the said injury.

Defendant in error filed his application for adjustment of his claim August 26, 1919, 20 months after he returned to his work for plaintiff in error. The arbitrator made an award of $10.745 per week for a period of 100 weeks for permanent loss of sight of the right eye, under the provisions of paragraph (e) of section 8 of the Compensation Act (Hurd's Rev. St. 1919, c. 48, § 133), on October 6, 1919. Petition for review was filed by plaintiff in error with the Industrial Commission, and after a hearing, in which both parties appeared and participated, the Commission approved and confirmed the award, allowing a credit to plaintiff in error of $75, which had also been allowed by the arbitrator, and ordered that the award stand as the decision of the Commission. The circuit court of Cook county, in certiorari proceedings before it, modified the award by disallowing the credit of $75, and confirmed it for $10.745 per week for 100 weeks. A writ of error was allowed by this court for review of the judgment of the circuit court.

Two questions only are raised on this record by plaintiff in error: (1) No written claim for compensation was made within the time required by the statute after payments of compensation had ceased; (2) the defendant in error failed to show by competent evidence that the loss of his eye was due to an injury arising out of and in the course of his work.

We think the evidence in this record sustains the award and finding of the Commission that the defendant in error lost the sight of his eye by reason of the injury aforesaid, and that such injury arose out of and in the course of his work. As the judgment of the court will have to be reversed for the reasons assigned in plaintiff in error's first contention, it will not be necessary to make any further discussion of the second contention.

[1] The evidence of the defendant in error is positive that he never at any time made any written demand upon the plaintiff in error for compensation, or any demand therefor whatever, except as disclosed in the foregoing statement. Plaintiff in error paid both of the physicians for their services in treating the eye of defendant in error in December, 1917, and in May, 1918, in addition to the payment of $75 for operation and in full settlement of all of his claims. The agreement signed by the parties on May 27, 1918, cannot be construed as a demand for payment for his injuries. The payments for medical services for defendant in error were payments of compensation under the provisions of the Compensation Act. Central Locomotive & Car Works v. Industrial Com., 290 Ill. 436, 125 N. E. 369.

[2] Section 24 of the Compensation Act of 1917 (Hurd's Rev. St. 1917, c. 48, § 149) provides that no proceedings for compensation under the act shall be maintained unless claim for compensation has been made within 6 months after the accident, or, in the event that payments have been made under the provisions of the act, unless written claim for com-

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pensation has been made within six months after such payments have ceased. There was no demand of any character after the payment of the $75 for operation and hospital fees, if that shall be considered as a payment under the act, and there was no written demand after the payments of compensation had ceased in May, 1918, as required by the foregoing section. Defendant in error is therefore barred, under this section of the statute, from any recovery unless there is some other section of the statute under which he can maintain his claim.

Paragraph (d) of section 8 of the Compensation Act further provides that, in the event the employee returns to the employment of his employer in whose employment he was injured, the employee shall not be barred from asserting a claim for compensation under the act, provided notice of the claim is filed with the Industrial Board within 18 months after he returns to such employment, and the board shall immediately send to the employer, by registered mail, a copy of such notice. Defendant in error returned to his employment with plaintiff in error on December 26, 1917, just 20 months before his claim for compensation was filed. The 18 months dates from the day the employee returns to the service of his employer under whom he was injured, and he is barred from recovering under this section.

[3] Paragraph (h) of section 19 of the Compensation Act (section 144) is not applicable to this case, as that section simply provides that an agreement or award under the act providing for compensation in installments may, at any time within 18 months after such agreement or award, be reviewed by the Industrial Board at the request of either the employer or employee, on the ground that the disability of the employee has subsequently recurred, increased, diminished, or ended, and on such review compensation payments may be re-established, increased, diminished, or ended. The application in this case is an original application for compensation, and not for the review of an agreement or award for compensation in installments. For the same reason the case of Tribune Co. v. Industrial Com., 290 Ill. 402, 125 N. E. 351, is not applicable.

[4] It is suggested by defendant in error that the transcript of the proceedings before the Industrial Commission was not filed in time, as required by statute, and People v. Andrus, 299 Ill. 50, 132 N. E. 225, is cited as authority for that proposition. It is true that the transcript of these pro eedings was filed long after the time allowed by paragraph (b) of section 19 of the Compensation Act, and the Commission would thereby have lost jurisdiction of the case had defendant in error taken advantage of this objection before the Commission before he appeared and participated in the case. The Commission had jurisdiction of the subject-matter of the proceedings and had jurisdiction of the parties by reason of their appearance and taking part in the proceedings. The objection of defendant in error is therefore waived. Pocahontas Mining Co. v. Industrial Com. (No. 14332) 134 N. E. 160.

[5] Plaintiff in error made his contention before the Industrial Commission that the defendant in error had not made written demand within 6 months after payment of compensation had ceased or any demand for compensation at any time. His contention would have also been waived had it not been made before the Industrial Commission, as held in the case last cited.

For the reasons aforesaid, the judgment of the circuit court is reversed, and the cause is remanded to the circuit court, with directions to quash the record of the Industrial Commission.

Reversed and remanded, with directions.

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REPUBLIC IRON & STEEL CO. v. INDUSTRIAL COMMISSION ET AL. (No. 14121.)

(Supreme Court of Illinois. Feb. 22, 1922. Rehearing Denied April 5, 1922.)

134 Northeastern Reporter, 754.

2. MASTER AND SERVANT—REVIEWING COURT BOUND BY INDUSTRIAL COMMISSION'S FINDINGS ON EVIDENCE.

The court is bound by the findings of the Industrial Commission if there is any competent evidence in the record to sustain them.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

3. MASTER AND SERVANT — CONTRIBUTORY NEGLIGENCE DOES NOT BAR COMPENSATION.

Contributory negligence of the party injured is no bar to recovery under the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 356.)

4. MASTER AND SERVANT—INJURY TO EMPLOYEE VIOLATING ORDER TO USE STREET CAR HELD COMPENSABLE.

Though the violation of an order of the employer which takes the employee entirely out of the sphere of his employment prevents recovery of compensation for injuries, an employee's violation of an order to use the street car in reaching a depot to which he was sent to mail a letter did not take him out of the sphere of his employment, and his dependents can recover compensation for his death while walking to the depot along the railroad right of way.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

Error to Circuit Court, Rock Island County; F. D. Ramsay, Judge.

Proceedings under the Workmen's Compensation Act by Maude Moore to recover compensation for the death of her husband, Charles E. Moore, opposed by the Republic Iron & Steel Company, employer. The award of compensation by the Industrial Commission was quashed by the circuit court, and claimant brings error. Judgment of the circuit court reversed, and cause remanded, with directions.

G. C. Wenger and W. C. Allen, both of Rock Island, for plaintiff in error.

Kenworthy, Dietz, Shallberg, Harper & Sinnett, of Moline, for defendant in error.

DUNCAN, J. Charles E. Moore prior to his death had been an employee of defendant in error, the Republic Iron & Steel Company, at Moline for 20 years and during the last 5 years of his life was storekeeper and had charge of the stores. He worked 7 days a week and was paid for Sunday work. A part of his work was to go to Moline to do chores, to get bolts, nuts, and like things, and he was often sent to trains with mail. The last day he worked, Sunday, January 23, 1916, he left his home at 6 o'clock for his place of work. On that morning he checked up his store books and swept and mopped the floors. At about 11:20 o'clock a. m. J. E. N. Olson, chief clerk of defendant in error, gave Moore a letter written for the company, with directions to him to take it to the Rock Island station in Moline and mail it on the train going east at 1:20 o'clock p. m. The record does not disclose the time that

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Moore left the plant to mail the letter, and the record leaves it uncertain as to what route he took to reach the station. Olson testified that he handed him a letter and told him to take the street car for the train. He also testified that Moore afterwards told him at the hospital that he did not take the car, but walked the entire way from the plant down to the station on the railroad track. No one else seems to have heard this conversation. An employee of the steel company testified that Olson handed Moore the letter to take to the train and handed him a dime for street car fare, but did not hear Moore make any reply and did not hear Olson give him any directions when he gave him the dime. Gust Garke, a 12 year old boy, testified that he was at the depot, heard the train, ran to the door, saw a man get off a Third avenue street car and run up to hand the baggageman a letter, saw the letter in his hand, and that the man was struck by a train going east. He stated particularly that he saw this man get off the rear end of the street car, on the west side of Thirteenth street, and that he saw him picked up and put into an ambulance. He did not know Moore, but heard some people saying, "Mr. Moore got hurt," and found out that the man injured was Moore. He was corroborated by his sister, Gertrude, who testified that she remembered the accident, saw them pick up the injured man and put him in an ambulance, and saw her brother, Gust, standing next to the injured man. The evidence further shows that the depot is situated on the east side of Thirteenth street, which runs north and south, and that Twelfth street is west of and parallel with Thirteenth street. The plant is about 14 blocks from the railroad station, and the station may be reached from the plant by walking down the railroad right of way or by walking from the plant 2 blocks south on Second street to Third avenue, at which point a Third avenue car passes about every 15 minutes going east to Thirteenth street which it crosses a block north of the depot. Moore was picked up on the railroad right of way about midway between Twelfth and Thirteenth streets and west of the depot, and the testimony shows that the right of way at this point between Twelfth and Thirteenth streets is used by the public, and particularly by pedestrains, as a place for crossing the tracks, and it had been frequently so used for 5 or 6 years previous to this accident. Moore died of his injuries February 1, 1916, leaving surviving him Maude Moore, his widow, and one daughter, Edith Moore.

Maude Moore, plaintiff in error, filed her petition for compensation, and on September 27, 1917, the arbitrator awarded her the sum of $7.56 per week for a period of 416 weeks under paragraph (a) of section 7 of the Compensation Act (Laws 1913, p. 341), and the sum of $50 for first aid, medical, surgical, and hospital services as provided by paragraph (a) of section 8, and that there was also due $385.56 of said compensation up to the time of the award, and that the remainder thereof should be paid in weekly payments beginning with January 22, 1917. The arbitrator recited in his award that Olson gave the deceased a dime to be expended for car fare to the depot for the purpose of mailing the letter, but that deceased did not use the street car as a conveyance, but walked on the right of way of the railroad to the station. On a petition for review by defendant in error the Commission affirmed the award on September 27, 1917, and ordered it stand as the decision of the Commission. It does not appear what findings the Commission made as to the facts or how deceased traveled to the railroad station. The circuit court of Rock Island county in certiorari proceedings before it in June, 1918, quashed the record of the Commission, set aside the award, and certified that the cause was one proper to be reviewed by this court. A transcript of the record of the circuit court was filed in this court September 10, 1921, in answer to a writ of error.

It is stated in defendant in error's brief that there is no dispute about the main facts in this case, and that the only question presented is one

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of law, and that question is whether or not the alleged accidental injury so received by Moore arose out of and in the course of his employment. Plaintiff in error further insists that the testimony of Olson as what Moore told him in answer to his question as to how Moore reached the depot is incompetent because hearsay evidence, and the case of Chicago Packing Co. v. Industrial Board, 282 Ill. 497, 118 N. E. 727, is rened on as sustaining her in this contention.

[1] The statement made to Olson by the deceased was admissible on the part of defendant in error, as his statement was a declaration or an admission against his interests, and such declarations or admissions are an exception to rule, as to hearsay evidence when offered against him or his administrator, or one claiming under him, by the party sued. Schell v. Weaver, 225 Ill. 159, 80 N. E. 95, 8 Ann. Cas. 339; Chicago City Railway Co. v. Henry, 218 Ill. 92, 75 N. E. 758. The rule is otherwise, however, when such declarations are offered as evidence by the injured party who makes them or when offered by his administrator or one suing for injury or compensation for his death. In such a case the declarations are in the nature of self-serving declarations and come strictly under the hearsay rule. For that reason the declarations of the deceased in the case of Chicago Packing Co. v. Industrial Board, supra, were held incompetent.

[2] In this case this court is bound by the finding of the facts as found by the Commission if there is any competent evidence in the record to sustain its finding. The Commission may have found, so far as we are advised, that the deceased did take a street car in making his journey to the station, as the evidence of the two Garke witnesses tended to prove. Under such a finding it could not be questioned successfully that the injury arose out of and in the course of the employment.

[3] If the finding of the Commission was entirely in accord with the finding of the arbitrator that the deceased walked on the railroad track instead of taking the street car, and if its finding should have been that in walking on the railroad the deceased disobeyed his instructions, our decision of this case would not be changed. This court has many times decided that contributory negligence of a party injured is no bar to a recovery under the Compensation Act.

[4] The most that may be said in favor of defendant in error's contention is that the deceased was guilty of negligence in not obeying the order or directions of Olson. The rule is that, where the violation of a rule or order of the employer takes the employee entirely out of the sphere of his employment, and he is injured while violating such rule or order, it cannot be then said that the accident arose out of the employment and in such a case no compensation can be recovered. If, however, in violating such a rule or order the employee does not put himself out of the sphere of his employment, so that it may be said he is not acting in the course of it, he is only guilty of negligence in violating such rule or order and recovery is not thereby barred. Union Colliery Co. v. Industrial Com., 298 Ill. 561. 132 N. E. 200. As was said in the case just cited in quoting from the case of Jackson v. Denton Colliery Co., W. C. & Ins. Rep. 91, 7 B. W. C. C. 92, it does not matter in the slightest degree how many orders the employee disobeys or how bad his conduct may have been if he was still acting in the sphere of his employment and in the course of it the accident arose out of it. The deceased was performing the errand that he was directed to perform, and this errand was a part of his employment or an incident of it. Had he used the street car in reaching the depot, it is conceded by defendant in error that he would have been performing a duty that his employment required of him, and it is further conceded that in such a case the injury would have arisen out of his employment and in the course of it and that defendant in error would be liable for the compensation. If he walked on the railroad to the station he was at all times in the performance of his employment up

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until he was struck by the train, and the violation of his order never at any time took him out of the sphere of his employment. Plaintiff in error was therefore entitled to recover, and the judgment of the circuit court must be reversed.

The judgment of the circuit court is reversed, and the cause remanded to that court, with directions to quash the writ.

Reversed and remanded, with directions.

GARDINER v. COCHRAN CHAIR CO. (No. 11239.)

(Appellate Court of Indiana. March 29, 1922.)

134 Northeastern Reporter, 873.

1. MASTER AND SERVANT—COMPENSABLE INJURY MUST BE PROVED.

In a proceeding before the Industrial Board for compensation, the fact that the injury complained of arose out of and in the course of the employment must be found to sustain an award, and the burden of proving that fact rests on the applicant.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

2. MASTER AND SERVANT — ONLY EVIDENCE SUSTAINING COMPENSATION AWARD CONSIDERED ON APPEAL.

On appeal from an award of the Industrial Board, only evidence tending to sustain the award will be considered.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

3. MASTER AND SERVANT — PRESUMPTION IN FAVOR OF COMPENSATION AWARD.

On appeal from an award of the Industrial Board it is assumed that the board drew the inferences which are in harmony with and support the award.

(For other cases, see Master and Servant. Dec. Dig. § 417[5].)

4. MASTER AND SERVANT — FINDINGS ON EVIDENCE IN COMPENSATION CASE CONCLUSIVE.

The findings of the Industrial Board have the same force as the finding of a court or the verdict of a jury, and are not to be set aside if there is evidence upon which they can rest.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

5. MASTER AND SERVANT—FINDING OF NONCOMPENSABLE INJURY TO WORKMAN COMPLAINING OF HERNIA SUSTAINED.

In a proceeding by an employee claiming compensation for hernia, evidence *held* to sustain the Industrial Board's finding that the disability did not arise out of and in the course of employment.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Dausman, C. J., and Nichols, J., dissenting.

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Appeal from Industrial Board.

Proceeding by Robert J. Gardiner against the Cochran Chair Company before the Industrial Board for an award. From an award that plaintiff take nothing, plaintiff appeals. Affirmed.

Martin J. Givan, of Lawrenceburg, and Claycombe, Givan & Stump of Indianapolis, for appellant.

Ketcham, McTurnan & Higgins, of Indianapolis, for appellee.

REMY, J. Appellant filed with the Industrial Board his application for compensation. At the hearing, the board found that the disability for which compensation was claimed, that is inguinal hernia, did not arise out of and in the course of appellant's employment, and made an award that appellant take nothing. From this order the appeal is prosecuted.

The sufficiency of the evidence to sustain the finding and award is assigned as error.

The only question for our consideration is; Does the evidence sustain the finding of the board that appellant's injury for which he claims compensation did not arise out of and in the course of his employment? The evidence on this issue is in substance as follows:

Appellant, who is 68 years of age, was employed by appellee in its chair factory, and as such employee one of his duties was to place unfinished chairs in piles. On March 23, 1920, a rocking chair, which appellant was attempting to place upon the top of a pile, fell to the floor, causing appellant to lose his balance, and as a result he fell upon the chair in such a manner as to strike his right groin upon the point of one of the runners of the chair. The injury resulting to appellant was such as to cause him pain at the time, but not sufficient to stop him from work. He continued his work for appellee regularly until October 9, 1920, when he ceased to work for appellee. Appellant did not notify appellee of his fall, or that he had received an injury until November 27, 1920.

Appellant testified that a short time after the injury he consulted Dr. Stewart, by whom he was told that he had sustained a partial rupture, but that he did not again consult a physician until November 24, 1920, when he again consulted Dr. Stewart, and was told that he had a complete hernia.

At the hearing, Dr. Stewart, as a witness for appellant, testified that he examined appellant "the last of November, 1920," at which time he found him suffering from inguinal hernia. The witness also testified that he had no recollection of being consulted by appellant "soon after his fall," or at any time prior to the last of November, and that to the best of his knowledge he had not been so consulted. Dr. Stewart also testified that a blow such as appellant received by falling on the chair "could have" produced hernia.

Dr. Emmert who testified as an expert witness on behalf of appellant, stated that he had examined appellant the day before the hearing, and found him suffering from right inguinal hernia; that "external injuries hardly ever" produce hernia. The witness during his examination was asked by appellant's attorney the following question:

"Assume that Mr. Gardiner, a man 66 or 67 years old, is engaged in lifting a chair up on a tier of chairs, and the chair slipped, and he became overbalanced and fell, striking himself in the right groin with the sharp point of the runner of that chair, could such a blow as that produce any such a condition as you found in him?"

To this question the witness answered, "No, sir." The witness stated that when a man arrives at the age of appellant the muscles of this abdomen become weak, and that hernia is easily produced by a strain. Appellant refused to submit to an operation, though his physicians recommended it.

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Charles Fauss, a witness for appellee, testified that during the time appellant was working for appellee in the chair factory appellant asked him to help get a chair down from a pile, and as a reason for wanting assistance said that, "while he was in the grocery business," before he took employment with appellee, "he had sprained himself lifting a barrel of sugar." Appellant made no complaint to Fauss "about being hurt there in the factory."

Appellant's wife attended the hearing and testified on behalf of her husband that notice of her husband's injury was by her given to appellee on November 27, 1920, but gave no testimony whatever as to the character of the injury of which her husband complained, or that she knew he had an injury prior to the time he filed his application for compensation, although the evidence shows that she was living with appellant as his wife at the time he claims to have received the injury, and continuously thereafter until the hearing.

[1-4] In a proceeding before the Industrial Board for compensation, one of the facts which must be found as a legal basis for an award is that the injury complained of arose out of and in the course of applicant's employment. Haskell, etc., Car Co. v. Brown, 67 Ind. App. 178, 117 N. E. 555. The burden of proving such fact rests upon the applicant for compensation. New Castle Foundry Co. v. Lysher, 68 Ind. App. 509, 120 N. E. 713. On appeal only the evidence tending to sustain the award will be considered. Haskell, etc., Car Co. v. Kay, 69 Ind. App. 545, 119 N. E. 811. It is the province of the Industrial Board to draw legitimate inferences from facts and circumstances proved, and on appeal it will be assumed that the board drew those inferences which are in harmony with and support the award. Bachman v. Waterman, 68 Ind. App. 580, 121 N. E. 8. The findings of the Industrial Board have the same force as the finding of a court or a verdict of a jury, and are not to be set aside if there is evidence upon which they can rest. Sugar Valley Coal Co. v. Drake, 66 Ind. App. 152, 117 N. E. 937; American Hominy Co. v. Davis (Ind. App.) 126 N. E. 703; Northern Indiana, etc., Co. v. Thomas (Ind. App.) 133 N. E. 393.

[5] In the light of the foregoing rules and principles, we have considered the evidence, and hold that there is sufficient evidence to sustain the finding and award.

Dausman, C. J., and Nichols, J., dissent.

DUNCAN v. IOWA RY. & LIGHT CO. (No. 34138.)

(Supreme Court of Iowa. April 4, 1922.)

187 Northwestern Reporter, 486.

3. MASTER AND SERVANT — NEGLIGENCE IN FAILING TO WARN INEXPERIENCED EMPLOYEE OF DANGER HELD QUESTION FOR JURY.

Where plaintiff, a 15 year old boy, employed to clean out a combustion chamber of a furnace with a long-handled shovel, crawled into the chamber and was injured when water was thrown on the hot cinders, defendant's negligence in failing to warn plaintiff of the danger was a question for the jury.

(For other cases, see Master and Serant, Dec. Dig. § 386[4].)

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Appeal from District Court, Boone County; G. D. Thompson, Judge.

Action for personal injury. Verdict for plaintiff, and defendant appeals. Reversed and remanded.

John A. Reed and Ralph Maclean, both of Cedar Rapids, C. H. E. Boardman, of Marshalltown, and John A. Hull, of Boone, for appellant.

Dyer, Jordan & Dyer, of Boone, for appellee.

FAVILLE, J. The appellant operates an electric light plant at Boone, Iowa. At the time of the injury complained of, the appellee who sues by his father as next friend, was about 15 years of age. On May 14, 1919, he left school and went to the plant of the appellant, in company with a boy named Myers, and there met the chief engineer of the appellant, who asked the boys if they wanted work, and, being told that they did, the engineer said he had a little work to be done. He set the two boys to unloading a car of brick, which they worked at about an hour, and he then told another employee, one Merrick, to take the two boys and clean out the combustion chamber of the furnace. This combustion chamber, it appears, is common to all boilers. It is a room in the back of the boiler where the soot and cinders collect before the smoke passes into the smokestack. This chamber in appellant's furnace is about 8x12 feet in size, and at the bottom, next to the floor, was an opening about 12x14 inches, through which the ashes, soot, and cinders which collect in the chamber are removed. Unless the fires are out and the furnace has cooled down, this combustion chamber is always a hot place, and was very hot on this occasion. The ordinary and usual manner of cleaning the chamber was from the outside, by reaching through this opening with a long-handled shovel. Appellee and Merrick were furnished with such shovels. When the parties got to the furnace room, for the purpose of undertaking the work, the appellee voluntarily laid on the floor and crawled through this opening into the combustion chamber, and Merrick followed him. Appellee took the shovel that had been furnished him into the combustion chamber with him, and started to shovel the hot ashes out. He had shoveled out three or four wheelbarrows full before the injury occurred. Merrick had taken a hose inside the combustion chamber and turned water into the pile of hot soot, ashes, and cinders. This resulted in the formation of steam and an eruption which threw the wet and hot material around the feet and legs of the appellee, causing serious burns below the knees.

[1] I. It is one of the contentions of the appellant that the appellee comes within the terms and provisions of the Workmen's Compensation Act (Acts 35th, Gen. Assem. c. 147), and hence cannot maintain this action, and that the court should have directed a verdict for the appellant upon this ground. The court submitted to the jury, under proper instruction, the question as to whether or not the employment of the appellee was purely casual, and directed the jury that, if they found the employment of the appellee was casual, then he did not come under the terms and provisions of the Workmen's Compensation Act, and could maintain this action. The court properly defined to the jury by its instructions what constitutes casual employment within the meaning of the Workmen's Compensation Act. Said instruction is in accordance with our holdings in construing this act. Bedard v. Sweinhart, 186 Iowa, 655, 172 N. W. 937; Herbig v. Walton Auto Co. (Iowa) 182 N. W. 204; Porter v. Mapleton Electric Co. (Iowa) 183 N. W. 803; Oliphant v. Hawkinson (Iowa) 183 N. W. 805. There was no error in submitting this question to the jury, and the finding of the jury has support in the evidence. The court did not err in refusing to direct a verdict upon this ground.

[2] II. It is the appellant's contention that there was no proof of negligence on the part of the appellant justifying a submission of the

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case to the jury. The court submitted to the jury four grounds of alleged negligence on the part of the appellant: First, the failure to furnish a reasonably safe place to work; second, failure to warn the employee of the danger; third, failure to instruct the employee so he would fully understand and appreciate the danger of his employ; fourth, negligence by reason of employing a person under 16 years of age at a work or occupation which, by reason of its nature or the place of employment, the health of such person may be injured, or giving employment in an occupation dangerous to life or limb.

There was a general allegation in the petition that the appellant was guilty of negligence in failing to provide and maintain a safe place for the appellee to work. There were no specifications in the petition with regard to the manner in which it is claimed that the place where the appellee was to work was unsafe, unless it is to be found in an allegation that—

"In said plant of said defendant there were many wires carrying high voltage, switchboards, and panels, to which wires charged with high voltage are connected, fly wheels and other moving machinery and parts thereof, with which the plaintiff's son, because of his youth and inexperience, might or could come in contact, and his life or limb be in danger."

It is the contention of the appellee that this allegation with respect to the electric wires and other appliances in appellant's plant was not pleaded by appellee for the purpose of making the existence of the same a ground of negligence, but solely for the purpose of showing that the appellee, being under 16 years of age, was employed by appellant in an occupation that was prohibited by the so-called "Child Labor Statute" (Acts 31st. Gen. Assem. c. 103) of the state. The contention now made by the appellee in argument was, however, in no manner pointed out by the court in his instructions to the jury in the trial of the cause. No proof whatever was offered in regard to the existence of the electric wires, switchboards, and panels, flywheels, and other moving machinery at appellant's plant, as pleaded in the petition. The court, however, in submitting to the jury the grounds of negligence, told the jury it was the duty of the employer to use reasonable care and diligence to furnish an employee a reasonably safe place in which to work. In defining the issues the court set out in full the allegations of the petition above referred to respecting the high voltage wires, switchboards, and panels, flywheels, and other moving machinery, regarding which no proof whatever had been offered. So in respect to this matter the situation was left where the court stated to the jury, as one of the issues in the case, the allegations of the petition respecting the existence of the dangerous instrumentalities described, and, after so doing, told the jury that one of the grounds of negligence was failure to furnish the employee with a safe place in which to work, and told the jury it was the duty of the employer to use reasonable care and diligence to furnish such safe place.

With the record in this form, we think the court erred in the manner of submitting the matter of the alleged negligence of the appellant in failing to provide the employee with a safe place in which to work. The court should not have submitted to the jury, as an issue in the case, the existence of the high voltage wires and other appliances referred to in the petition, in view of the fact that there was no evidence to sustain the allegation. The court should have eliminated from the instructions any reference whatever to the matters about which no proof whatever had been offered. We shall discuss this allegation of the petition in another division of this opinion, but at this point we hold that it was error on the part of the court to submit, as an issue in the case, the allegation respecting the existence of high voltage wires and other dangerous appliances, and, without any further explanation, instruct the jury that the appellant was liable for negligence if it failed to furnish the appellee a safe place in which to work. As bearing on this question, see Cresswell

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v. Wainwright, 154 Iowa, 167, 134 N. W. 594; Morton v. Woods, 154 Iowa, 728, 135 N. W. 400; Heisler v. Heisler, 151 Iowa, 503, 131 N. W. 676.

[3, 4] III. In view of the evidence regarding the youth and inexperience of the appellee, it was a question for the jury to determine whether or not it was the duty of the master to warn the appellee, under the circumstances, of danger that might arise to him in the manner in which he performed the work he was about to undertake. Whether or not there is a duty resting upon the employer to warn of possible danger depends upon the nature of the employment, the age, capacity, intelligence, experience, of the employee, as well as all of the surrounding facts and circumstances. We think it was a question for the jury, in the instant case, to determine, in view of all the facts and circumstances surrounding the situation, whether or not it was negligence on the part of the appellant to fail to warn the appellee of any danger there might be in connection with the business he was about to undertake. Atlanta, etc., Ry. Co. v. Smith, 94 Ga. 107, 20 S. E. 763; Egan v. Sawyer, etc., Lbr. Co., 94 Wis. 137, 68 N. W. 756.

[5] IV. It was also a question for the jury to determine whether, under the facts and circumstances, there was negligence on the part of the appellant in failing to instruct the appellee in regard to the proper manner in which he should perform the work which he was instructed to undertake. It was for the jury to determine whether or not it was negligence on the part of the appellant not to do more, under the circumstances, than to furnish the appellee with a long-handled shovel and direct him to clean out the combustion chamber of the furnace. It is strenuously argued by the appellant that it could not have anticipated that the appellee would crawl through the small opening and get inside the combustion chamber and attempt to clean it out from there, or remain therein while his coemployee was pouring cold water upon the hot ashes and cinders therein. However, it became apparent, from what was actually done by the appellee, that there were two methods available of removing the cinders and soot from the combustion chamber. The evidence showed that the usual and ordinary method was by reaching through the aperture with a long-handled shovel. It could also be done in the method undertaken by the appellee. We think it was a question for the jury to determine whether or not, under the facts and circumstances disclosed, it was the duty of the appellant to instruct the inexperienced employee in regard to the proper manner of performing the work which he was to undertake, and whether or not the appellant was liable for negligence in failing to so instruct the appellee. The duty to instruct is closely allied with the duty to warn. The court did not err in submitting to the jury the question for them to determine as to whether or not, under all of the facts and circumstances disclosed by the record, there was negligence on the part of the appellant in failing to instruct the appellee in regard to the proper manner of performing the work which the appellee undertook to do.

[6] V. The court instructed the jury, as a part of instruction 7, that—

"The law of this state forbids any person from employing any person under 16 years of age at any work or occupation by which, by reason of its nature, or the place of employment, the health of such person may be injured, or in any occupation dangerous to life or limb, and the employment of such person under such conditions would constitute negligence."

This portion of the instruction, it is claimed by the appellee, was framed in view of the provisions of section 2477b of the Supplemental Supplement to the Code. Said provisions are as follows:

"No person under sixteen years of age shall be employed at any work or occupation by which, by reason of its nature or the place of employment, the health of such person may be injured, or his morals de-

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praved, or at any work in which the handling or use of gunpowder, dynamite or other like explosive is required, or in or about any mine during the school term, hotel, bowling alley, pool or billiard room, or in occupations dangerous to life or limb."

This statute is penal, and violation of its terms and provisions constitutes a crime, punishable by fine and imprisonment. The petition alleged that—

The employment of the appellee "was illegal and forbidden by law, in that the work to which he was assigned was injurious to his health, in that in performing said work he was obliged to inhale gas fumes, particles of hot soot, and hot defiled air, with injurious effect to his lungs, and the character of work to which he was assigned was dangerous to life or limb because of the matters herein set forth. The plaintiff further shows to the court that in the plant of said defendant there are many wires carrying high voltage, switchboards, and panels, to which wires charged with high voltage are connected, flywheels, and other moving machinery and parts thereof, with which the plaintiff's son because of his youth and inexperience might or could come in contact, and his life or limb endangered."

We have heretofore referred to the fact that there was no evidence to sustain the allegations of the petition with regard to the existence of the wires carrying high voltage or the other instrumentalities referred to. There is also no evidence in the record that the appellee in performing said work was obliged to inhale gas fumes, particles of hot soot, and hot defiled air, with injurious effect to his lungs, or that he did inhale the same. There was expert evidence to the general effect that, in any combustion chamber in a furnace at the time it is in use with a fire in it, there would be "more or less" gas, and that such gas is carbon monoxide, and injurious to the lungs.

The court submitted to the jury, as one of the issues in the case, the allegation above set forth, to the effect that it was claimed by appellee that the employment of the appellee was illegal and forbidden by law, in that the work to which he was assigned was injurious to the health, in that in performing said work he was obliged to inhale gas fumes, particles of hot soot, and hot defiled air, with injurious effect to his lungs, and also submitted in the same connection the allegation that in the plant of the appellant there were wires carrying high voltage, switchboards, and panels, flywheels, and other moving machinery. With these allegations submitted as one of the issues in the case, the court gave the instruction above quoted in regard to the employment of a person under 16 years of age at any dangerous work or occupation, and that such employment would constitute negligence. No further instructions were given on the subject. We think that this instruction failed to adequately and fully submit to the jury the essential things that the jury must find in order to charge the appellant with negligence per se.

The appellee based his claim that such employment was illegal and constituted negligence per se on three grounds, namely, that he was under 16 years of age, that the occupation was dangerous because of the presence of gas fumes which might be injurious to the lungs, and that the place of employment was dangerous because of the presence of electrical wires and machinery. The jury should have been told that before the appellant could be held negligent as a matter of law in employing the appellee it must appear from the evidence that the appellee was under 16 years of age, and was employed in a place or at an occupation that was rendered dangerous to life or limb because of the things claimed by appellee that made said place or occupation dangerous, to wit, the presence of gas fumes, or the presence of dangerous wires and machinery. Nothing of the kind was pointed out to the jury by the court, and, as before stated, there was no evidence whatever to sustain the allegations of the petition in regard to the presence of dangerous wires and ma-

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chinery. It is also doubtful if, under the record, there was proof of the existence of any gas fumes in the combustion chamber at the time the appellee was injured. Under the circumstances, it was the duty of the court to have instructed the jury clearly and explicitly upon this question. The rule of res ipsa loquitur has no application here. The appellee claimed that the employment was illegal, and therefore constituted negligence per se. This presented a fact question upon which the jury should have had explicit instructions as to matters essential to be established in order to charge the appellant with negligence per se by reason of a violation of said statute. This was not done.

[7] VI. The petition contains the following allegations:

"That said child's limbs are greatly disfigured, and will forever remain in said conditon, and that because of said disfigurement he is caused great mental suffering, mortification, and humiliation, such disfigurement making him an object of pity, and that plaintiff further charges that because of the negligence of said defendant the earning capacity of said child has been greatly decreased, and will forever be less than it would have been had said child did not sustained said injuries; and the plaintiff avers that said child is permanently injured."

These are the only allegations that in any manner refer to future damages. In instructing the jury in regard to the matter of damage, the court gave the following:

"In determining said amount you will take into consideration the proof, if any, showing the mental pain and suffering sustained by him by reason of his injuries; any pain or suffering, if any you find he will sustain in the future resulting from such injuries; the proof, if any, of the probable effect of the injuries in the future upon his health; and also any reduction of his power and capacity to earn money, if any, in the future after he has arrived at the age of 21 years, or to pursue the course of life he might but for his injuries have pursued after he arrives at the age of 21."

In Fry v. Dubuque & S. W. Ry. Co., 45 Iowa, 416, the instruction to the jury was that they should give such damages "as will fairly compensate her for all past, present or future physical suffering or anguish which is, has been or may be caused by said injury." We said that the instruction was too broad, and that the jury should have been directed that they might give the plaintiff damages for such future pain "as it was reasonably certain from the evidence she would suffer." The case was reversed.

In Ford v. City of Des Moines, 106 Iowa, 94, 75 N. W. 630, the Fry Case was approved and followed.

In Hall v. C. R. & M. C. Ry. Co., 115 Iowa, 18, 87 N. W. 739, we disapproved an instruction that permitted recovery for future pain "which she may in the future suffer, if any, in consequence of the alleged injury." It was held that this permitted the jury to enter into the realm of speculation regarding future suffering.

The same rule was announced in Williams v. Clark County, 143 Iowa, 328, 120 N. W. 306, wherein we again announced that the instruction in respect to future damages should be limited to such damages as were reasonably certain to be caused by the injury. See, also, Sanders v. O'Callaghan, 111 Iowa, 574, 82 N. W. 969.

In Kendall v. City of Albia, 73 Iowa, 241, 34 N. W. 833, we refused to reverse where the court told the jury:

"With reference to future damages you should be satisfied from the evidence that they will probably be sustained by the plaintiff."

In Bailey v. City of Centerville, 108 Iowa, 20, 78 N. W. 831, the instruction allowed the jury to assess damages if they found from the evidence that "such disability will probably continue." We said:

"Reasonable certainty that future pain and suffering or loss of capacity will follow is all that is required. When we say that it is 'likely'

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or 'probable' that such results will follow, we mean the evidence preponderates that way, and there is that reasonable certainty which the law requires. Something more than mere conjecture is necessarily implied. Moreover, in the same instruction, the court plainly instructed that plaintiff could only recover such damages as were caused solely by the accident, and that the jury must be guided by the evidence in determining whether or not there would be future damage. While it would have been better to use the words 'reasonably certain,' yet, looking to the whole instruction, we think that idea was conveyed, and that there was no prejudicial error."

In Woodworth v. Railway Co., 170 Iowa. 697, 149 N. W. 522, we criticized an instruction that permitted the jury to allow for any "pain and suffering that he may endure in the future, as shown by the evidence in this case, if any he will suffer in the future," and "all as established by the evidence admitted."

Where damages may be recovered for future loss, such damages must be limited to such loss as is shown by the evidence will be reasonably certain to be suffered in the future. The instruction given in the instant case does not meet with our approval. It should not be given in this form upon retrial of the case.

[8] VII. Over the defendant's objection, the plaintiff was permitted to introduce evidence to the effect that there were signs posted at the doors of the appellant's power plant which bore the word "Danger" on them. There was no showing that these signs were placed on the building where the appellee was employed, although we assume such to be the fact. The appellant's objections to this testimony should have been sustained. The appellee was claiming that his employment was illegal under the statute, because the place where he was employed and the occupation in which he was engaged was dangerous on the two grounds heretofore set out and discussed. The admission of the evidence of the existence of the danger signs at some of the doors of the power plant, without further proof of any kind in regard to said matter, was improper, and we think said evidence was prejudicial to the appellant.

Other errors argued by the appellant are not likely to occur upon a retrial of this cause.

For reasons pointed out, the judgment of the lower court is reversed and the cause remanded for new trial.

Stevens, C. J., and Evans and Arthur, JJ., concur.

HILSINGER v. ZIMMERMAN STEEL CO. (No. 34494.)

(Supreme Court of Iowa. April 8, 1922.)

187 Northwestern Reporter, 493.

2. MASTER AND SERVANT — EXCLUSIVE REMEDY OF FATHER OF INJURED MINOR EMPLOYEE IS UNDER WORKMEN'S COMPENSATION ACT.

In cases where the Workmen's Compensation Act applies to injuries sustained by a minor employee, and in view of Code Supp. 1913, §§ 2477m(a), 2477m2(a), 2477m9(f), 2477m12, 2477m16, there can be no recovery by the father for loss of the services of his minor son, an employee under Code, § 3471.

(For other cases, see Master and Servant, Dec. Dig. § 355.)

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3. MASTER AND SERVANT — WORKMEN'S COMPENSATION ACT NOT UNCONSTITUTIONAL AS APPLIED TO PARENT'S RIGHT TO CHILD'S SERVICES.

Workmen's Compensation Act is not unconstitutional as depriving the parent of his vested right to the value of the services of his minor child, since such right is statutory, and one subject to amendment by subsequent legislation.

(For other cases, see Master and Servant, Dec. Dig. § 347.)

5. MASTER AND SERVANT — ALLOWANCE OF COMPENSATION ADJUDICATION AS TO MINOR'S EMPLOYMENT.

The fact that compensation has been allowed under Workmen's Compensation Act is an adjudication as to a minor that he was injured in his regular course of employment as an employee, and that his employment was not casual.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

Appeal from District Court, Scott County; F. D. Letts, Judge.

Action by plaintiff under Code, § 3471, to recover for loss of the earnings of his minor son, resulting from injuries received while an employee of the defendant, and through the negligence of the defendant. Medical expenses also are claimed. One defense pleaded by the defendant was that the defendant, as an employer, was operating under the Workmen's Compensation Act (Code Supp. 1913, §§ 2477m to 2477m51) and that its liability had been adjudicated under such act, and that the defendant had paid all installments adjudicated against him as they matured. By way of reply the plaintiff admitted that the defendant was operating under the Workmen's Compensation Act, and that all the liability of the defendant to the employee had been adjudicated pursuant to such act, but averred that he, as parent of the minor employee, was not bound by the provisions of such Compensation Act and that he was entitled to recover independent thereof by virtue of section 3471. The defendant filed a motion for judgment on the pleadings, which was duly sustained, and judgment entered dismissing the petition. Plaintiff has appealed. Affirmed.

A. G. Bush, of Davenport, for appellant.

Bollinger & Block, of Davenport, for appellee.

EVANS, J. [1] There is no warrant under our statute for a motion for judgment upon the pleadings, though such practice is not infrequently resorted to by apparent mutual consent of counsel. The parties themselves have mutually treated the motion as the equivalent of a demurrer to the plaintiff's reply and an election by the plaintiff to stand upon his pleading. We shall for that reason so treat it here without giving sanction to the practice. The practice, if sanctioned, would quite supplant the demurrer. If the practice were sanctioned as a matter of right to the movant, he would, if successful, be entitled to summary judgment without any right of amendment to the adverse party. However, where the parties mutually agree to present an issue of law in that form, there can be no special objection to it as an agreement of the parties.

[2] The question presented here is whether the right of a father to recover for the loss of services of a minor child through injury resulting from the negligence of another, as provided by section 3471, is affected to any degree by the Workmen's Compensation Act.

The pleadings disclose that the defendant was engaged in operating a factory, and that Harry Hilsinger, the minor son of plaintiff, 18 years of age, was regularly employed therein at $40 per week. While so employed he received the injuries complained of.

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The argument for the appellant is that the Workmen's Compensation Act did not in terms repeal section 3471, and that its terms are not so repugnant to section 3471 that a repeal by implication should be found. To our minds, the question involved is not so much whether section 3471 has been repealed by implication, but whether the field of its application has been circumscribed or reduced by the operation of the Compensation Act. Assuming that the purpose of the Compensation Act was to cover the entire field of liability for industrial injury, section 3471 could still be operative outside of that field.

In order to get before us the real purport of the Compensation Act, a few quotations therefrom will be necessary. Section 2477m is:

"*Employers—Employees—Exceptions.* (a) *Presumption—Employees Excepted.* Except as by this act otherwise provided, it shall be conclusively presumed that every employer as defined by this act has elected to provide, secure and pay compensation according to the terms, conditions, and provisions of this act for any and all personal injuries sustained by an employee arising out of and in the course of the employment; and in such cases the employer shall be relieved from other liability for recovery of damages or other compensation for such personal injurv, unless by the terms of this act otherwise provided; but this act shall not apply to any household or domestic servant, farm or other laborer engaged in agricultural pursuits, nor persons whose employment is of a casual nature."

Section 2477m2 is:

"*Rights of Employee—Notice to Reject.* (a) *Exclusive of Other Rights—Presumption—Notice.* The rights and remedies provided in this act for an employee on account of injury shall be exclusive of all other rights and remedies of such employee, his personal or legal representatives, dependents or next of kin, at common law or otherwise [,] on account of such injury; and all employees affected by this act shall be conclusively presumed to have elected to take compensation in accordance with the terms, conditions and provisions of this act until notice in writing shall have been served upon his employer, and also on the Iowa Industrial Commissioner, with return thereon by affidavit showing the date upon which notice was served upon the employer."

Section 2477m16 defines certain terms used in the Compensation Act, including the following:

"The term 'workmen' shall include the singular and plural of both sexes. Any reference to a workman who has been injured shall, where the workman is dead, include a reference to his dependents as herein defined, legal representatives or where the workman is a minor or incompetent to his guardian or next friend."

Also:

"(c) The following shall be conclusively presumed to be wholly dependent upon a deceased employee: * * * (3) a parent of a minor entitled to the earnings of the employee at the time when the injury occurred, subject to provisions of subdivision (f), section 10 hereof."

Section 2477m12 is:

"*Contributions from Employees—No Reduction of Employer's Responsibility.* The compensation herein provided shall be the measure of the responsibility which the employer has assumed for injuries or death that may occur to employees in his employment subject to the provisions of this act, and it shall not be in any wise reduced by contribution from employees."

Section 2477m9(f) is:

"Where injury causes death to an employee, a minor, whose earnings were received by the parent, the compensation to be paid the parent shall be two-thirds of the amount provided for payment in subdivision (d) section 10."

It will be seen from the foregoing that the Compensation Act does purport to provide a complete and exclusive remedy for all injured em-

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ployees and their beneficiaries, and that it does purport to provide a complete and exclusive liability on the part of the employer for such injuries. Section 2477m2 above quoted expressly so provides. It makes this remedy—

"exclusive of all other rights and remedies of such employee, his personal or legal representatives, dependents or next of kin, at common law or otherwise [,] on account of such injury."

This enumeration necessarily includes the father as the next of kin. If death had resulted to the employee, the statute would become applicable to the father not only as the next of kin, but as a dependent, as provided by section 2477m16 above quoted. That the act is applicable to the parent of a minor is also indicated by 2477m9(f) above quoted. True these particular divisions have reference to a case of wrongful death. But, if section 3471 is not affected by the Compensation Act, then the father of the minor is as much entitled thereunder to sue for damages for the wrongful death of the minor as for his wrongful injury. It must be said, therefore, that the Compensation Act does operate upon the rights accruing under section 3471 to the parents of a minor before the enactment of the Compensation Act; that, though it has not repealed section 3471 either expressly or by implication, yet it has necessarily narrowed its field of application to cases arising outside the field of the Compensation Act itself. Industrial injuries are to be compensated for by the methods of the Compensation Act, and not otherwise.

Cases from other jurisdictions are few. Such as there are are necessarily made to rest upon the particular statute under consideration. The appellant places special reliance upon King v. Viscoloid Co., 219 Mass. 420, 106 N. E. 988, Ann. Cas. 1916D, 1170. The Massachusetts statute construed in that case is not identical with ours, nor does it contain the equivalent of the more important provisions which we have above quoted herein.

Appellant puts reliance also upon Mackin v. Detroit-Timkin Axle Co., 187 Mich. 8, 153 N. W. 49. This case can hardly be deemed a precedent upon the question before us, for the reason that such question was not directly involved in the cited case. The remark contained in the opinion which is relied upon by appellant was used argumentatively only in sustaining the constitutionality of the statute. Neither was that statute identical with ours.

The question was before the Supreme Court of West Virginia in Adkins v. Hope Engineering & Supply Co., 81 W. Va. 449, 94 S. E. 506. The language of the West Virginia statute is not identical with ours, but is more nearly equivalent thereto than was the Massachusetts statute. The holding in that case was that the Compensation Act was exclusive of the parent's right to maintain an action for loss of services.

The same question arose in New Jersey in Buonfiglio v. R. Neumann & Co., 93 N. J. Law, 174, 107 Atl. 285. The holding in that case was adverse to the claim of the parent. To the same effect are Hetzel v. Wasson Piston Ring Co., 89 N. J. Law, 201, 98 Atl. 306, L. R. A. 1917D, 75, and Hartman v. Unexcelled Mfg. Co., 93 N. J. Law, 418, 108 Atl. 357.

The trend of authority, therefore, so far as it has gone, is in support of the holding of the trial court.

[3, 4] II. It is urged by appellant that the Compensation Act, if construed as herein indicated, is rendered unconstitutional. Such claim of unconstitutionality is based upon several specific grounds. Some of these grounds may be reduced to the broad contention that it deprives the parent of his vested right to the value of the services of his minor child. Such alleged vested right of the parent arises out of section 3471. Such statute did not confer upon the parent any right which was superior to the power of amendment by subsequent legislation. The subsequent legislation being had, it is as decisive of the right of the parent as was the previous legislation prior thereto. It is also urged that the Compensa-

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tion Act as thus construed becomes discriminatory against the parents of minors engaged in industrial pursuit. This means that the Compensation Act fixes a remedy for liability for personal injuries in industrial pursuits which does not extend to all forms of liability for personal injury. It will be seen that this is a question of classification. Is the field of liability covered by the terms of the Compensation Act an appropriate classification within the permission of the Constitution? We have previously sustained the constitutionality of the act in that regard. Hunter v. Colfax Coal Co., 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L. R. A. 1917D, 15, Ann. Cas. 1917E, 803.

[5, 6] It is also contended that the employment of the minor at the time of his actual injury was casual only, and that therefore the injury did not come within the terms of the Compensation Act. It is not claimed that the minor was not a regular employee of the defendant. He was regularly engaged in the factory at $40 per week. It is claimed, however, that the defendant momentarily diverted him from his regular work, and set him momentarily to a more dangerous work, and that the injury resulted from such diversion.

The very fact that compensation has been allowed under the Compensation Act is an adjudication as to the minor that he was injured in his regular employment as an employee, and that his employment was not casual. If it had been casual within the meaning of the act, then the act could not have applied to him at all. The defendant pleaded that the injury was subject to adjustment under the Compensation Act. The plaintiff's reply admitted that allegation. Plaintiff cannot both admit and deny. The admission will necessarily override the denial. Clearly the liability could not in fact be within the Compensation Act for the purpose of compensating the minor and without the Compensation Act for the purpose of compensating the parent. This is not saying that an adjudication as to the minor is necessarily an adjudication as to the parent. Plaintiff's contention, therefore, that the minor's employment was casual must be ignored. We reach the conclusion that the trial court properly dismissed the petition, and its order is accordingly affirmed.

Stevens, C. J., and Arthur and Faville, JJ., concur.

CASEBEER ET AL. v. CARBON COAL CO. (No. 23795.)

(Supreme Court of Kansas. March 11, 1922.)

205 Pacific Reporter, 626.

(Syllabus by the Court.)

1. MASTER AND SERVANT—OBJECTION TO AWARD OF COMPENSATION HELD TOO LATE.

The defendant, having consented to the appointment of an arbitrator under the Workmen's Compensation Act and having appeared before him without objection and tried the matter, cannot now be heard for the first time to impeach the award because not filed within 60 days from the appointment.

(For other cases, see Master and Servant, Dec. Dig. § 418[3].)

2. MASTER AND SERVANT—OBJECTION TO COMPENSATION CLAIM HELD TOO LATE.

The application for appointment having alleged proper notice of the injury and demand for compensation, and no objection for lack of proof thereof being made in the court below, none will be heard now.

(For other cases, see Master and Servant, Dec. Dig. § 418[3].)

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3. MASTER AND SERVANT—FINDING OF COMPENSABLE INJURY SUSTAINED.

The evidence examined, and *held* fairly to support the conclusion that the injury arose out of and in the course of the employment.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Appeal from District Court, Cherokee County.

Action by Polly Casebeer and eight minor children of John Casebeer, deceased, against the Carbon Coal Company, brought under the Workmen's Compensation Act, for an award. Judgment for the plaintiffs, and the defendant appeals. Affirmed.

J. J. Campbell, P. E. Nulton, and C. O. Pingry, all of Pittsburg, for appellant.

C. A. McNeill, of Columbus, Maurice McNeill, of Galena, and E. V. McNeill, of Baxter Springs, for appellees.

WEST, J. The defendant coal company appeals from the judgment rendered under the Workmen's Compensation Act, Laws 1911, c. 218 as amended by Laws 1913, c. 216.

John Casebeer had been employed by the defendant about 16 months before his death, and was operating a steam shovel in a strip pit. In the pit was a pump controlled by electricity. Casebeer was directed with others to lift this pump up on some ties to get it out of the water. While so doing he fell and threw out his hand and grasped an electric wire, which rendered him unconscious for three or four minutes. His hand was burned, but he came back to work, and continued working some time. His ear became inflamed, and as a result he died January 8, 1921. The plaintiffs, applied for the appointment of an arbitrator, alleging that the deceased in the discharge of his duties was injured, and as a result of the accident death ensued, asking for $3,800, alleging failure to agree upon an arbitrator, demand in writing, and notice of the injury. The company filed its consent to the appointment of an arbitrator, and one was appointed on February 16, 1921. The deceased's wife testified before the arbitrator that some time about the 1st of December he came home, and something appeared to be the matter with him.

"He came home at quitting time in the evening; he was sick. Clear across his hands were wire prints. They were burns. There was a kind of watery blood, not real red blood, but watery blood coming from the right ear. He appeared to be sick and suffering and trembly. He couldn't hardly hold his fork at the table, and he was pale and apparently suffering pain. My husband attempted to work after that. After that he just looked bad, looked pale and like he was in pain always. During part of the time it was bloody water like and corruption coming from his ear. I had never noticed that condition prior to the time he came on the 4th day of December. * * * A. He said he was going to die. He called me to him and told me that he got hurt with the Carbon Coal Company, and had always suffered ever since. He got hurt moving a pump, he said, lifting a pump over some way. He told me that Mr. Crossby and two or three other men and his son were there at the time he got hurt. This wire struck him, or he took hold of it in some way, he said. And he said, 'You call Mr. McNeill; I am going to leave you and the children.'" (The part about Mr. McNeill was stricken out by the court.)

Dr. Brookhart testified that he attended the deceased in his last sickness.

"He was in a very precarious condition. He lived a few hours after that. He had an infectious condition. It was not produced by any of the common diseases I am called upon to treat. I have a slight experience in regard to persons afflicted with electric shock. I have studied

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the matter a little. In an electric shock, if it is of enough severity to inflict any great injury, there is usually two points, the one of the contact and one of the current."

He was asked a hypothetical question intended to cover the history of the case and said:

"A. I believe from my experience, that the shock could have some bearing on the condition."

John Casebeer testified that he was working with his father when he received the shock.

"My father was unconscious between three and five minutes after grabbing the wire, and he had burns across his left hand. He was nervous, and complained about his head that night. Prior to that time he was well and able-bodied, and after this injury he ws rather nervous, and some times weak-minded. We both continued to work at that mine, and at times we were working together I helped him. Prior to his getting this shock, it was not necessary for me to assist him. He became more weak and nervous, and finally quit work. He went out two or three times before he quit, and came back because he couldn't stand it. He was nervous, trembly, and pale. I did not notice anything of this kind before the shock."

"The pump was not moved the latter part of July or August instead of December. It seems to me it was the first of December or the last of November that the pump was moved. It don't seem like the last of August to me. I saw some kind of pale watery blood coming from my father's ear the same evening he was hurt."

Other witnesses for the plaintiffs were more or less indefinite as to when the shock was received though one miner thought it was in August and another thought it was in July. This defendant's witnesses who testified on this question seemed all to place it in July.

On May 14, 1921, the arbitrator made the award, finding that John Casebeer died January 8, 1921, as a result of accidental injuries received while in the course of his employment; that his average earnings the preceding year were more than $1,500, three times the amount of which would be more than $3,800, the total amount of compensation to be received by the plaintiffs, for which judgment was given, with costs. A petition for review and cancellation of the award was filed by the defendant company on the grounds that it was obtained through fraud and undue influence; was made without authority of law; that the arbitrator was guilty of misconduct, and found contrary to law that there was $3,800 due; and that the conclusions were not supported by the testimony. The plaintiff moved to confirm the report and findings, and on June 22, 1921, the court sustained the motion to the extent of ordering $405 paid in a lump sum, and the balance of the award at the rate of $15 a week on the regular semimonthly pay days until paid in full.

The defendant moved for a new trial, claiming error in finding that Casebeer died of an accident arising out of and in the course of his employment, and in the finding that the defendant should pay interest on $405, and for refusing to cancel the award.

Specifications of errors are abuse of discretion in refusing the petition for modification and cancellation; error in finding that the deceased's death was caused by accident arising out of and in the course of his employment, and refusing a new trial.

[1] The defendant in its brief insists that the award is void because not filed within the time provided by law, the statute fixing 60 days is cited, but as the defendant appeared without objection before the arbitrator when 60 days had already elapsed and tried its side of the case, it cannot be heard now to insist in the invalidity of the award because not made within the 60 days.

[2] It is argued that the arbitrator made the award without authority of law, because the claim for compensation was not made within

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the required time, and because the death did not result from an injury arising out of and in the course of the employment. The application for appointment of an arbitrator alleged demand in writing and knowledge of the injury on the part of the defendant, and no point appears to have been made on this in the hearing before the arbitrator. Neither does the point appear to have been made in the motion to set aside the award or in the motion for a new trial. We deem it without merit now.

[3] It is argued that the death did not result from an injury arising out of and in the course of the employment, because the shock occurred several months before the fatal sickness of the deceased, and considerable point is sought to be made touching the time when the pump was moved and when the shock was received. The conflicting evidence on this point was considered by the arbitrator, who found against the defendant, and there is sufficient evidence in the record to support such finding. In almost every lawsuit the trier or triers of facts must reconcile conflicting testimony, and that is all the arbitrator did in this case, and his conclusion is something which the trial court did not, and which we cannot, overturn.

A careful consideration of the entire record and all the points presented impels the conclusion that no material error has been committed.

The judgment is affirmed.

All the Justices concurring.

EMRY v. CRIPES. (No. 23554.)

(Supreme Court of Kansas. March 11. 1922.)

205 Pacific Reporter, 598.

(Syllabus by the Court.)

1. MASTER AND SERVANT — STATUTORY SCHEDULE OF COMPENSATION FOR TOTAL LOSS OF HAND INAPPLICABLE TO PARTIAL DISABILITY.

Under the Workmen's Compensation Act where a permanent partial disability to a workman's hand is only equivalent to 50 per cent. to 75 per cent. of the total loss of the hand or a total loss of its use compensation for such injury cannot be awarded by applying the statutory schedule of allowance prescribed for the total loss of the hand or total loss of its use; nor does the statute permit the compensation to be based on a proportionate amount of such scheduled allowance for the total loss of the hand.

(For other cases, see Master and Servant, Dec. Dig. § 385[13].)

2. MASTER AND SERVANT—RULE FOR DETERMINING COMPENSATION FOR PERMANENT PARTIAL DISABILITY STATED.

Under the Workmen's Compensation Act where a workman suffers a permanent partial disability, the compensation for which is not definitely prescribed by the statutory schedule for specific injuries, the rule for determining the compensation to be awarded is to make a computation of 60 per cent. of the difference in his weekly earning capacity before and after his injury, for eight years; and if this computation results in any sum less than a minimum of $6 per week for eight years, the disabled workman shall be awarded such minimum.

(For other cases, see Master and Servant, Dec. Dig. § 385[11].)

Dawson, Porter. and Marshall, JJ.; dissenting in part.

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Appeal from District Court, Reno County.

Action by Fred D. Emry, by his father and next friend Julius W. Emry, against A. J. Cripes, doing business as the Cripes Bakery, brought under the Workmen's Compensation Act for injury to plaintiff's hand. Judgment for plaintiff, and both plaintiff and defendant appeal. Reversed and remanded with directions.

Malloy, Davis & White, of Hutchinson, for appellant.

Williams & Martindell, of Hutchinson, and J. W. Rogers, of Kansas City, Mo., for appellee.

DAWSON, J. This was an action under the Workmen's Compensation Act (Laws 1917, c. 226) for injuries to plaintiff's hand in a bread-molding machine in defendant's bakery.

The jury allowed compensation in the sum of $1,500 less a credit of $95.70 for payments already made by defendant before the action was begun.

The jury answered some special questions:

"Q. No. 1. State whether you find that the plaintiff is permanently partially disabled. A. No. 1. Yes.

"Q. No. 2. State what you find to be the average weekly earnings of a workman in the same grade employed at the same or similar work to that in which the plaintiff was employed at the time of the accident by the same employer. A. No. 2. $20.00.

"Q. No. 3. If you find that no workman was employed by the defendant in the same grade and at the same work as the plaintiff for a year preceding the accident, then state what you find to be the average weekly earnings of a person in the same grade employed by some other employer in the same district at the same or similar work or employment. A. No. 3. $20 00.

"Q. No. 4. Is the plaintiff's injury of such a nature that he will suffer a disability partial in character but permanent in quality? A. No. 4. Yes.

"Q. No. 5. Did plaintiff's injury entirely destroy the use of his hand? A. No. 5. No.

"Q. No. 6. If you answer the above interrogatory in the negative, then to what extent did plaintiff's injury impair the use of his hand? A. No. 6. Fifty per cent. to 75 per cent.

"Q. No. 7. Was the injury to plaintiff's hand less than the loss of his hand, or the loss of the use of his hand? A. No. 7. Yes.

"Q. No. 8. What do you find to be the per cent. of the use of plaintiff's hand as compared with the entire loss of said hand or the entire loss of the use of said hand? A. No. 8. Twenty-five per cent. to 50 per cent."

Judgment was entered for plaintiff, and both parties appeal—the plaintiff because it is too little, and the defendant because it is too much.

The trial court determined the amount of compensation to be awarded by applying the statutory rule—

"Where disability partial in character but permanent in quality, results from the injury, * * * compensation in a lump sum shall be paid as provided in the following schedule * * * [but] in no case less than $6 per week nor more than $12 per week. * * *

"(11) For the loss of a hand, 50 per cent. of the average weekly wages during 150 weeks." (Excerpt from section 3 of chapter 226, Laws of 1917, p. 306).

"(22) Loss of use. Permanent loss of the use of a hand, arm, foot, leg or eye, as a direct result of an injury, shall be considered as the equivalent of the loss of such hand, arm, foot, leg or eye."

[1] If this were the proper rule to apply, the judgment was correct; but both sides agree that such is not the proper rule, and they are both

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measurably right on this point, because the jury determined that the hand was not rendered altogether useless, it was not a total loss, but only diminished in usefulness from 50 per cent. to 75 per cent.

The defendant asked for an instruction in the trial court, and contends to the same effect here, that since the injury to the plaintiff's hand only impaired its usefulness 50 per cent. to 75 per cent., he could only recover 50 per cent. to 75 per cent. of the amount allowed by the statute for the loss of a hand or permanent loss of its use. Whatever plausibility there might be in that contention as a mere abstract theory the complete answer to it lies in the fact that the matter is not governed by abstract principles of law but, as we shall see, by a pertinent provision of the statute itself. That provision reads:

"(19) * * * In case of partial disability not covered by schedule the workman shall receive during such period of partial disability not exceeding (8) eight years, 60 per cent. of the difference between the amount he was earning prior to said injury as in this act provided and the amount he is able to earn after such injury."

Certainly this provision is pertinent to the matter under consideration. In this case, the amount which the plaintiff is able to earn since the injury to his hand was not determined, but that must be ascertained before this case can be fully disposed of.

[2] The plaintiff, however, contends for another rule—the one which, in addition to the one last quoted, fixes a minimum of $6 per week, if the "60 per cent. of the difference" rule does not amount to that minimum. He relies on the case of Stefan v. Elevator Co., 106 Kan. 369, 187 Pac. 861, where it was held that the maximum and minimum limitations of $6 to $12 per week cover cases of partial disability not covered by the schedule. The court's opinion, in part , reads:

"Section 3 of chapter 226 of the Laws of 1917 is devoted to the subject of amount of compensation. The section is divided into three major paragraphs. * * * Paragraph 3 is subdivided. Subdivision 'c' commences with an unnumbered introductory paragraph. * * *

"Then follow twenty-three numbered paragraphs. The first eighteen deal with specific injuries. * * *

"Paragraphs 10 and 16 are interpretative, and are similar in character to paragraph 22. * * *

"How compensation provided for in paragraph 19 shall be computed is a question of some difficulty. The earnings before and after injury referred to are evidently average weekly wages, computable in the usual way; but no maximum and minimum limit is affixed. In one sense that which is referred to in the introductory paragraph of division 'c' as 'the following schedule,' ends with paragraph 18. Paragraph 22, however, is as much a part of the schedule as paragraph 10 or paragraph 16; so that, to the extent necessary, all the numbered paragraphs may be said to constitute the schedule. Major paragraphs 1 and 2 of section 3 fix maximum and minimum amounts of compensation. Major paragraph 3 discloses a distinct purpose to fix a weekly wage basis with a maximum and minimum limit for the computation of compensation in all cases, unless paragraph 19 of division 'c' be an exception. It will not be assumed the policy was abandoned in paragraph 19, and the court is of the opinion the provision contained in the introductory paragraph of division 'c'—'the compensation to be in no case less than $6 per week nor more than $12 per week'—applies to the disability covered by paragraph 19. Without proof that 60 per cent. of the difference between earnings before and after injury would equal or exceed $6 per week, the plaintiff is entitled to the minimum for the period of eight years less one week, on account of permanent partial disability found by the jury. * * *"

Under this authority—and a majority of the court continues to adhere to it—the plaintiff's principal contention is correct. The plaintiff is entitled to 60 per cent. of the difference between his past and present

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earning capacity computed for eight years, and if that computation produces a minimum of less than an average amount of $6 per week his compensation shall be raised to that sum. That this may result in a greater compensation for a permanent partial disability of his hand than for a total loss of it or a total loss of its use is merely one of the possible inconsistencies which sometimes attend the application of general laws to particular cases, but such peculiar results are subject only to legislative correction and not to judicial nullification. Close v. Mining Co., 105 Kan. 257, 182 Pac. 392.

The judgment is reversed, and the cause remanded for the ascertainment of the plaintiff's present earning capacity, and to apply the "60 per cent. of the difference" rule thereto, with the further direction that if such rule does not produce the statutory minimum of $6 per week, that he be allowed that sum for eight years, less deductions for advances already paid.

Johnston, C. J., and Burch, Mason, and West, JJ., concurring.

DAWSON, J. (dissenting in part). The minimum and maximum allowance per week for eight years does not apply except in the specific instance where the statute says it shall apply. It applies in cases of total permanent disability. The minimum and maximum weekly allowance, for the particular times fixed, in the numerous other specified cases mentioned in the statutory schedule (none of which is for eight years), applies to those specified cases and for the times fixed in those cases. To illustrate, the schedule, page 306, Session Laws of 1917, provides: "(1) For the loss of a thumb, 50 per cent. of the average weekly wages during 60 weeks." Now, if a workman should lose a thumb, and his average weekly wages had been $20 per week, then 50 per cent. of $20 for 60 weeks would amount to $600. That would satisfy the minimum requirement of $6 per week for 60 weeks, and it would not exceed the maximum of $12 per week for that period. If his wages had been $50 per week, 50 per cent. of such amount for 60 weeks would be $1,500, but the maximum allowance is $12 per week, so, notwithstanding this computation his maximum allowance could not exceed $720. On the other hand, if his average weekly wages had been only $8, 50 per cent. of that amount for 60 weeks would only be $240, but that sum would not satisfy the statutory minimum which in the supposed case would be $6 per week for 60 weeks, or $360. This is according to the schedule.

But the plaintiff's case is not covered by the schedule. It is squarely within the provision governing injuries "not covered by schedule" quoted in the main opinion—60 per cent. of the difference between $20 per week and the amount he is now able to earn, computed for eight years. To determine his present earning capacity and to make the proper computation for the foregoing, the judgment of the district court should be reversed and remanded.

But I do not assent to any result which can lead to an allowance of two or three times as much as a permanent partial injury to plaintiff's hand as the Legislature has specifically fixed for the total loss of it or a total loss of its use. I cannot assent to thrusting into the schedule a case not covered by the schedule and one expressly excluded therefrom; and while I would by no means disregard an express statutory provision, I deem it proper, always, to search for an interpretation of a statute which will avoid giving it an illogical result. Take the example of the lost thumb again. The minimum allowance is $360; the maximum $720; but for a permanent partial loss of it, the minimum, under the rule here applied, must be $2,496. And this minimum must be awarded, however slight the disability, if it is sufficiently serious to require and compensation at all. To this extent I dissent.

Porter and Marshall, JJ., concur in this partial dissent.

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STOVER v. DAVIS ET AL. (No. 23544.)

(Supreme Court of Kansas. March 11, 1922.)

205 Pacific Reporter, 605.

(Syllabus by the Court.)

MASTER AND SERVANT — COMPENSATION ACT HELD INAPPLICABLE TO EMPLOYERS DRILLING OIL WELL WITH CREW BELOW MINIMUM NUMBER.

The proceedings in an action for compensation considered, and *held* the Workmen's Compensation Act did not apply to the injured workmen's employers, whose business was drilling oil wells, because they had not employed five or more workmen continuously for more than one month, at the time of the accident. Gen. St. 1915, § 5902.

(For other cases, see Master and Servant. Dec. Dig. § 361.)

Appeal from District Court, Butler County.

Action by Ella Stover, as an individual and as guardian, against James Davis and another, copartners as Davis & Aylward, for compensation for the death of plaintiff's husband. Judgment for plaintiff, and defendants appeal. Reversed and remanded, with direction to enter judgment for defendants.

Aikman & Aikman and Hamilton & McKay, all of El Dorado, for appellants.

Kramer & Benson, and J. M. Pleasant, all of El Dorado, for appellee.

BURCH, J. The action was one for compensation for death of the plaintiff's husband. The plaintiff recovered, and the defendants appeal.

The defendants Davis and Aylward are partners in the business of drilling oil and gas wells. At the time of the accident they were engaged in drilling an oil well for the Ramsey Petroleum Company, on a farm near El Dorado. The plaintiff's husband, John Stover, was one of the defendants' drillers, and worked from midnight to noon. On the night of November 29, 1917, a casing crew was pulling casing, and encountered a "frozen" joint of 10-inch casing. Four members of the crew were pushing on the casing pole, and Stover and the tool dresser, who were assisting the casing crew, were pulling. Stover released his grasp of the pole, put his hand to the right side of his neck, said he was hurt, stepped aside, and sat down. This occurred at about 11:30 p. m. Stover went home, his wife bathed his neck with liniment, and he went to bed without eating anything. The next morning he appeared to be in pain, would put his hand to the right side of his neck, and ate but little, but he went to work at noon. That night when he came home his wife bathed his neck, and when he got warm he went to bed. During the day he had worked as usual. In the forenoon of December 1, he arranged to purchase some stock in the petroleum company, and then, because he was late, expressed anxiety to get to the well, which had been drilled to the oil sand. When he came on duty about 1 p. m., he operated the bailer for a time, and then, together with the defendant Davis, washed some of the sand. They were drilling in, and had reached the point where the character of the well would soon be revealed. Stover was very much interested, and exhibited some excitement. A witness testified as follows:

"I saw him leave the rig with Davis to wash some sand. They went back of the engine house; Stover was stirring the sand; he was stooped over; and when he raised up he just went around and sat down on the

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tool rack. He said, 'My God, my head hurts me,' and put his hand up there. Somebody asked him if he got hurt, and he said 'No,' but he complained of his head hurting. Four or five asked him if he got hurt, and he told them all 'No.' Duff and Davis and I brought him to town in my car. He kept complaining of his head, and telling Davis he was going to die. Mrs. Stover came out, as we were taking him out of the car, and said 'John, how did you get hurt?' and he said 'Mama, I didn't get hurt'; and then we took him out of the car. We got the doctors as soon as possible."

Soon after the doctors arrived, Stover died of apoplexy.

While apoplexy may occur when the subject is at rest or asleep, severe exertion, such as lifting a heavy object, is a direct cause and, without doubt, the strain incident to Stover's pulling on the casing pole caused a cerebral hemorrhage. The effect of a cerebral hemorrhage depends on the portion of the brain in which it occurs, the amount of blood which escapes, and the rate of extravasation. Death may come quickly. In case of slight lesion and slow hemorrhage, the first symptoms may be of minor severity, and the attack may progress slowly to culmination, occurring some days later. During this period the person affected may be able to perform his usual work. Sometimes the blood clot is absorbed, and the patient apparently recovers. Generally the attack is a blow to health, with marked residual physical effect. The patient should be put to bed and kept quiet, physical strain should be avoided, blood pressure should be reduced, and emotional stress should be avoided. In this instance, Stover not only kept at work, but worked under the excitement attending bringing in the well, in which he was financially interested, and the result was inevitable.

The district court found that Stover's death resulted from personal injury, by accident arising out of his employment. Approval of the finding would not benefit the plaintiff. Her action must fail, because the Workmen's Compensation Act (Gen. St. 1915, §§ 5896–5942), did not apply to her husband's employment.

The defendants owned five "strings of tools." When all of them were in use, 20 men were regularly employed, 2 drillers and 2 tool dressers to each well. The number of outfits continuously in use depended on the number of drilling contracts the defendants were able to obtain. Sometimes their entire equipment was busy, sometimes 2 or 3 strings were in use, and sometimes none at all. Whenever a string of tools was shut down, the men who had been operating it were released. For a period of four or five days previous to the casing pole incident, and for a week or more previous to the sand-washing incident, the defendants had no men employed except the four, including Stover, who were drilling the petroleum company's well. Other work in progress when this well was commenced had been completed, and the workmen had been discharged. The pertinent statutes read as follows:

"This act shall apply only to employment in the course of the employer's trade or business on, in or about a railway, factory, mine or quarry, electric, building or engineering work. * * *

"'Engineering work' means any work in the construction, alteration, extension, repair, or demolition of a railway (as hereinbefore defined), bridge, jetty, dyke, dam, reservoir, underground conduit, pole lines constructed or used for carrying conductors, sewer, oil or gas well. * * *"

Laws 1917, c. 226, § 1, 2.

"It is hereby determined that the necessity for this law and the reason for its enactment, exist only with regard to employers who employ a considerable number of persons. This act, therefore, shall only apply to employers by whom five or more workmen have been (employed) continuously for more than one month at the time of the accident: Provided, however, that employers having less than five workmen may elect to come within the provisions of this act in which case his employees

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shall be included herein, as hereinafter provided: And provided further, that this act shall apply to mines without regard to number of workmen employed."

Gen. Stat. 1915, § 5902.

When applied to the facts disclosed by the evidence, the meaning of the section last quoted is too plain to require interpretation. A definite minimum number of workmen must have been employed, not intermittently, or part of the time, but continuously for a definite minimum period, computed from the time of the accident. Possibly, under some circumstances, fortuitous interruption affecting number of workmen or continuity of employment may be taken into consideration. Upon that subject the court expresses no opinion. There is no room, however, for interpolating, by process of average, a mean number of workmen or mean time of employment; there is no way of bridging over a clear gap in number of men or continuity of employment; and the statute may not be restated in terms which would make it apply to some usual number of men, ordinarily employed most of the time during considerable periods when business was fairly good. In this instance there is no suggestion of purpose to evade the statute. The accident was not anticipated; and workmen were discharged because the defendants had no work for them to do. Whatever the status of the defendants with reference to the compensation act earlier in November, the public interest and public policy, which prompted the statute, ceased to be concerned with their business when the number of employees fell below the statutory minimum.

The plaintiff seeks to bring the employment within the terms of the statute by counting the casing crew of five men. This may not be done for two reasons. The casing crew worked but three days, November 29, November 30, and December 1, and the casing crew was not employed by the defendants. When drilling an oil well, the contractor puts in the casing, but it is no part of his business to remove casing when the well approaches completion. For that purpose casing crews are employed and paid by the owner of the well. The drillers supervise the work of pulling casing, the drillers and tool dressers work with the casing crew, and the contractor is paid by the owner for use of his tools and men while drilling operations are suspended. In this instance the defendants were paid $60 per day while the casing crew was at work. In practice, the owner of the well tells the contractor what casing he desires pulled. The contractor speaks to the manager or foreman of some casing crew, who brings his men, keeps accounts of their time, renders his bill to the owner, collects the sum due, and pays his men.

The defendants' workmen were taken from the city of El Dorado, where they resided, to the site of the well, and from the well to the city, by a taxicab driver who made two trips per day, one at noon and one at midnight.

The plaintiff insists that the taxicab driver should be counted as one of the defendants' workmen. In its relation to the present controversy, application of the statute of 1917, quoted above, is limited to employment in the course of the employer's business on, in, or about engineering work, embracing construction of an oil well. Workmen affected by the act are workmen exposed to the peculiar hazards of the locality (Bevard v. Coal Co., 101 Kan. 207, 165 Pac. 657; Hicks v. Swift & Co., 101 Kan. 760, 168 Pac. 905), and in ascertaining the number of workmen necessary to bring an employer's business within the statute, none are to be counted except those exposed to the hazards of the locality. Udey v. City of Winfield, 97 Kan. 279, 155 Pac. 43. It seems quite clear the El Dorado taxicab driver was engaged in the transportation business, and not in engineering work on the farm where the well was located.

The judgment of the district court is reversed, and the cause is remanded, with direction to enter judgment for the defendants.

All the Justices concurring.

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WARDWELL'S CASE.

(Supreme Judicial Court of Maine. March 25, 1922.)

116 Atlantic Reporter, 447.

1. MASTER AND SERVANT—FINDING OF COMPENSABLE INJURY SUSTAINED.

Finding of injury to knee by accident arising out of and in the course of the employment within Workmen's Compensation Act, *held* sustained by the evidence.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

2. MASTER AND SERVANT — FINDING ON EVIDENCE IN COMPENSATION CASE CONCLUSIVE.

In case of controverted facts tending to excuse failure to notify master of injury within 30 days, under the Workmen's Compensation Act, §§ 17–20, it is the province of the chairman of the Industrial Accident Commission to determine those facts like any other issue of fact before him, and his finding is final provided there is some competent evidence to support it, but on facts undisputed, or on facts found by the chairman, the question whether proper written notice has been given to the employer is one of law.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

3. MASTER AND SERVANT — DELAY IN GIVING NOTICE OF COMPENSABLE INJURY HELD EXCUSED BY "UNFORESEEN CAUSE."

Where servant's injury first seemed comparatively insignificant, and then pneumonia set in, and later an ugly abscess developed at the place of the injury, with the consequent suffering, weakness, and natural inability or disinclination to give thought to business matters, the Industrial Accident Commission did not err in awarding compensation, though notice of injury was not served on the employer until 50 days after the accident, instead of 30 days, as required by Workmen's Compensation Act, §§ 17–20; the situation being within the meaning of term "unforeseen cause" excusing delay, which may be defined as one which could not have been reasonably foreseen as likely to arise or occur, and yet is of such a nature as to have substantially interfered with the giving of the notice contemplated by the statute which is remedial, and should be applied in a broad and reasonable way.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

(For other definitions, see Words and Phrases, First and Second Series, Unforeseen Cause.)

4. MASTER AND SERVANT—JURISDICTION OF INDUSTRIAL ACCIDENT COMMISSION LIMITED BY COMPENSATION ACT.

The Industrial Accident Commission is a creature of the statute, and no jurisdiction is conferred except as the statute confers it; but, whenever the granted powers are discretionary within reasonable limits, then Workmen's Compensation Act, § 37, providing that a liberal construction shall be given, applies with full force.

(For other cases, see Master and Servant, Dec. Dig. § 397.)

On Appeal from Supreme Judicial Court; Knox County, at Law.

Proceeding by George A. Wardwell under the Workmen's Compensation Act to obtain compensation for personal injuries, opposed by the

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Camden Anchor-Rockland Machine Company, the employer. There was an award of compensation and the employer appeals. Affirmed.

Argued before Cornish, C. J., and Spear, Hanson, Morrill, and Wilson, JJ.

Edward C. Payson, of Rockland, for plaintiff.
Andrews, Nelson & Gardiner, of Augusta, for defendant.

CORNISH, C. J. Appeal from the decision of the chairman of the Industrial Accident Commission awarding the claimant compensation. The principal contention of the respondents is that written notice of the accident as required by the Workmen's Compensation Act (P. L. 1919, c. 238, §§ 17 to 20) was not given to the employer within the required time, and therefore these proceedings for compensation cannot be maintained.

Section 17 provides:

"No proceedings for compensation for an injury under this act shall be maintained unless a notice of the accident shall have been given to the employer within thirty days after the happening thereof."

The accident in this case happened on February 17, 1921. The written notice to the employer was given on April 8, 1921, 20 days after the expiration of the statutory period. This is admitted. But section 20 provides among other things:

"Want of notice shall not be a bar to proceedings under this act if it be shown that the employer or his agent had knowledge of the injury, or that failure to give such notice was due to accident, mistake or unforeseen cause."

It is not shown that the employer or its agent had knowledge of the injury, apart from this notice of April 8th, and therefore the contention is narrowed to this, whether under the facts of this case the failure to give the notice was due to "accident, mistake, or unforeseen cause."

The facts connected with the accident and the events subsequent thereto may be summarized as follows: On Thursday, February 17th, the claimant while in the employ of the Camden Anchor-Rockland Machine Company, struck his left knee with a sledge hammer weighing between 6 and 10 pounds, while "dumping out a flask," a mechanical process in the foundry. The blow caused a discoloration and a slight abrasion of the skin but the injury was not regarded by him as serious. He continued at work on Friday, on Saturday forenoon, and on Monday, during which time he was suffering some pain, and was treating the knee when at home with liniment. On Monday, although still at work, he felt sick in other ways, as he expresses it, and on reaching home that night went at once to bed. On Tuesday morning, February 22d, Dr. Bartlett, the family physician, was called. Pneumonia soon developed, and on the following Sunday, February 27th, Mr. Wardwell became delirious. His illness progressed, and after a consultation of physicians he was taken on March 2d to Dr. Silsby's hospital. The next day he was examined by Dr. Crockett, who was called by Dr. Bartlett in consultation. He was still suffering from pneumonia, had a high fever, rapid pulse, was spitting blood, and was unconscious. In addition Dr. Crockett found that his left knee was infected, and a large abscess was forming. Two days later the abscess was lanced by Dr Silsby, and not less than 10 ounces of pus removed. His convalescence was slow, and he was not removed from the hospital to his home until April 4th. Three days later, on April 7th, the claimant's wife notified the manager of the employer corporation by telephone of the injury to her husband's knee, and on April 8th gave him written notice of the same, accompanied by statements of Dr. Bartlett, the attending physician, and of Dr. Silsby, in

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whose hospital he had been treated. At the time of the hearing before the chairman of the Industrial Commission on July 21st he was still incapacitated from labor.

[1] From the foregoing evidence the chairman very properly found that the claimant received a personal injury by accident arising out of and in the course of his employment, and no objection to this is now taken by the defendants. He further found on the question of notice as follows:

"In view of the physical condition of Mr. Wardwell following the attack of pneumonia, and continued by reason of the serious condition of the abscess from March 1st for many days, it is found that seasonable knowledge of the injury was properly communicated to the employer."

This evidently refers to the last sentence in section 20 of the Workmen's Compensation Act, and in effect the decision holds that the failure to give the written notice within 30 days was due to accident, mistake, or unforeseen cause. In that sense the chairman held that notice was seasonably filed.

[2] In case of controverted facts which would tend to excuse a failure to notify within 30 days, it is the province of the chairman to determine those facts like any other issue of fact before him, and his finding is final provided there is some competent evidence to support it. Westman's Case, 118 Me. 133, 106 Atl. 532; Mailman's Case, 118 Me. 172, 106 Atl. 606. But, upon facts undisputed, or upon facts found by the chairman in compliance with this rule, the question whether the written notice has been given to the employer within the time allowed by the legislature is one of law. It is similar to the question of reasonable time within which the right of rescission of a contract may be exercised. Hotchkiss v. Bon Air Coal Co., 108 Me. 34, 78 Atl. 1108; Getchell v. Kirkby, 113 Me. 91, 94, 92 Atl. 1007; Dutch v. Gamage, 120 Me. 305, 309, 113 Atl. 785. The finding of facts by the chairman on this branch of the case is therefore conclusive, but his ruling of law thereon is subject to review. In this case his conclusion of law should also be upheld.

[3] The Legislature inserted this provision as to excuse for failure to comply with the strict 30-day limit with a definite purpose, and that purpose was the protection of the legal rights of the parties in meritorious cases when the facts should warrant it. It employed comprehensive and elastic terms to accomplish that purpose, and to enable the court to grant relief from hardship or misfortune; "accident, mistake, or unforeseen cause," which are confidently invoked here by the claimant. An unforeseen cause in this connection may be defined in general as one which could not have been reasonably foreseen as likely to arise or occur, and yet is of such a nature as to have substantially interfered with the giving of the notice. That definition fits here. The claimant's injury at first seemed to him comparatively insignificant. He did not even speak to his fellow workmen about it. He continued his work for two or three days. Then unexpected complications arose. Pneumonia at first set in and later an ugly abscess developed with the consequent suffering, weakness and natural inability or disinclination to give thought to business matters, all of which certainly bring the situation within the purview of the term "unforeseen cause." In his petition the claimant alleges that he gave notice as soon as he was able to do so—that is as soon as he was reasonably able to do so. Other things were upon his mind. The 30 days expired on March 19th, right in the midst of his stay in the hospital. Was the door then shut against him? If not, when was it afterward closed, as he did not leave the hospital until April 4th, and within four days thereafter sent the written notice? The relief clause was enacted to meet just such a case as this. It is a remedial provision, and it is the duty of the court to apply it in a broad and reasonable way to the facts of each case that may call for its consideration. No more definite rule

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can be laid down. The decision must be left to the sound judgment and wise discretion of the court in each instance.

[4] The Industrial Accident Commission, as we have had occasion to remark before, is a creature of the statute. No jurisdiction is conferred except as the statute confers it. Maguire's Case, 120 Me. 398, 115 Atl. 176; Conner's Case, 121 Me. 37, 115 Atl. 520. Explicit limitations must be observed. Lemelin's Case, 121 Me. 72, 115 Atl. 551. When, however, the granted powers are discretionary within reasonable limits, as in the section under consideration, then the provision of section 37 that in interpreting the act a liberal construction shall be given with a view to carrying out its general purpose, applies with full force.

The Workmen's Compensation Act of Rhode Island (Laws 1912, c. 831) employs precisely the same language as to justifiable excuse for delay in giving notice, "accident, mistake or unforeseen cause:" The Supreme Court of that state has had occasion to interpret and apply the words "unforeseen cause" in a recent case involving facts quite similar to these at bar. If a precedent were needed the exhaustive opinion in that case furnishes an admirable one. Donahue v. Sherman's Sons Co. 39 R. I. 373, 98 Atl. 109, L. R. A. 1917A, 76.

Appeal dismissed, with costs.

Decree of sitting Justice affirmed.

BRYAN v. HUDSON MOTOR CAR CO. ET AL. (No. 158, OCT. TERM, 1921.)

(Supreme Court of Michigan. March 30, 1922.)

187 Northwestern Reporter, 343.

1. MASTER AND SERVANT—FINDING OF COMPENSABLE INJURY BY FALL SUSTAINED.

In a proceeding under the Workmen's Compensation Act to recover for the death of an employee, who fell from a ledge about 18 inches wide, evidence *held* to sustain a finding that his fall was caused by accident, and not by disease, and to sustain the award.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

2. MASTER AND SERVANT—FINDINGS OF FACT IN COMPENSATION CASE CONCLUSIVE.

In proceedings before the Industrial Accident Board under the Workmen's Compensation Act, only questions of law are reviewable by the Supreme Court, and the findings of fact, on competent evidence, are conclusive.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Certiorari to the Industrial Accident Board.

Proceeding by Letticia Bryan, before the Industrial Accident Board against the Hudson Motor Car Company and another, for an award. From a judgment of the Industrial Accident Board, affirming an award made at an arbitration hearing, defendants appeal. Award sustained.

Argued before Wiest, Stone, Bird, Sharpe, Moore, and Steere, JJ.

Kerr & Lacey, of Detroit, for appellants.
Entenza, Gramer & Ricca, for appellee.

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STEERE, J. At about 4 o'clock in the afternoon of November 18, 1920, Arthur E. Bryan met sudden death while working for the Hudson Motor Car Company as a steam fitter's helper. At the time of his death he was standing on a concrete ledge about 18 inches wide, which was about 5 feet above a concrete floor covering a tunnel 20 feet deep, engaged with the steam fitter in drilling I-beams for brackets to put a pipe on. He had in his hands a hammer and chisel, with which he was doing his work, and suddenly fell backwards from the ledge through a hole in the concrete floor about 4 feet square, made for an air shaft, striking the back of his shoulder against the side of the hole as he fell through it, to the bottom of the tunnel, 25 feet below where he was working. At the bottom of the tunnel he struck a stooping workman with "just a glancing blow," as the latter stated; further saying:

"I don't think it could be his body. I could not swear what part hit me; * * * just enough to daze me, * * * not enough to break the fall."

This man was the first one near deceased after he fell, and lifted his head from a shallow puddle of water where he lay, noting he was perfectly limp and made no movement. He was apparently dead when picked up and carried out.

The steam fitter with whom deceased was working when he fell testified:

"I was on the scaffold, about 6 or 8 feet to the left of him, saw him move, and I looked up, and he fell through the hole—through a hole in the concrete floor. I should judge about—well, it wasn't over 4 feet square. * * * I handed him the hammer and chisel, and he dug out the bottom of the hole; that is, about 20 inches below the top. * * * He could reach up. * * * I saw him start to fall, and hollered for him to look out. * * * I saw one foot right over the hole, and he just dropped right in. * * * I could not say he was tripping; I just saw him go down the hole. * * * Well, he was just limp, and dropping down through the hole. * * * Well, he was just falling when I saw him."

The witness also stated that deceased made no outcry, nor raised his arms, and fell backwards off the ledge.

Deceased was a single man 49 years of age, living with his mother, Letticia Bryan, in Detroit, and supporting her, as she claimed. On January 21, 1921, she made application under the Employers' Liability Law (Pub. Acts Ex. Sess. 1912, No. 10) for compensation as a total dependent. This was opposed by defendants, and the provided proceedings therefor were had under the law, resulting in an arbitration hearing, at which an award was made to plaintiff as a total dependent of $14 per week for 300 weeks, from which defendants appealed to the Industrial Accident Board, and a hearing had, at which the award was affirmed.

Defendant's claim was and is that deceased died from an acute attack of heart failure coming upon him while at his work, as the culmination of an advanced and active syphilitic myocarditis, with which he had been afflicted for some time, or in other words, that he suddenly died from disease while at his work, and his body dropped from the ledge through an opening to the bottom of the tunnel, and that there is no competent testimony in the case upon which the Industrial Accident Board could base its conclusion that death resulted from the fall, or award compensation for injuries received in an industrial accident.

[1] After hearing the testimony of the two eye witnesses, who saw the beginning and end of the deceased's fall from the ledge, where he stood at his work, to the bottom of the tunnel, where his dead body was picked up, and the testimony of medical experts as to the cause of his death, based on a post mortem examination, the Board said and found in part as follows:

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"The story of this event, as told by Folwell, reveals a typical picture of a man stepping backwards and sideways into a hole. For this reason we think that Bryan stepped into the hole accidentally, and did not fall into the hole as a result of sickness, or the body fall in following death. It should be borne in mind that at the time of the alleged accident Bryan had been working steadily as usual, that he was facing the wall, and that the hole through which he fell was more or less back of and to one side of where he was working."

That plaintiff was wholly dependent upon deceased for support at the time of his death is not controverted in the brief of defendant's counsel. An examination and autopsy of the body was ordered by the coroner, and held at the morgue that evening by Dr. French, the medical examiner of Wayne county; such examination being one of his official duties. Drs. Morse and Crump, medical expert witnesses for defendants, were permitted by him as a matter of professional courtesy to participate in the examination, and Morse to perform the autopsy. Dr. French made an official report of the autopsy at its conclusion, which he produced at the hearing and identified. Portions read by him from it when testifying are as follows;

"This is the report of autopsy on the body of Arthur Bryan, held at the Wayne county morgue in the city of Detroit, on the 18th day of November, 1920, between the hours of 9 and 10 p. m. 'The body was that of a male: color, white; apparent age, 49; height, 5 feet 10 inches; apparent weight, 170 pounds. Marks and deformities, none. Nutrition, good. Location and description of wounds: There was a deep lacerating wound, 1¼ inches long, in the scalp, exposing skull, two inches above inion.' In other words, it was on the back of the head, here (indicating). 'Cerebral edema and engorgement. Hemorrhoid. The cause of death, as ascertained at the time of autopsy, was 'probable shock, following concussion of brain. Q. So, then, at the autopsy, you concluded that the cause of death was a concussion of the brain? A. Shock following concussion."

Sections of the brain and heart were taken away by Dr. Morse for examination. He and Dr. Crump, called as witnesses for defendants, testified that from microscopic examinations of the parts, taken in connection with what appeared at the autopsy, their diagnosis and conclusions were that deceased was not killed by the fall, but—

"There was a sudden death, from sudden heart failure, resulting from syphilitic myocarditis. The man was dead when he started to fall."

It appears undisputed that deceased had been troubled with indigestion for some time, and occasionally suffered acutely from it, particularly after a hearty meal. Folwell, the steam fitter who saw him fall, testified deceased had been working steadily with him as helper for 8 or 9 weeks, and he had seen him have spells of distress after a hearty meal, when he would put his hand in the region of his heart and claim he had eaten too much, sometimes complaining of his heart, but "more of indigestion than anything else." Dr. McVoy, a general practitioner of 12 years' experience, whom deceased had visited at his office and been treated by several times, testified that his troubles were hemorrhoids and constipation, with auto-intoxication; that not long after November 8 he had made a rectal examination, and at the same time also examined his heart very carefully, using a stethoscope, and aside from a little irregularity, due to the auto-intoxication found nothing wrong, and in his opinion deceased had no organic trouble of the heart. Plaintiff stated deceased had supported her for about 8 years, and his married brother, who said he saw him often, testified that, while he was troubled at times with and complained of indigestion, if he ate too heartily, or certain kinds of food, he made no other complaint, and they had no knowledge of his suffering from heart trouble.

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In the course of Dr. French's examination, he testified in substance that, from the pathologist's microscopic report, he thought the diagnosis of Drs. Morse and Crump as to the cause of death was correct, which defendants urge explains and in effect nullifies his official report as to cause. The expert opinion testimony of these three physicians is not in all respects in perfect harmony. Dr. French testified that, when they removed the calvarium of the skull during the autopsy, there was "a great deal of edema, and there was a bloodshot condition of the arterioles and the meninges." Asked if that could be caused by concussion of the brain he replied in part:

"Yes; it is quite possible, certainly it is—traumatic cerebral edema, and hemorrhage. I have described that in my definition of concussion, when we started out after we begun. That was checked up and ruled out by the microscopic examination."

Dr. Morse, who made the microscopic examination, testified that the general condition of the brain "is the best evidence it was not due to concussion." Dr. French saw the general condition of the brain before he made his official report, which showed "nutrition good," a "deep lacerating wound" in the back of the head, through the scalp, "exposing the skull" on the outside, and on the inside "cerebral edema and engorgement"; the probable cause of death being "shock following concussion of the brain." That evidence was in the case for the Board to weigh; also the testimony of Dr. McVoy, who made a professional examination with a stethoscope of deceased's heart not many days before his death, and found no organic trouble, together with all the circumstances attending the death.

[2] As heretofore frequently noted, only questions of law are reviewable by this court in these proceedings. There was competent legal evidence produced by plaintiff tending to support the Industrial Accident Board's findings as to the cause of death, and to sustain its award. The board was acting within its statutory powers, and in the absence of fraud its findings of fact, supported by competent evidence, are made conclusive. In such case this court cannot weigh the evidence or disturb the findings.

The award is therefore sustained.

The late Justice Stone took no part in this decision.

CLIFTON v. KROGER GROCERY & BAKING CO. ET AL. (No. 50.)

(Supreme Court of Michigan. March 30, 1922.)

187 Northwestern Reporter, 380.

1. MASTER AND SERVANT — FINDINGS ON EVIDENCE ARE IN COMPENSATION CASE CONCLUSIVE.

Under the Workmen's Compensation Act findings of fact by the Industrial Accident Board acting within its powers are, in the absence of fraud, made conclusive, and the court is limited to determining as to whether there is any competent evidence, to support the findings.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

2. MASTER AND SERVANT — INJURY TO STORE MANAGER CARRYING HOME MONEY RECEIVED AFTER BANKING HOURS HELD COMPENSABLE AS "ARISING OUT OF AND IN COURSE OF EMPLOYMENT."

Where the manager of a store who was paid a weeky wage and commissions, and who was required by his employers to take home with him

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each night the money received after banking hours, was injured in a street accident while he was taking such money home by his usual route, pursued to avoid danger from holdups, the injury was compensable under the Workmen's Compensation Act as one arising "out of and in course of employment," the expression being defined as covering accidents to an employee while he is discharging some duty he is authorized or directed to perform for the furtherance of his employer's business.

(For other cases, see Master and Servant, Dec. Dig. § 375[2].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

Certiorari to Industrial Accident Board.

Proceeding under the Workmen's Compensation Act (Pub. Acts Extra Sess. 1912, No. 10) by Albert Clifton, opposed by the Kroger Grocery & Baking Company, employer, and Fidelity & Casualty Company, insurer. The Industrial Accident Board awarded compensation, and the employer and insurer bring certiorari. Award affirmed.

Argued before Fellows, C. J., and Wiest, Stone, Clark, Bird, Sharpe, Moore, and Steere, JJ.

Cummins & Nichols, of Lansing, for appellants.

F. E. Rankin, of Detroit, for appellee.

STEERE, J. Plaintiff was manager of one of defendant's numerous stores located in the city of Detroit. He was injured on his way home after closing hours on the evening of October 1, 1920. His hours at the store, which he was managing, were from 7 a. m. to 6:30 p. m. When injured, he had in his possession about $332 of defendant's money, taken in at the store after banking hours, which it was his duty to care for.

Defendant kept no safe or other suitable provision for the safety of money in this or any of its stores of like kind operated by a local manager. Plaintiff was instructed by defendant's district manager, Mr. White, to take charge at the close of the day of all money, except change which he might secrete, that had been taken in after banking hours, audit it, take it home with him, and care for it overnight, verify it in the morning, and return it to the cash drawer in the store, which he testified was the general custom of defendant's store managers. Plaintiff regularly did so, and the money he had with him when injured was money received at the store after banking hours that day. On starting home he placed it in a little five pound paper bag, with a can of vegetables on top of it, for the purpose of concealment as the roll of bills mainly of small denominations was too large for his pocket. The store was located at 2448 north side of Howard street and to go home, a distance of about two miles, he started directly to take his car on Michigan avenue, going on the same side as the store along Howard to Sixth street, where he turned northerly along the left side of Sixth street, until he neared a large building in process of construction, which he was accustomed to avoid, because it was a convenient place for a holdup, and then crossed to the other side of the street, proceeding along it northerly about a block to Michigan avenue, where he turned to his left and went along its south side, where there was less travel, to Brooklyn avenue, and started to cross over Michigan to the safety zone to take a car which would carry him to his home on Merrick avenue. As he went out from the curb to cross, he passed back of a parked car at his left and was struck by an automobile running easterly, which knocked him down, inflicting serious injury which, amongst other things, resulted in the loss of an eye.

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Defendant was operating under the Employers' Liability Act, and plaintiff made claim for compensation under that law, which was granted by the Industrial Accident Board. The issue raised by defendant for review is whether the accident which caused his injuries arose out of and in the course of his employment.

[1, 2] Broadly defined, it may be taken as authoritatively settled that "out of and in the course of his employment" covers those accidents which befall an employee while he is discharging some duty he is authorized or directed to perform for the furtherance, directly or indirectly, of his employer's business. It is undisputed that plaintiff suffered an accident on the occasion in question while regularly in defendant's service, receiving a weekly salary as manager of one of its stores, and that it befell him while performing a duty he was specifically directed to perform in the furtherance of his employer's business, consisting of taking home with him and caring for money received at the store he was managing after banking hours. It is also undisputed that the accident befell him in the street, after he had closed the store for the day and was on his way home for the night. The defense contends the latter facts preclude his recovery, for the reason that "the trip he was taking was not taken because of his employment at all."

In support of this contention defendant's counsel invoke the general rule that the act does not apply to employees going to and from their day's work, and not in the immediate vicinity of their place of employment. This general rule has its full application to common laborers and other employees who work during stated hours at specified places, and when they are through for the day are free to go where they like and do as they please, with no further responsibility under their employment or duty to perform for their employers until working hours begin the next day, or until they again resume their employment. If in the meantime they are accidentally injured while going somewhere or doing some act wholly for their own benefit, they are not protected by the statute. But that rule does not necessarily apply where the injured employee is yet acting within the scope of his employment, carrying out the orders of his employer, and performing some duty to further the latter's business. Where he was going or what he was doing might also further his own interests, but it would not in itself bar him from recovery.

Under our statute, findings of fact by the Industrial Accident Board, acting within its powers, are, in the absence of fraud, made conclusive. This court is limited to determining whether there is any competent evidence, direct or inferential, to support the findings and order of the Board. In making this award, the Board found and held on the matters in controversy in part as follows:

"We think the record supports the applicant's contention that the possession of the money made him apprehensive. That is borne out by his action in placing the money in a paper sack and camouflaging it with groceries, his action in crossing the street to avoid passing the building under construction, and his action in asking for the sack containing the money upon recovering consciousness. There had been a number of robberies in that vicinity. The applicant contends, further, that he did not follow the course he would ordinarily have followed, had he not been in possession of the money. He testified that he would have proceeded along the north side of Michigan avenue, but that he avoided this side of the street because he daily carried money to the bank along that side of the street, and he was confident that a number of people along that side of the street knew that he carried a considerable amount of money. This applicant was paid a weekly wage, plus commissions. This arrangement takes him out of the usual hourly rate class, and covered whatever service he performed for the respondent employer. The respondent employer undoubtedly considered the carrying home of the

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money as an important part of the applicant's duties, as he was specifically instructed on that point. * * * We find as a fact that at the time of the accident the applicant was carrying out a specific order to perform a specific duty for the respondent employer, and we further find that, because of the peculiar circumstances surrounding the case, the carrying out of this duty caused the applicant considerable apprehension. It is therefore found that the applicant suffered an accidental personal injury which arose out of and in the course of his employment with the respondent employer. It thus follows that the decision of the Arbitration Committee should be and the same is in all things affirmed."

That plaintiff was performing a daily duty imposed by distinct orders of his employer, at the time and as required by the terms of employment, is undisputed, and there is evidential support for the conclusion of the Board that there were peculiar circumstances surrounding this case. This defendant grocery company had adopted the peculiar custom of converting its numerous store managers into perambulating safety deposit boxes, charged with the duty of carrying through the streets of Detroit after closing hours a large amount of money, instead of having safes or valuts, or making other provision for the safety of money taken in at their stores after banking hours. The nature of their business was such that the bills averaged small denominations, requiring the money carrier to freight himself with a bulky roll of small bills on his way home through a city and at a time where and when the dangers of such a course were a matter of common knowledge. Plaintiff testified that during the short period he acted as manager there were two or three other managers in that district held up and money taken from them. Not only does he testify that there was absolutely no provision at his or any of the other stores for safely caring for the money during closing hours, and he was distinctly instructed by his district manager to carry the money home and see that it was kept safely overnight, but a witness named Hampton testified that he had worked for the Kroger Company in various capacities from porter up to store manager, and finally as district manager, and such were the customary instructions and practice; that when store manager he was so ordered by his district manager, and when he became district manager he by direction of his superior instructed the managers of the 21 stores in his district to take the money on hand home at night. If the duty imposed on the store manager was to carry the money on hand at closing hours to a bank or some other depository where it might be received, there would be little question but that any one of them who was injured in a street accident while on such mission would come under this act.

We think defendant begs the question in the assertion that carrying the money home was a mere incident of plaintiff's trip, at which time his employer had no control over him, but he was left free to go where he pleased, even to "have dined down town and then go to the theater"; that, had he done so and "fallen down the theater stairs," he could with like force claim he violated no duty, and "but for the money he would have taken another stairway." So far as the duties of his employment are concerned, it can as well be said that his going towards home was an incident of the performance of his unfinished daily duties. In Punches v. American Box Board Co., 216 Mich. 342, 185 N. W. 758, the injured party was at the same time returning to work from his home, and as a duty of his employment was taking a team of horses back to the factory for his employer. Vide, also, Beaudry v. Watkins, 191 Mich. 445, 158 N. W. 16, L. R. A. 1916F, 576; Kunge v. Detroit Shade Tree Co., 192 Mich. 435, 158 N. W. 851, L. R. A. 1917A, 252.

The instant case was not a casual or unusual service, incidentally performed for the employer's interest on the employee's initiative, but a regular, imperative, daily duty, in direct obedience to the terms of plain-

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tiff's hiring, and in prompt compliance with a specific order to take the money home with him and there care for it. He had no orders or permission to carry the bulky roll with him while dining at some public place down town, or when attending a theater. He yet had an important duty to perform in the course of his employment, calculated to further his employer's business, and was engaged in performing it when injured. Under the general rule relative to performing a service within the scope of his employment tending to further his employer's interests, this case falls on the liability side of the line of demarcation so carefully pointed out, with review of many authorities, by Justice Fellows in Sichterman v. Kent Storage Co., 217 Mich. 364, 186 N. W. 498.

The ultimate facts found by the Board were not without evidential support.

The award is affirmed.

The late Justice Stone took no part in this decision.

FORTIN ET AL. v. BEAVER COAL CO. (No. 43.)

(Supreme Court of Michigan. March 31, 1922.)

187 Northwestern Reporter, 352.

MASTER AND SERVANT—MINER HELD GUILTY OF "WILLFUL MISCONDUCT" WITHIN COMPENSATION ACT.

Mere negligence, however great, is not "willful misconduct" within the Workmen's Compensation Act (Comp. Laws 1915, § 5432), precluding recovery of compensation, but the employee is guilty of such misconduct where the conduct occasioning the injury is of a quasi criminal nature, involving the intentional doing of something with knowledge that it is dangerous, and with a wanton disregard of consequences; and a coal miner was guilty of such misconduct where he jumped across the pit, instead of walking along path provided therefor, in violation of Comp. Laws 1915, §§ 5542, 5562.

(For other cases, see Master and Servant, Dec. Dig. § 380.)

(For other definitions, see Words and Phrases, First and Second Series, Willful Misconduct.)

Certiorari to Department of Labor and Industry.

Proceedings under the Workmen's Compensation Act by Rose Fortin and others for compensation for the death of Earl Fortin, opposed by the Beaver Coal Company, employer. Award for claimants, and the employer brings certiorari. Award vacated.

Argued beforee Fellows, C. J., and Wiest, Stone, Clark, Sharpe, Moore, and Steere, JJ.

Humphrey, Grant & Henry, of Saginaw, for appellant.

Coumans & Gaffney, of Bay City, for appellees.

WIEST, J. Earl Fortin, 25 years of age and unmarried, was employed in defendant's coal mine as a trip rider, and had worked in the mine 11 years. In the mine, at the foot of a double hoisting shaft, there was a pit known as the sump, to let the bottom of the cages in to bring the floors thereof flush with the floor of the mine. The sump was an

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open space about 4 feet 10 inches by 6 feet 6 inches and 5 feet deep. Earl Fortin, on the day he was killed had finished his work for the day, and, evidently intending to volunteer his help to the cager, attempted to jump across the sump, and was struck by a piece of coal falling down the shaft and instantly killed. There was a traveler or run-around for use in going from one side of the sump to the other, and no reason appears for the deceased not using it, instead of doing the rash and exceedingly dangerous thing of attempting to jump across. The Department of Labor and Industry awarded compensation to the mother of the deceased and to his sister and her children, and the case is here for review.

Counsel for defendant coal company contend that, as a matter of law, the accident was caused by the intentional and willful misconduct of the deceased, and that it was not sustained in the course of his employment.

Section 5432, C. L. 1915, provides:

"If the employee is injured by reason of his intentional and willful misconduct, he shall not receive compensation under the provisions of this act."

In 1913 the Legislature of this state encated a law to provide for the health and safety of persons employed in and about coal mines, and section 27 of that act (section 5542, C. L. 1915) provides:

"At the bottom of each hoisting shaft there shall be constructed a safe and convenient traveling way around the shaft for employees and animals, and it shall be unlawful for any person to pass across the shaft bottom in any other manner or in any other way than the traveling way herein contemplated, except such employees as may be necessary to perform the work at the bottom of the shaft or those engaged in making repairs."

The penal provision of the statute (section 5562, C. L. 1915) provides:

"Any person, firm or corporation, violating any of the provisions of this act shall be guilty of a misdemeanor, and upon conviction shall be fined not less than ten dollars nor more than one hundred dollars, or be imprisoned in the county jail not exceeding thirty days, or both at the discretion of the court."

Was the death of Earl Fortin occasioned by his intentional and willful misconduct? The authorities seem to be agreed that mere negligence, however great, is not willful misconduct. Gignac v. Studebaker Corporation, 186 Mich. 574, 152 N. W. 1037.

If, however, the conduct occasioning the injury is of a quasi criminal nature, involving the intentional doing of something with knowledge that it is dangerous and with a wantom disregard of consequences, then it is intentional and willful misconduct.

We do not consider the cases cited in the opinion of the board as decisive of the question here presented.

In Rumboll v. Nunnery Colliery Co., 80 L. T. (Eng.) 42, the injured employee in breaking the rules made under the Coal Miners' Regulation Act of 1897 was acting under orders of his superior, and not at his own volition.

In Alexander v. Industrial Board of Illinois, 281 Ill. 201, 117 N. E. 1040, the employee was killed while about the master's service, but while violating an ordinance of the city of Chicago, and it appears from the opinion that the deceased had permission from an employee of the railroad company to enter upon the elevated tracks to recover tools to enable him to carry on the work of the master.

In Casey v. Humphries, [1913] 6 B. W. C. C. 520, the court remarked that the case was undoubtedly a border-line one, and one of the judges stated:

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"It is a case in which, if the learned judge had found that there was serious and willful misconduct, it could not in my judgment be disputed that there was ample evidence to justify such a finding."

It cannot be said that the accident had its origin in a risk connected with the employment, and to have happened as a consequence thereof.

The mining company could not, under the law, have employed the deceased or have directed him to do the act causing his death. The law enacted for safeguarding the lives of miners against taking hazardous risks of life and limb must be obeyed, and it would be anomalous, to say the least, to permit one statute to be invoked and award compensation thereunder for death occasioned in violating another statute prohibiting the act and making it a misdemeanor.

Here the statute expressly forbids the deceased from doing the act occasioning his death, and, had he not been killed, he could have been prosecuted for such act and convicted of a misdemeanor. A safe way was there for his use. No emergency existed for his not using it. The law not only made it a misdemeanor on the part of the company if it failed to provide such a way, but as well a misdemeanor for the deceased to jump across the sump. So serious was the danger from coal falling down the shaft that the Legislature took notice thereof, and made it a misdemeanor to do what the deceased was doing when he was killed. He intentionally made an effort to jump across the sump, and this was willful misconduct on his part.

Such reckless disregard of the statute and invitation of the very consequences the statute was enacted to avoid being a voluntary act on the part of the deceased, involving plan and effort and calculation, and, not being in furtherance of any of his duties nor under the direction of his superior, constituted intentional and willful misconduct on his part, and bars compensation to his dependents. Leisham v. Wm. Dixon Co., Ltd. (1910) Sess. Cas. 495; Fidelity, etc., Co. v. Ind. Acc. Com., 171 Cal. 728, 154 Pac. 834, L. R. A. 1916D, 903; Bay Shore Laundry Co. v. Ind. Com., 36 Cal. App. 547, 172 Pac. 1128.

The award is vacated.

The late Justice Stone took no part in this decision.

FOX v. DETROIT UNITED RY. (No. 41.)

(Supreme Court of Michigan. March 30, 1922.)

187 Northwestern Reporter, 321.

4. MASTER AND SERVANT—EMPLOYEE HELD NOT TO HAVE ELECTED "TO PROCEED" UNDER COMPENSATION ACT.

An employee who permitted employer's insurer to pay his hospital and doctor's bills did not by reason thereof elect to "proceed" under the Workmen's Compensation Act, under part 2, § 4, and part 3, § 15.

(For other cases, see Master and Servant, Dec. Dig. § 358.)

(For other definitions, see Words and Phrases, First and Second Series, Proceed.)

Error to Circuit Court, Wayne County; Arthur Webster, Judge.

Action by Fred Fox against the Detroit United Railway. Judgment for plaintiff, and defendant brings error. Affirmed.

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Argued before Fellows, C. J., and Wiest, Stone, Clark, Bird, Sharpe, Moore, and Steere, JJ.

Corliss, Leete & Moody, of Detroit (Frederic T. Harward, of Detroit, of counsel), for appellant.
Paterson & Svenson, of Detroit, for appellee.

SHARPE, J. The plaintiff, a man 56 years old, was, on October 24, 1918, driving a horse and wagon to the north on Fifteenth street in the city of Detroit. He was in the employ of Lowrie & Robinson, lumber dealers. He was familiar with the surroundings. Fifteenth street intersects Warren avenue. This avenue has a double line of street car tracks, operated by the defendant. Cars on the north side travel westerly, and those on the south side easterly. Defendant's Warren car house is three blocks to the west. Defendant has air stations on both sides of the avenue between Fourteenth and Fifteenth streets. Plaintiff approached the intersection about 5 o'clock in the afternoon. The cars leave defendant's car house on the east-bound track very frequently at this hour. They stop to take air before proceeding on their trip. As plaintiff approached the crossing he stopped and waited for three east-bound cars to pass, and also a truck being driven in the same direction. The last of the three cars stopped with its rear end slightly protruding into the traveled portion of Fifteenth street, which was 26 feet in width at this point. Plaintiff's view to the east was entirely obstructed by this car. After waiting, as he claims, for five or six minutes, he testified that he looked along the trolley wire, which he could see over the standing car, and also through the glass on it, and could see no signs of an approaching car; that he listened and heard no sound of a gong or rumble of the car wheels; that, he then attempted to cross, passing close to the standing car, and, as soon as he was able to see the track on the north side of the street, he discovered a car, which approached him so rapidly that he was unable to get across; his wagon was struck by it, and he thrown out and very severely injured. Plaintiff's witnesses testified the car was traveling from 12 to 15 miles per hour, while defendant's witnesses claim its rate of speed was from 2 to 4 miles per hour.

Plaintiff was taken to a hospital, and the bill for hospital and doctor's services, amounting to $130, was paid by the insurance company which had furnished indemnity insurance to plaintiff's employers. Plaintiff claims he was to return this money in case he recovered damages from the defendant.

When the plaintiff had rested, and also at the conclusion of the proofs, defendant's counsel moved for a directed verdict. The decision on these motions was reserved under the Empson Act (3 Comp. Laws 1915, § 14568), and the case submitted to the jury, who rendered a verdict in plaintiff's favor for $5,840. Defendant's motion for a judgment non obstante veredicto was overruled, as was also its motion for a new trial.

The assignments of error will be considered in the order discussed by defendant's counsel in their brief.

[1, 2] 1. Was plaintiff guilty of contributory negligence? Defendhad no greater right to the use of the street at this crossing than had the plaintiff. The car which struck plaintiff had come from the south on Fourteenth street, and then curved sharply onto Warren avenue and ran west. At the rate at which it was traveling, as testified to by plaintiff's witnesses, this car would have traveled the distance between Fourteenth and Fifteenth streets, approximately 330 feet, in about 20 seconds. Had plaintiff alighted from his wagon and walked to the point from which he could have obtained a view to the east on the north track he could not have seen the car in time to be warned of its approach had he re-

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returned to the wagon and attempted the passage across. It is true that he could not see the approaching car from where he stopped. He waited five or six minutes to permit the car obstructing his view to move onward. It did not do so. He looked at the trolley wire. The approach of a car would be indicated by the movement of the trolley pole thereon. He saw none. He looked through the windows of the standing car as best he could. He listened, but heard no sound of an approaching car. Whether or not he exercised that care which an ordinarily prudent person would exercise under the circumstances and the surroundings was, we think, a question for the jury.

The decisions of this court relied on by defendant (Doty v. Detroit Citizens' St. Ry. Co., 129 Mich. 464, 88 N. W. 1050; Clark v. Detroit United Railway, 168 Mich. 457, 134 N. W. 463; Davis v. Saginaw-Bay City Ry. Co., 191 Mich. 131, 157 N. W. 390; Blatnikoff v. Detroit United Ry., 202 Mich. 69, 167 N. W. 956) are clearly distinguishable. These were all cases in which a passenger who had alighted from a street car passed onto the second track without looking for the approach of a car thereon.

[3] 2. Was there evidence of defendant's negligence? There was testimony tending to show that the car which caused plaintiff's injury was traveling from 12 to 15 miles per hour, and that no gong was sounded. In view of the condition of the street, congested as it was by defendant's cars, and the fact that one car obstructed the view to the east on Warren avenue, we find no error in the submission of this question to the jury. See Ommen v. Grand Trunk R. Co., 204 Mich. 392, 169 N. W. 914, and cases cited.

3. Was the verdict against the overwhelming weight of the evidence? The trial court concluded it was not, and with his conclusion we agree. Plaintiff's testimony was corroborated in all its essentials by that of apparently disinterested witnesses.

[4] 4. Had plaintiff elected to proceed under thee Workmen's Compensation Act? Section 15 of part 3 of the act (2 Comp. Laws 1915, § 5468) provides:

"Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof, the employee may at his option proceed either at law against that person to recover damages, or against the employer for compensation under this act, but not against both, and if compensation be paid under this act the employer may enforce for his benefit of for that of the insurance company carrying such risk, or the commissioner of insurance as the case may be, the liability of such other person."

Section 4 of part 2 (2 Comp. Laws 1915, § 5434) provides:

"During the first three weeks after the injury the employer shall furnish, or cause to be furnished, reasonable medical and hospital services and medicines when they are needed."

Defendant insists that the plaintiff, by permitting the insurance company to pay his hospital and doctor's bills, exercised the option given him by the act to proceed hereunder against his employer for compensation. He made no claim for compensation under the act. There was clearly no election on his part to hold his mployers liable. As was said in Braben v. Gladwin Light & Power Co., 201 Mich. 697, 706, 167 N. W. 1024, 1027:

"To proceed against the employer is to employ the procedure, the method, pointed out in the statute."

The judgment is affirmed.

The late Justice Stone took no part in this decision.

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HELDER v. LUCE FURNITURE CO. ET AL. (No. 61.)

(Supreme Court of Michigan. March 30, 1922.)

187 Northwestern Reporter, 263.

MASTER AND SERVANT — EVIDENCE HELD TO SUSTAIN COMPENSATION AWARD FOR DEATH FROM HEART DISEASE.

Evidence that an employee, while engaged in heavy work requiring him to hold heavy hangers above his head, had an attack of acute dilation of the heart and died within a short time *held* to support a compensation award as against the objection that no accident in the sense of a fortuitous. unforeseen mishap was shown.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Certiorari to the Department of Labor and Industry.

Proceedings under the Workmen's Compensation Act (Pub. Laws 1912 [Ex. Sess.] No. 10) by Fannie Helder for compensation for the death of Dirk Helder, opposed by the Luce Furniture Company, employer, and the Furniture Mutual Insurance Company, insurer. Compensation was awarded, and defendants bring certiorari. Affirmed.

Argued before Fellows, C. J., and Wiest, Stone, Clark, Bird, Sharpe, Moore, and Steere, JJ.

Francis D Campau, of Grand Rapids, for appellants.

Joseph R. Gillard, of Grand Rapids, for appellee.

MOORE, J. This is certiorari to the Department of Labor and Industry to review an award of $14 a week for 300 weeks.

The claim of appellants is that there is no evidence that an actual accident in the sense of a fortuitous, unforeseen mishap occurred, counsel citing Bayne v. Cartage & Storage Co., 181 Mich. 278, 378, 148 N. W. 412; Redfield v. Insurance Co., 183 Mich. 633, 150 N. W. 362; La Veck v. Parke, Davis & Co., 190 Mich. 604, 157 N. W. 72, L. R. A. 1916D, 1277, and Guthrie v. Detroit Shipbuilding Co., 200 Mich. 355, 167 N. W. 37. It will appear later that these cases do not sustain the contention of counsel, when applied to the record in this case.

There is testimony to the effect that Dirk Helder was nearly 46 years old at the time of this accident. He was a big, strong, and apparenty an able-bodied man. He hardly ever missed a day at the factory. He worked for Luce Furniture Company nearly 20 years. as an operator of a mitre saw in the cabinet room. It was not heavy work. On January 31, 1920, Mr. Helder was called upon to help install 3 pieces of new line shafting requiring metal hangers, each 20 inches long and weighing 60 to 75 pounds, to suspend the shafting from the ceiling of the factory.

On Saturday morning January 31, 1920, the old hangers and shafts were taken down and scaffolds were constructed and placed 6 to 9 feet from the floor; the top planks were 2 feet wide and about 6 feet from the ceiling. Mr. Helder worked until noon on Saturday and took his Saturday half holiday. Monday, February 2, 1920, Mr. Helder returned to work and lifted the first hanger from the floor up over his head 6 feet to the scaffold. He then went up on the scaffold and held this heavy hanger up over his head against the ceiling while the carpenter bored the holes in the ceiling and put in the lag bolts. He returned to the floor and, for the second time, lifted one of these heavy hangers over his

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head and up onto the scaffold. He then went up on the scaffold presumably to hold this second hanger up to be bolted as before when he suddenly gave way and hurried back down from the scaffold and was rushed to the men's room where he vomited blood profusely. This happened about 8:30 a. m. When Mr. Helder came from the men's room he was exhausted and said to his straw boss, "Golly, Ed. I have got to go home. I threw pretty near the guts out of me, and I think there must be something wrong with my stomach." He was too weak to punch the time clock as he passed by it, and the timekeeper later marked his leaving time on the card at 8:30 o'clock.

Mr. Helder went to his home, ordinarily a walk of 7 to 10 minutes. He could not speak. Later he indicated to his wife that he was hurt internally. The wife left him in a chair and ran to call the family doctor. When she returned Mr. Helder was on the bed. When Dr. Barth came he saw Mr. Helder was dying. He gave him a hypodermic, and, before he could give him a second one, he passed away at about 10:30 a. m. The doctor testified Mr. Helder died of acute dilation of the heart which was, in his opinion, caused by overexertion.

We think the award was justified by the repeated rulings of this court. Some of the cases are Raynor v. Slight Furniture Co., 180 Mich. 168, 146 N. W. 665, L. R. A. 1916A, 22, Ann. Cas. 1916A, 386; Bayne v. Riverside Storage Co., 181 Mich. 378, 148 N. W. 412; Redfield v. Mutual Insurance Co., 183 Mich. 633, 150 N. W. 362; La Veck v. Parke, Davis & Co., 190 Mich. 604, 157 N. W. 72, L. R. A. 1916D, 1277; Ramlow v. Moon Lake Ice Co., 192 Mich. 505, 158 N. W. 1027, L. R. A. 1916F, 955; Schroetke v Jackson-Church Co., 193 Mich. 616, 160 N. W. 383, L. R. A. 1917D, 64; St. Clair v. Meyers Music House, 211 Mich. 285, 178 N. W. 705; Shaw v. Packard Motor Car Co., 214 Mich. 660, 183 N. W. 767.

The award is affirmed, with costs to the appellee.

The late Justice Stone took no part in this decision.

KLEIN ET AL. v. LEN H. DARLING CO. ET AL. (No. 1, OCT. TERM, 1921.)

(Supreme Court of Michigan. March 30, 1922.)

187 Northwestern Reporter, 400.

MASTER AND SERVANT—DEATH FROM SHOCK BY INJURY TO FELLOW EMPLOYEE HELD COMPENSABLE AS AN "ACCIDENT."

Where an employee suffering from a nervous condition caused by sulphuric acid fumes accidentally let a radiator slip through a hole in the floor, and it fell, striking a fellow employee on a lower floor, rendering him unconscious, and the former thereby received a shock causing a delirious condition from which he died within two weeks, *held*, that death resulted from an "accident" within the Workmen's Compensation Law (citing Words and Phrases, First and Second Series, Accident).

(For other cases, see Master and Servant, Dec. Dig. § 373.)

Certiorari to Industrial Accident Board.

Proceedings under the Workmen's Compensation Law (Pub. Acts Ex. Sess. 1912, No. 10) by Doris Klein and another for compensation for death of Otto Klein, opposed by the Len H. Darling Company, em-

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ployer, and the Hartford Accident & Indemnity Company, insurer. Award for claimants, and employer and insurer bring certiorari. Affirmed as modified.

Argued before Fellows, C. J., and Wiest, Stone, Clark, Bird, Sharpe, Moore, and Steere, JJ.

Kerr & Lacey, of Detroit, for appellants.

Baldwin & Alexander, of Adrian, for appellees.

MOORE, J. Otto Klein, husband and father of appellees, was in the employ of Len H. Darling Company, who manufacture separators for batteries. Part of his time he looked after the treating of wood separators. The treatment was accomplished by boiling the wood in a solution of caustic soda and sulphuric acid. Mr. Klein quit work January 3, 1920, and died on January 15, 1920. His widow wrote to the Industrial Accident Board and to respondent company to the effect that her husband died January 15, 1920, "from acid poisoning, from acid inhaled, and absorbed on account of lack of proper ventilation equipment while at work."

On February 4th, 1920, Mrs. Klein gave written notice of the injury and claim for compensation, in which it was said:

"His death was caused by acid poisoning from acid inhaled and absorbed during his work treating materials for storage batteries."

On April 20, 1920, arbitration proceedings were held, at which time appellee for the first time advanced the theory that on December 29, 1919, while her husband was putting a register in place in a hole on the second floor of the plant where he worked, he let the register slip through the hole, and it fell, striking Merchant Harris on the head, and dedeceased received a shock followed by his death as a result of this accident.

Objections were interposed by counsel. Counsel for claimant proposed an amendment which would cover the claim. The commissioner was of the opinion that, as respondents had written the Board that they were unable to find there had been any accident, the amendment would not change the status of the case, and permitted the amendment.

Appellants' objections to the testimony was that no claim for compensation had been made for such an accident within the time prescribed by law, and that appellants did not have notice of such an incident within the time prescribed by statute. The commissioner before whom the case was tried overruled these objections, and the case proceeded to hearing.

In its return the Board says in part:

"For a period of about 18 months previous to January 3, 1920, Otto Klein had been employed by the respondent Len H. Darling Company, a copartnership engaged in manufacturing automobile parts and batteries. On various previous occasions, while dipping parts of batteries in sulphuric acid and caustic soda in respondent's plant, he spilled this solution on his hands, arms, and legs, causing sores on his wrists and legs. It further appears from the proofs that decedent worked in what was known as the vat room, where there were fumes from the sulphuric acid, which were injurious to decedent's health and caused him to suffer from a toxic and nervous condition. The decedent had enjoyed good health prior to his employment with respondent, but began during the year 1919 to become nervous, to lose his appetite, have headache, and complain of being unable to sleep. On January 3, 1920, while putting a radiator in place in a hole on the second floor of the plant where he was working, he accidentally let the radiator slip through the hole, and it fell, striking a man by the name of Merchant Harris on the head, causing a wound

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and rendering him unconscious. There is evidence to the effect that the decedent became excited on account of the injury to Harris, and that he at first thought he had killed Harris, but this was not so. The decedent went below, where Harris was, and later accompanied him to a doctor. There is testimony to the effect that the shock was so great that it affected Klein, and that he continued to be in a highly nervous state and condition from that time on, and that at night he would wake up and cry out that he had killed this man. He continued his work four days after the accident, when he was taken to his bed in a delirious condition, which delirious condition continued and grew worse until the 15th of January, when he died. He was treated by a physician, Dr. Hyde, who testified that he did not discover that the decedent had any organic troubles, and that he could not say that the poisoning from the fumes or the burns were sufficient to have caused his death. The only thing that could have caused death was the shock. * * *

"Under the medical testimony before us, it is established that death resulted from the shock, which the decedent experienced from the incident of accidentally permitting a radiator to fall, hitting his fellow workman and injuring him.

"It having been established that death resulted from shock brought about by an accidental happening, we are confronted with the question of whether or not this is a compensable accident. We have been unable to find a case upon this question arising under the Compensation Law in any state."

The Board made an award in favor of the appellees.

Counsel for appellant argue many questions. We quote from the brief:

"The Industrial Accident Board erred in holding that deceased, Otto Klein, received an accidental injury arising out of and in the course of his employment, and that death was due and traceable thereto. * * *

"Under the Michigan act, before one is entitled to compensation, it must be established that an accidental injury was received. This honorable court has passed upon this question in disposing of several important compensation cases, and it was held that the provisions of the law providing compensation for personal injuries arising out of and in the course of the employment include only injuries by accident. See Jendrus v. Detroit Steel Products Co., 178 Mich. 265, 144 N. W. 563, L. R. A. 1916A, 381, Ann. Cas. 1915D, 476; Clem v. Chalmers Motor Co., 178 Mich. 340, 144 N. W. 848, L. R. A. 1916A, 352; Kutschmar v. Briggs Mfg. Co., 197 Mich. 146, 163 N. W. 933, L. R. A. 1918B, 1133.

"There is not any proof to show that the radiator incident and the effects thereof, if held to be an accidental injury within the meaning of the law, was the cause of death, but in addition to that contention we sincerely insist that deceased did not receive an accidental injury within the meaning of the law which would entitle his dependents to compensation"—citing Nelson v. Crawford, 122 Mich. 466, 81 N. W. 335, 80 Am. St. Rep. 577.

It may be well here to quote some of the testimony. The doctor who attended Mr. Klein was frank to say that he could not swear positively what caused his death, but said:

"By Mr. Baldwin: Q. Just one question, Doctor. This nervous condition, and the pain that was manifest in the base of this man's brain, came from the shock that he received at the time of the accident, when he dropped the radiator; that, of course, would be when he was in the employ of the Darling Company?

"Mr. Kerr: I didn't get the question. Wait just a moment.

"A. I didn't just get it.

"Q. I say, as you understood, he was in the employ of the Darling Company when he dropped this radiator? A. Yes.

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"Q. And that was one of the things that you saw affected his mind at the time of his illness? A. Yes; yes; it had a marked effect upon his mind and nervous condition. * * *

"Q. Well, that didn't cause death, did it, Doctor? A. What was that?

"Q. The effect that this radiator— A. That, of itself, I don't think did. That was simply a contributory cause of his condition at the time of death, in my opinion.

"Q. Well now, let's see, in what way would that be a contributory cause. What portion—how would it affect the brain, Doctor? A. It would induce increased congestion and excitation of the brain.

"Q. What portion? A. Just as if you already had a felon on the hand, and you hurt that, you would increase the irritation and the pain, and aggravate the general condition; and that would irritate the brain, in my opinion, in the same way.

"Q. Well, now Doctor, do you profess to be a specialist on the brain? A. I don't.

"Q. Do you profess to advise accurately and definitely with reference to what effect, if any, the incident of the radiator would have upon this deceased; that is, from a medical and from a scientific standpoint? A. Why, I am no specialist at all, but I am positive as to the effect that would produce a condition of that kind shock to the system. I have seen a great many times in people that were sick, if there was a nervous excitement. * * *

"Q. So in this case you are not testifying that it had been irritated or that it was irritated by this fall, are you, Doctor? A. No; I am not, except that it produced an increased nervous excitation.

"Q. But that would not be the proximate cause of death, would it? A. Not the proximate cause; No; if it were any cause.

"Q. And it is possible, too, Doctor, that that fall should be dissociated—the falling of the radiator should be dissociated absolutely with the cause of death in this case? I say, that is possible, too? A. Oh, it might be possible. I judged that it was, that it had a bearing on the case simply from the fact that it was on his mind, and talking of that constantly in delirium, and even when awake, and he seemed very much worried and nervous over the accident. I had no doubt but what that had a bearing on his condition.

"Q. You mean a bearing on his nervous condition? A. On his nervous condition, and of course my opinion was that there was already a nervous irritation there.

"Q. What caused that? A. I don't know, if you want my opinion. That opinion was based on the history I got of the conditions under which he worked, that his health became deteriorated, and the condition developing at that time excited that and brought about the culmination.

"Q. Well, Doctor, can you state that that accident, the falling of a radiator—state positively that that had anything to do with his nervous temperament? Isn't it possible, in other words, that a man who was extremely nervous, and who had been in failing health for several months, just gradually got worse? A. I had every reason, from the conditions existing—what I saw—to believe that did have an influence and bearing. I wouldn't say that it was not possible that it did not have, but I have no doubt in my own mind, from what I observed, that it had."

Drs. Miller and Jewett in answer to hypothetical questions expressed the opinion that the shock was the final and real cause of Mr. Klein's death.

The important question is: Did Mr. Klein come to his death by reason of an accident within the meaning of the Employers' Liability Law? We think the case of Nelson v. Crawford, supra, cited by counsel for appellant, is not in point as a reading of the opinion will show.

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The case before us is based upon the employers' liability statute. There are many definitions of the word "accident" in Words and Phrases, First Series, vol. 1. We quote some of them:

"'Accidental' means 'happening by chance, or unexpectedly taking place not according to the usual course of events; casual; fortuitous. We speak of a thing as accidental when it falls to us by chance, and not in the regular course of things, as an accidental meeting, accidental advantage,' etc. North American Life & Accident Ins. Co. v. Burroughs, 69 Pa. (19 P. F. Smith) 43, 51, 8 Am. Rep. 212.

"An 'accident' is an event happening without the concurrence or the the will of the person by whose agency it was caused; any event that takes place without one's foresight or expectation; anything occurring unexpectedly or without known or assignable cause; that which happens without one's direct intention. The opposite of accident is design, volition, intent. Ætna Life Ins. Co. v. Vandecar, 86 Fed. 282, 285, 30 C. C. A. 48. * * *

"An 'accident' is the happening of an event without the design and aid of the person, and which is unforeseen. Paul v. Travelers' Ins. Co., 112 N. Y. 472, 478, 20 N. E. 347, 3 L. R. A. 443, 8 Am. St. Rep. 758; Williams v. United States Mut. Acc. Ass'n, 60 Hun, 580, 14 N. Y. Supp. 728, 730; Guldenkirch v. Same (N. Y. City Ct.) 5 N. Y. Supp. 428, 430; Ætna Life Ins. Co. v. Vandecar, 86 Fed. 282, 285, 30 C. C. A. 48.

"An 'accident' is any event which takes place without the foresight or expectation of the person acted upon or affected by the event. Crandal v. Accident Ins. Co. (C. C.) 27 Fed. 40, 42; Ripley v. Railway Passengers' Assur. Co., 20 Fed. Cas. 823, 825, No. 11,854; Providence Life Ins. & Inv. Co. v. Martin, 32 Md. 210, 315; United States Mut. Acc. Ass'n v. Hubbell, 56 Ohio St. 516, 47 N. E. 544, 546, 40 L. R. A. 453. * * *

"According to lexicographers, an 'accident' is a sudden, unforeseen, and unexpected event. It has been held by courts, adopting this or any similar definition, that, where a man is killed by robbers, this was a case of death by 'accident,' in the sense in which that word is used in accident insurance policies. So too, it has been held that death from a blow struck by one who has attempted to blackmail the assured was an accident covered by an accident insurance policy. In these and in all like cases in which death occurs by violent means, external to the man, and against or without intention or concurrence of will on the part of the man, death may probably be called an accident. A learned and laborious writer states the true rule for determining whether injuries are accidental. With great simplicity, clearness and strength, Biddle says: 'An injury may be said objectively to be accidental, though subjectively it is not, and if it occurs without the agency of the insured it may logically be termed "accidental," though it was brought about designedly by another person.' Fidelity & Casualty Co. v. Johnson, 17 South. 2, 3, 72 Miss. 333, 30 L. R. A. 206, citing Bid. Ins. vol. 2, p. 780."

In Johnson v. Fidelity & Casualty Co., 184 Mich. 407, 151 N. W. 596, L. R. A. 1916A, 475, it was held (we quote from the opinion):

"It is said death as the result of ptomaine poisoning does not create liability under this policy, counsel citing American Accident Co. v. Reigart, 92 Ky. 142, 17 S. W. 280, and Bacon v. Accident Ass'n, 123 N. Y. 304, 25 N. E. 399, 20 Am. St. Rep. 748. The first of these citations relates to the improper taking of an appeal and is not in point. The second case is distinguishable and is not controlling. The instant case is more like Paul, Adm'r, v. Insurance Co., 112 N. Y. 472, 20 N. E. 347, 3 L. R. A. 443, 8 Am. St. Rep. 758, where the liability of the company was sustained. No question would be raised here, I take it, if the assured by mistake had taken carbolic acid, when he intended to take a helpful medicine. Travelers' Insurance Co. v. Dunlap, 160 Ill. 642, 43 N. E. 765, 52 Am. St. Rep. 355. Why, then, should it be said there is no liability when the assured, intending to take nourishing food, in fact took

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tainted food, which resulted in ptomaine poisoning and death? See Vance on Insurance, pp. 570, 576, and notes. Richards on Insurance Law, § 386, and notes; 1 Am. & Eng. Enc. of Law, p. 272, and page 294; Freeman v. Accident Ass'n, 156 Mass. 351 (30 N. E. 1013, 17 L. R. A. 753); Jiroch v. Insurance Co., 145 Mich. 375 (108 N. W. 728)."

See Rayner v. Slight Furniture Co., 180 Mich. 168, 146 N. W. 665, L. R. A. 1916A, 22, Ann. Cas. 1916A, 386; Ramlow v. Moon Lake Ice Co., 192 Mich. 505, 158 N. W. 1027, L. R. A. 1916F, 955; Schroetke v. Jackson-Church Co., 193 Mich. 616, 160 N. W. 383, L. R. A. 1917D, 64.

In the instant case Mr. Klein could not anticipate that, when he removed the register, it would slip from his hand, nor could he anticipate it would hit a fellow employee, rendering him unconscious nor could he anticipate that he himself would receive a shock which would so affect him in his weakened condition that he would as a result thereof pass away in less than three weeks. This, however, was just what happened in the opinion of the attending physician and the other doctors. This also was the conclusion of the Industrial Accident Board.

Some of the cases holding that the findings of fact made by the Industrial Accident Board, acting within its powers, shall, in the absence of fraud, be conclusive, are Jendrus v. Detroit Products Co., 178 Mich. 273, 144 N. W. 563, L. R. A. 1916A, 381, Ann. Cas. 1915D, 476; Rayner v. Slight Furniture Co., 180 Mich. 170, 146 N. W. 665, L. R. A. 1916A, 22, Ann. Cas. 1916A, 386; Bayne v. Riverside Storage Co., 181 Mich. 380, 148 N. W. 412; Rock v. Whittlesberger, 181 Mich. 468, 148 N. W. 247, Ann. Cas. 1916C, 771; Hills v. Blair, 182 Mich. 26, 148 N. W. 243; Estate of Beckwith v. Spooner, 183 Mich. 332, 149 N. W. 971, Ann. Cas. 1916E, 886; Redfield v. Compensation Ins. Co., 183 Mich. 638, 150 N. W. 362; Paton v. Port Huron Engine & Thresher Co., 214 Mich. 130, 182 N. W. 639.

One other question requires attention. Counsel say the compensation should not commence with January 15, 1920. We quote:

"If it be held that radiator incident and circumstances surrounding the same amounted to an accident within the meaning of the Compensation Law, which resulted in the death of deceased, compensation should have been directed for a period of 300 weeks from December 29, 1919."

Counsel for claimant acquiesce in the change, and it may be made.

In all other respects the award is affirmed, with costs to the appellees.

Steere, Sharpe, Clark, and Bird, JJ., concurred with Moore, J.

The late Justice Stone took no part in this decision.

WIEST, J. (concurring). At first I was inclined to disagree with Mr. Justice Moore, but upon reflection I am convinced he is right.

An accident happened in which the deceased was an actor, and the shock to him was so acute and so depressed his vital forces as to kill him. We must not overlook man's nervous system and mental makeup and their intimate relation to his vital forces.

This man died because his vital forces could not meet and withstand the acute depression occasioned by what he had done in the course of his employment. The injury to him was no less real and fatal in its consequences than a mortal wound. "Accidents," within the comprehension of the Workmen's Compensation Law, include all accidents actionable at law and all former nonactionable accidents, except in case of intentional and willful misconduct on the part of the employee.

Fellows, C. J., and Clark, J., concurred with Wiest J.

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McCARTNEY ET AL. v. WOOD-TEMPLE CO. ET AL. (No. 20.)

(Supreme Court of Michigan. March 31, 1922.)

187 Northwestern Reporter, 251.

1. MASTER AND SERVANT — FINDING ON EVIDENCE IN COMPENSATION CASE CONCLUSIVE.

On review by certiorari of an award under the Workmen's Compensation Law, if there is any legal evidence sustaining the finding, the Supreme Court is not at liberty to set it aside.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

2. MASTER AND SERVANT—EMPLOYER'S REPORT OF ACCIDENT HELD TO SUPPORT FINDING OF INJURY "ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT."

In proceedings under the Workmen's Compensation Law to recover compensation for the death of a printer caused by blood poisoning from a finger cut, the employer's report to the Department of Labor, stating that the place of accident was in the employer's job rooms, and that the cause and manner of the accident was a cut on the finger and infection from handling type, *held* to constitute prima facie evidence that the accident arose out of and in the course of the employment and to furnish legal support for such a finding.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

Certiorari to Department of Labor and Industry.

Application by Ruby R. McCartney and others for compensation under the Workmen's Compensation Law, opposed by the Wood-Temple Company, employer, and the Ocean Accident & Guarantee Corporation, Limited, insurer. An award was made and affirmed by the Department of Labor and Industry and the employer and insurer bring certiorari. Affirmed.

Argued before Fellows, C. J., and Wiest, Stone, Clark, Bird, Sharpe, Moore, and Steere, JJ.

Vandeveer & Foster, of Detroit, for appellants.
R. W. Nebel, of Munising, for appellees.

WIEST, J. George McCartney was a printer in the employ of the Wood-Temple Company at Munising, Mich. On January 28, 1921, he became so ill from a streptococcic infection originating from a small cut in the index finger of his right hand that he quit work and took to his bed, and on March 19, 1921, he died from septicæmia, or blood poisoning.

A claim for compensation under the Workmen's Compensation Law (Pub. Acts [Ex. Sess.] 1912, No. 10) was made against the Wood-Temple Company, on the ground that the injury to his finger, the seat of the infection, was the result of an accident arising out of and in the course of his employment.

An arbitration award was affirmed by the Department of Labor and Industry, and the case is here for review on writ of certiorari; defendants claiming that the evidence wholly failed to show the injury was received out of and in the course of the employment.

The Wood-Temple Company, by Arthur D. Wood, manager, made two reports to the Department of Labor and Industry. In the first of

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which, dated February 2, 1921, it was stated that the date of the accident was "January 22, 1921," and the place, the "news and job rooms," and the cause and manner of accident, "cut on index finger—infection of finger and right arm." In the second report, dated March 10, 1921, it was stated, date of accident, "January 28, 1921," place of accident, "newspaper office," cause and manner of accident, "infection," nature and extent of injury, "infection from handling type."

In affirming the arbitration award the commission reviewed the evidence and held that the accident arose out of and in the course of the employment of the deceased.

[1] This holding is attacked on the ground that there was no testimony given by any witness showing that the accident was received while the deceased was working in the printing office. If there was any legal evidence sustaining the finding, we are not at liberty to set it aside.

[2] The reports made by the employer and filed with the Department, as required by law, appear to have been made after investigation by Mr. Wood, and after he had had ample opportunity to satisfy himself of the facts, and under our holdings such reports furnished prima facie evidence that the accident arose out of and in the course of the employment of Mr. McCartney.

A reading of the testimony discloses that Mr. Wood not only talked with Mr. McCartney, but also with the attending physician, and that he worked in the printing office with Mr. McCartney. He was well aware of the fact that in handling the material in the office cuts upon the hands were of frequent occurrence.

The testimony without the aid of the reports would probably bring the case within Hubbard v. Republic Motor Truck Co., 216 Mich. 358, 185 N. W. 715 but the reports of the employer constituted prima facie evidence of the accident and that it arose out of and in the course of the employment. Such reports furnished legal support for the finding that the accident arose out of and in the course of the employment. Reck v. Whittlesberger, 181 Mich. 463, 148 N. W. 247, Ann. Cas. 1916C, 771; Ginsberg v. Burroughs Adding Machine Co., 204 Mich. 130, 170 N. W. 15.

The award is affirmed.

The late Justice Stone took no part in this decision.

McGEE v. COLUMBIA BODY CO. ET AL. (No. 25.)

(Supreme Court of Michigan. March 30, 1922.)

187 Northwestern Reporter, 270.

1. MASTER AND SERVANT — AMENDMENT TO COMPENSATION ACT VALID.

Pub. Acts 1919, No. 64, amending the Compensation Act, is constitutional.

(For other cases, see Master and Servant, Dec. Dig. § 347.)

2. MASTER AND SERVANT — FINDING IN FAVOR OF WIFE CLAIMING COMPENSATION AS DEPENDENT SUSTAINED.

In a proceeding under the Workmen's Compensation Act, as amended by Pub. Acts 1919, No. 64, evidence *held* to sustain a finding that applicant was living apart from her husband at the time of his decease for justifiable cause.

(For other cases, see Master and Servant, Dec. Dig. § 405[5].)

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Certiorari to the Department of Labor and Industry.

Proceedings under the Workmen's Compensation Act by Josephine McGee, opposed by the Columbia Body Company and another. Award for plaintiff, and defendants bring certiorari. Affirmed.

Argued before Fellows, C. J., and Wiest, Stone, Clark, Bird, Sharpe, Moore, and Steere, JJ.

Beaumont, Smith & Harris, of Detroit (Hal H. Smith and Albert E. Meder, both of Detroit, of counsel), for appellants.

Anderson, Wilcox, Lacy & Lawson, of Detroit., for appellee.

SHARPE, J. Two of the questions considered in Kirkley v. Baking Co. (decided Feb. 8, 1922) 217 Mich. 307, 186 N. W. 482, are presented on this record:

(1) Was the applicant living apart from her husband at the time of his decease for justifiable cause?

(2) Is the amendment (Act No. 64, Public Acts of 1919) constitutional?

[1] We gave consideration to the brief and argument of counsel for the defendants in this case in deciding the Kirkley Case. What was there said disposes of the second question and the reasoning employed applies to the first. The facts, however, are somewhat different. The applicant and the deceased had been married about 35 years. He left her about 22 years before his death to seek employment in another city. She testified:

"He said he would go to look for a job first, and if he would get work, why, he would come back after her."

He returned after about 6 years and stayed a few months. His next visit was about 4 years later, when he stayed but a few days. On each of these occasions, marital relations were resumed. When he left the last time, he requested her to return with him, and she consented to do so as soon as he had a home for her to live in. She was at all times ready and willing to go and live with him, and she so informed him. She did not take any proceedings to compel him to support her "because she thought he would always come back," "she lived in hopes." His contributions to her support were but a few dollars occasionally.

[2] There is nothing in this record to indicate that the applicant was living apart from her husband with her consent, or that she was in any way to blame for their separation. The proofs support the finding that she was living apart from him for justifiable cause.

The award is affirmed.

The late Justice Stone took no part in this decision.

ODLE v. CHARCOAL IRON CO. OF AMERICA ET AL. (No. 16.)

(Supreme Court of Michigan. March 30, 1922.)

187 Northwestern Reporter, 243.

1. MASTER AND SERVANT—CONTRIBUTION BY COMPENSATION CLAIMANT FOR HOSPITAL SERVICE HELD WITHOUT WEIGHT IN DETERMINING RELATION.

Where a physician who conducted his own hospital had arranged with the employees of a corporation to furnish medical and hospital services in return for payments by the employees of monthly assessments,

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the facts that compensation claimant had paid the assessments and that the corporation encouraged the plan have no weight in determining whether he was an employee of the corporation or an independent contractor.

(For other cases, see Master and Servant, Dec. Dig. § 367.)

2. MASTER AND SERVANT — COMPENSATION CLAIMANT SKIDDING LOGS HELD "INDEPENDENT CONTRACTOR," AND NOT "EMPLOYEE."

Where compensation claimant was, at the time of his injury, skidding logs from a swamp to a railroad, under an arrangement whereby he was given a certain tract from which to skid the logs and was paid for those delivered, selecting his working hours and assistants, and furnishing his own horses and selecting the particular method of doing the work, he was an independent contractor, and not an employee, though the party for whom the work was being done reserved the right to require prompt performance of the work or to terminate the arrangement, and also reserved the right to inspect the logs delivered.

(For other cases, see Master and Servant, Dec. Dig. § 367.)

(For other definitions, see Words and Phrases, First and Second Series, Employee; Independent Contractor.)

Certiorari to Industrial Accident Board.

Proceedings under the Workmen's Compensation Act (Pub. Acts Ex. Sess. 1912, No. 10) by George Odle, employee, to recover compensation for injuries, opposed by the Charcoal Iron Company of America, employer, and the Michigan Mutual Liability Company, insurer. Compensation was awarded by the Industrial Accident Board, and the employer and insurer bring certiorari. Award vacated.

Argued before Fellows, C. J., and Wiest, Stone, Clark, Bird, Sharpe, Moore, and Steere, JJ.

Beaumont, Smith & Harris, of Detroit (Hal H. Smith, and Albert E. Meder, both of Detroit, of counsel), for appellants.

William S. Baird, of Bessemer, for appellee.

CLARK, J. Certiorari to the Industrial Accident Board. Was the plaintiff an employee or an independent contractor at the time he suffered the accidental personal injury? If the former the award must be affirmed, and if the latter it must be vacated.

Plaintiff using his horse and harness and assisted by his son, was skidding cedar for the defendant, Charcoal Iron Company, under an agreement of which defendant's chief clerk testified:

"Q. Mr. Graham, do you know the nature of the contract and the method of payment of the jobbers who do the jobbing work for the Charcoal Iron Company? A. Yes, sir.

"Q. What is the method in which that's handled? A. In this particular case, this man was on for a skidding contract, skidding cedar poles; a certain portion of the country to go over and that was allotted to him to go over, and he goes and takes the poles out as he comes to them; drags the stump out to the sidings and he receives his pay every time he checks up. We used to endeavor to check up once a month, only that brought out was paid for, the different pieces, and all sizes and pieces.

"Q. He is paid on the basis of what he places on? A. Yes.

"Q. Is he assigned a certain section? A. Yes.

"Q. Can he employ others to help him, if he wishes? A. He can; yes, sir.

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"Q. These men are never paid by the Charcoal Iron Company? A. Not without the contract would ask them to pay.

"Q. What would be the reason to have these men paid by themselves? A. The only idea is that if the job be a big one he may have to have help. Some get along well and others don't. They probably wouldn't depend on their employer and would come to the office force and ask them to help them out.

"Q. There's no contract of employment between the company and the men in the case? A. No.

"Q. Was there any contract of employment between the company and the son of George Odle? A. No. sir.

"Q. In respect to these camps, is there any regulations in regard to the hours of labor; report at a certain time? A. No; no particular time at all.

"Q. Is there any one from the company who regulates just how they shall make their roads? A. Use their own judgment.

"Q. Any one to say which road or pole first? A. No; up to the fellow that's skidding.

"Q. Has to get it out to the side? A. Yes.

"Q. Has to come up to schedule? A. Yes, sir.

"Q. If it isn't up to specifications, he's docked? A. There isn't much docking in the skidding proposition because it cost the skidder as much to skid a pole—could be docked at any time.

"Q. Who furnished the tools, etc., that this work was done with? A. In this case, Mr. Odle had his own horse and harness the short nature of his own outfit, all he needed, an axe, tongs, a chain or two. At the camps, they are very lenient with these men, and could always borrow anything.

"Q. They were loaned to them? A. Just loaned him whatever—

"Q. Was there any foreman directly over this man? A. Well, of course he worked under a foreman, but this foreman never interfered with him, and if he was getting out stuff enough to be showing he was making enough headway; if he was doing fairly well, there was nothing said, but if very little, probably jacked up about it; would have to hustle a little.

"Q. What was desired by the company? Was it the clearing of the section and the placing of these poles? A. Getting these poles and posts out on the track, where they could be loaded, the sooner the better.

"Q. You had no interest in what kind of a horse or? A. No, nothing at all; used anything he wanted to.

"Q. Hired as many men as he wanted to? A. Yes.

"Q. Could he use a sleigh if he wanted to? A. Sleigh, drays. Some of the contractors do in the winter time. Some work is only short stuff, when they probably use a dray and skid it out; but the jobber uses his own methods of getting it out; up to him. * * *

"A. As far as Mr. Odle's case was specified, he was shown a piece of track or swamp to clear up. He could take that out along the track as he saw fit. The company had the right to let him go any time they wanted to. It's only a matter to get what's already cut there and clean it up. His work goes through this skidding and if it ain't all cleaned up, if not cleared, he docks him.

"Mr. Baird. If Mr. Odle had not been handling that work to the satisfaction of the company, they would simply discharge him? A. Yes."

Plaintiff testified:

"Q. Your boy worked with you? A. Yes, sir.

"Q. Who paid the boy? A. The check was always made out to me.

"Q. Who owned the horse that you worked with? A. I did.

"Q. So that this amount that you were getting there, was for yourself and the horse, was it? A. Yes, and the boy. * * *

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"Q. You fed this horse yourself? Kept it at home? A. Yes.

"Q. Did you have any tools there besides the horse and harness? A. Had an axe; not my own; had to get it from the company.

"Q. Using your own most of the time? A. Pretty much.

"Q. What was the boy doing? A. Dig the stump up; drag it out.

"Q. These scalers you said put you to work—did they lay out a strip for you to work in? A. It would be in a little swamp. I would go and skid it out; didn't matter if a large or small amount.

"Q. You dragged that along the track so it could be loaded on the cars? A. Yes.

"Q. The company paid you so much for each length of pole? A. They did.

"Q. If that material that came out didn't come up to schedule, what was done then? You wouldn't get paid for it? A .Unless cut it off. There wasn't very much of that; very few pieces.

"Q. Did your boy always work with you, every day? A. No, not every day; made it three or four days by myself.

"Q. What time did you have to go to work? A. Usually, any time we took out.

"Q. They didn't demand that you be there at 6:30? A. No.

"Q. What time did you stop work in the evening? A. Any time they turned in, we hitched up too.

"Q. They didn't demand any certain hours? A. No.

"Q. The hours of labor were not strictly regulated? A. If we neglected to go out I got a calling down for it.

"Q. In other words, they wanted the work done, but didn't demand any specific hours of labor from you? A. The only thing; wasn't any strain about my being there on time."

[1] A physician conducted a hospital, his own enterprise and agreed with the employees of the employer to furnish certain medical and hospital service in return for the payment by the employees of monthly assessments. This plan was encouraged by the employer. The plaintiff paid assessments. That fact and that employer encouraged the plan have no weight in determining the relation between the parties.

[2] It appears from the testimony quoted, that the contract did not require the personal service of plaintiff. It could be performed by substitutes and assistants chosen by him. It did not give the defendant the right to control either the men or the means in carrying it out. It gave a definite job, a definite and exclusive right to skid out the timber on a definite area, "a little swamp" or, "a certain portion of the country." Payments were made to plaintiff alone. He used his own horse and harness. His hours were not definite. True, the defendant sought prompt performance of the contract, and to that end and to protect its timber, reserved the right to terminate the contract, or to discharge plaintiff as it was said. Too, it had the right of inspection, and, as was said in Carleton v. Foundry & Machine Products Co., 199 Mich. 148, 165 N. W. 816:

"He, in following an independent business. undertook to do a specific job of work in his own way, with his own men, and his own appliances, without submitting himself to control as to petty detail as would an employee; any suggestion that came from defendant was advisory only. without the absolute right of interference; any supervision had to do only with ultimate results."

Counsel for plaintiff contends that here there was such right of control of, and interference in, the work by the employer as to bring this case within the holding in Tuttle v. Embury-Martin Lbr. Co., 192 Mich. 385, 158 N. W. 875, Ann. Cas. 1918C, 664, and Van Simaeys v. George R. Cook Co., 201 Mich. 540, 167 N. W. 925; Opitz v. Hoertz, 194 Mich. 626, 161 N. W. 866; and Lewis v. Detroit Vitrified Brick Co., 164 Mich. 489, 129 N. W. 726, are also cited.

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But we think this case is controlled rather by the Carleton Case, supra, where the authorities are fully reviewed, and by Gall v. Detroit Journal Co., 191 Mich. 405, 158 N. W. 36, and Zoltowski v. Ternes Coal & Lbr. Co., 214 Mich. 231, 183 N. W. 11. It was said in the Gall Case:

"One whom the employer does not control, and has no right to control, as to the method, or means, by which he produces the result contracted for is an independent contractor."

And in the Carleton Case:

"Nor is inspection, or such supervision as may be necessary to secure the ultimate result, sufficient to change the character of the contract, or the status of the parties."

And in the Zoltowski Case (quoting from syllabus);

"Where an employee engaged as a teamster quit work at 1 o'clock on Saturday afternoon, and thereafter engaged to unload a car of lumber for his employer for the specified price of $12, he was an independent contractor while unloading said car, and the right to have it done in accordance with contract and to inspect for that purpose did not change the relationship, since the employer had no right to control the method or means by which the result to be paid for was to be accomplished."

And see Perham v. American Roofing Co., 193 Mich. 221, 159 N. W. 140; Holbrook v. Olympia Hotel Co., 200 Mich. 597, 166 N. W. 876.

It follows that plaintiff, at the time in question, was an independent contractor, and that the award is vacated.

The late Justice Stone took no part in this decision.

SMITH v. PORT HURON GAS & ELECTRIC CO. (No. 66.)

(Supreme Court of Michigan. March 30, 1922.)

187 Northwestern Reporter, 292.

1. MASTER AND SERVANT—EMPLOYER HELD SUBROGATED TO COMPENSATED EMPLOYEE'S RIGHTS AGAINST THIRD PARTY.

Under Workmen's Compensation Act pt. 3, § 15, providing that, where the injury to an employee is caused under circumstances creating a legal liability in some person other than the employer, the employee may, at his option, proceed under the act or against the third person by an action for damages, but cannot proceed against both, the approval by the Department of Labor and Industry of a contract for compensation entered into by the employer and the employee under the act operates as an election by the employee, and extinguishes his right to maintain an action for negligence against a third party, and transfers such right to the employer.

(For other cases, see Master and Servant, Dec. Dig. § 389.)

2. MASTER AND SERVANT — COMPENSATION AGREEMENT CANNOT BE COLLATERALLY ATTACKED.

Though the Department of Labor and Industry is not a court, its approval of a contract for compensation between an employer and an injured employee on which judgment may be entered without notice under Workmen's Compensation Act, pt. 3, § 13 (Comp. Laws 1915, § 5466), cannot be attacked on the ground of fraud in a collateral proceed-

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ing by the employee against the wrongdoer, but the agreement may be impeached in a direct proceeding in equity.

(For other cases, see Master and Servant, Dec. Dig. § 382.)

Error to Circuit Court, St. Clair County; Harvey Tappan, Judge.

Action by William A. Smith against the Port Huron Gas & Electric Company. Judgment for plaintiff, and defendant brings error. Reversed, with new trial.

Argued before Fellows, C. J., and Wiest, Stone, Clark, Bird, Sharpe, Moore, and Steere. JJ.

P. H. Phillips, of Port Huron, for appellant.

Burt D. Cady and Walsh & Walsh, all of Port Huron, for appellee.

FELLOWS, C. J. On August 7, 1918, plaintiff was in the employ of the Mueller Metals Company, located at Port Huron. He was an electrician. On that day he received an injury in the course of his employment and arising out of the same by coming in contact with a switch then recently installed in the Mueller property by the defendant Port Huron Gas & Electric Company. On August 21st he entered into an agreement for compensation under the Workmen's Compensation Act (Pub. Acts Ex. Sess. 1912, No. 10) with the Travelers' Insurance Company, the insurer of the Mueller Company. On August 30th this agreement was approved by the Industrial Accident Board. Plaintiff has not accepted such compensation although in at least one occasion payment was offered. December 5, 1919, the present action was brought against the Port Huron Gas & Electric Company, claiming that it is liable in a common-law action for negligence, which negligence, it is claimed, was the proximate cause of plaintiff's injuries. Defendant in its defense denies that it has breached any duty it owes plaintiff, denies that it is guilty of any negligence, and insists that plaintiff has elected to proceed against the Mueller Company and its insurer for compensation under the provisions of the Workmen's Compensation Act, and cannot maintain this action against this defendant. Over defendant's objection plaintiff was permitted to give testimony tending to show that he did not intelligently sign the contract with the Mueller Company, and that his signature was procured by the fraud of the agents of that company. The trial resulted in a judgment for $9,600, which is reviewed on this writ of error. Defendant here insists on all the grounds of defense presented in the court below, but we deem it necessary to discuss but one of the defenses, as it disposes of the case.

[1] Section 15, pt. 3, of the Workmen's Compensation Act (section 5468, C. L. 1915) provides:

"Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof, the employee may at his option proceed either at law against that person to recover damages, or against the employer for compensation under this act, but not against both, and if compensation be paid under this act the employer may enforce for his benefit or for that of the insurance company carrying such risk, or the commissioner of insurance, as the case may be, the liability of such other person."

Provisions of similar purport sometimes couched in different language will be found in the British acts and in the compensation acts of the different states. Some of these provisions do not go as far as our act does and are simply designed to prevent a double recovery without putting the employee to his election. The British acts, and we think this should be borne in mind in considering the British cases, inhibit a double

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recovery, but make the receipt of compensation a bar to an action for negligence. They expressly permit actions against the employer for negligence in certain cases, but provide that, if the employee fails in such suit, he may in the same action be awarded his compensation if entitled to it, subject to have deducted therefrom the expenses of the litigation. Section 1 (4), c. 37, 60 and 61 Vict.; section 1 (4), c. 58, 6 Edw. VII. These provisions of the British act render the British decisions less helpful upon the question of election, but they should, however, not be overlooked. In this connection attention should be called to the fact that under our statute an election to proceed either in a common-law action against the third person or for compensation against the employer under the statute wipes out the other remedy. In Albrecht Co. v. Iron Works, 200 Mich. 109, 166 N. W. 855, this court said:

"After Debinski was injured he had his choice of two remedies. He could pursue his common-law remedy against the company whose negligent acts caused his injuries, or he could demand compensation from his employer through the Industrial Accident Board. He chose the latter and received an award of $10 per week for 400 weeks. This election by him under the terms of the act would amount to a waiver upon his part of his common-law remedy (section 15, supra). The common-law action having been extinguished by Debinski's election an assignment of it could not furnish a basis for this suit, and we do not understand it is now so claimed, although one count of the declaration counted upon an assignment of the cause of action."

And in Gray v. Brown & Sehler Co., 200 Mich. 177, 166 N. W. 930, where we were considering section 1, pt. 6 of the act (section 5488, C. L. 1915), it was said:

"This section makes the filing of a claim a 'release' of 'all claims and demands at law,' and is one of the essential features of the act. This court and other courts of last resort have so frequently commented on the purposes of this act and similar legislation in other states that it is unnecessary to here repeat what has so often been said, further than to say that among its purposes was the elimination of expense and delays growing out of litigation between employees and employers, a purpose which could be easily frustrated by permitting employees to bring litigation based upon common-law liability, while at the same time holding fast to the statutory right to compensation. This the Legislature clearly sought to prevent by this section. It is patent that the Legislature contemplated that parties should not be permitted to play fast and loose with this meritorious legislation; that the Legislature clearly had this in mind when this provision was incorporated in the act."

The precise question here involved, i. e., May the plaintiff in a collateral proceeding impeach the finding of the Board and the contract upon which it is based? has not arisen with any degree of frequency either in this country or in England, and is before this court for the first time. In fact, there is not a sufficient trend of decisions to establish a rule or to prevent this court from adopting a rule which will be in accord with the purposes of the act. In Little v. P. & W. Maclellan, 37 Scot. L. R. 287, the action was against the master for negligence. Several receipts for compensation were produced. Lord Justice Clerk said:

"The pursuer here is brought face to face with the fact that receipts for the sums paid to him have been granted by him in very specific terms."

He then states that the pursuer sought to amend the pleadings by alleging that he did not understand that he was making the election. This was denied, the Lord Justice remarking:

"That amendment does not appear to me to be relevant to be admitted to probation with the view of showing that he was entitled to have these documents set aside. I am therefore for sustaining the defenders' fourth plea and dismissing the action."

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Lord McLaren and Lord Thayer agreed, although intimating that another question would be presented if the receipts had not been properly procured. In Kelly v. North British Railway Co., 53 Scot. L. R. 53, plaintiff, an employee of the corporation of Glasgow, brought the action against the railway company for its negligence. It was insisted that he had received compensation from his employer, but was permitted to show that the money was not paid as compensation, but to tide him over his misfortune, and the Little Case was distinguished. But in Aldin v. Stewart, 53 Scot. L. R. 49, it was held (we quote from the syllabus):

"A workman while in the course of his employment was knocked down and injured by a motorcar. He received payments from his employers, and signed receipts for certain sums, 'being compensation for accident.' He thereafter brought an action against the owner of the motorcar. He stated that when he signed the receipts he was in minority, had no legal advice, and was unaware of his legal rights, particularly of his right to choose between compensation from his employer and damages from the owner of the car.

"Held that the workman had recovered compensation in the sense of the act, and was not entitled to maintain an action of damages. Per the Lord President: 'All the statute deals with is the question of fact: Did he de facto recover compensation from his employer under the statute? If so, the claim is barred.'"

In Oliver v. Nautilus Steam Shipping Co., 5 W. C. C. 65, the receipts had been given "without prejudice," and it was held that under the circumstances plaintiff's action for negligence was not barred, and in Rouse v. Dixon, 6 W. C. C. 44, it was held that a request for arbitration which was abandoned after answer filed showing the employee had no chance of succeeding under the act was not a bar. But in Cribb v. Kynoch, Limited, [1908] 2 K. B. 551, it was held that the employee could not successfully maintain a proceeding for compensation after an unsuccessful common-law action had terminated, although she had given notice some 13 months before. Huckle v. London County Council, IV B. W. C. C. 113, is sustaining of plaintiff's contention. These cases, as we have already noted, were under acts which did not make the bringing of a proceeding alone an election.

Barry v. Bay State Street Railway, 222 Mass. 366, 110 N. E. 1031, is relied upon by plaintiff's counsel. No doubt the court in that case sustains counsel's contention, but the case was disposed of by the holding of the court that plaintiff could not recover because he had accepted and receipted for compensation under the act. Under these circumstances the holding of the court relied upon was not necessary to decision and was obiter dictum. Brabon v. Gladwin Light & Power Co., 201 Mich. 697, 167 N. W. 1024, is also relied upon by plaintiff's counsel. In that case the question was whether plaintiff had proceeded under the statute. She had not, as had this plaintiff, entered into a contract which had been approved by the Board. In disposing of the case it was said in the prevailing opinion:

"On the other hand, we have legislation which requires interpretation, and, in the administration of the law, application, in harmony with its general purpose. It both creates a liability and provides a method for enforcing it. To proceed under it against an employer is to give notice of an injury, make a claim for compensation, secure the judgment and finding of the Board upon all points involved, or its approval of any agreement for compensation which the interested persons may enter into."

In McGarvey v. Independent O. &G. Co., 156 Wis. 580, 146 N. W. 895, it was said by Mr. Justice Marshall, speaking for the court:

"It is conceded, as the fact is, that, in case of an employee, in the course of his employment, being injured by the actionable negligence of a third person, a statutory remedy accrues to him for compensation against his employer and a common-law remedy against such third per-

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son, though he cannot have but one satisfaction. If he elects to pursue the latter remedy, he waives the statutory right, and. if he elects to pursue the former, the employer by succession, ipso facto et eo instanti, becomes the owner of the right against the wrongdoer, and 'may enforce the same in his own name.'"

And in Friebel v. Chicago City Ry. Co., 280 Ill. 76, 117 N. E. 467, it was pointed out that payment by the employer of compensation was not necessary before he would be subrogated to the employee's right of action against the third party, and in Sabatino v. Thomas Crimmins Const. Co., 102 Misc. Rep. 172, 168 N. Y. Supp. 495, it was said:

"Plaintiff urges that until the award is paid there is no consideration for the assignment, but this is not so. The statute gives a new remedy, and as a condition of its enjoyment requires a surrender of any cause of action against third parties. This is ample consideration for the assignment; the employee is not obliged to pursue the statutory remedy, but, if he does, he surrenders his claim against others. If the statute had intended the assignment should only become effective on payment, it could have so provided. It did not. On the contrary, as above pointed out, the language seems clear that such was not the intent.

"The construction contended for by the plaintiff would inject so much uncertainty and lead to such confusion as to the rights of the parties in regard to the claim against third parties that it is difficult to believe such a condition was intended. If the employee claims under the statute, the party liable to pay the compensation is entitled to the benefit of the claim against third parties, and to take such steps to protect his interest and enforce the claim as he deems advisable, Lester v. Otis Elevator Co., 169 App. Div. 613, 155 N. Y. Supp. 524. On the other hand, if the employee does not take under the statute, he retains the full benefit and control of the claim against third parties, with authority to compromise or settle it, and should be free to take such steps to protect his interest as he may deem advisable.

"If, as plaintiff contends, the assignment does not become effective until payment of the award, it is evident that during this period there would be uncertainty as to who would be ultimately entitled to this claim and as to the rights or interests of the parties and a manifest inability of either to effectively act so as to protect his interests. It is improbable a construction which would lead to such results is in accordance with the intent of the Legislature."

The Kentucky statute permits proceedings against the employer for compensation and actions against the third party for negligence without putting the employee to an election. But in Book v. City of Henderson, 176 Ky. 785, 197 S. W. 449, it was held that in the action against the third party the employer was a necessary party.

[2] It must be taken as settled by the Albrecht Case, supra and these cases that the approval by the Board (now Department of Labor and Industry) of a contract entered into by the employer and employee under the provisions of the act operates as an election by the employee, an extinguishment of the right in him to maintain an action for negligence against the third party, and a transfer or assignment of such right to the employer, a subrogation, which may be enforced by the employer in his own name for indemnity only. This results from the operation of the law. May this result be assailed in a collateral proceeding on the ground of fraud? We think not. Manifestly, if the action of the Board had been the judgment of a court, it could not be thus assailed in a collateral proceeding. While the Board exercises quasi judicial functions, it is not a court, but under section 13 of part 3 of the act (section 5466, C. L. 1915) by the filing of a certified copy of its approval of the contract judgment may be entered without notice. Indeed, in the instant case plaintiff by following this provision could have judgment entered against his employer, although the judgment in the instant case for all

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his damages was in full force and effect. Such a situation would do violence to the plain purpose of the act. In Estate of Beckwith v. Spooner, 183 Mich. 323, 149 N. W. 971, Ann. Cas. 1916E, 886, we held (quoting from the syllabus):

"An employer's agreement filed with and approved by the Accident Board, granting compensation to a servant for injuries sustained in the course of his employment, is a substitute for, and under the statute is, the legal equivalent of, a final award of the Board, and has equal force and standing, when, to enforce recovery, it becomes necessary to put them in judgment in the circuit court."

It is pointed out by counsel that, except for the purpose of reviewing weekly payments, the Board is without power to grant a rehearing. Pocs v. Buick Motor Co., 207 Mich. 591, 175 N. W. 125; Diebel v. Spitzley & Widenman Construction Co., 207 Mich. 618, 175 N. W. 126; Jones v. St. Joseph Iron Works, 212 Mich. 174, 180 N. W. 374. But we do not think plaintiff is without remedy. Here we have an order of the Board approving a contract which order is the equivalent of and tantamount to a final award by the Board. Estate of Beckwith v. Spooner, supra. In the recent cases of Jackson v. State Mutual Rodded Fire Ins. Co., 217 Mich. 301, 186 N. W. 514, and Palmer v. Patrons' Mutual Fire Ins. Co., 217 Mich. 292. 186 N. W. 511, we had an analogous question before us. In both cases the question of the liability of the insurance company had been submitted to arbitrators, and in both cases actions at law had been brought, and the trial court had permitted the impeachment of the award for fraud on the law side of the court. Both cases were reversed for this holding, and it was pointed out that the award could only be set aside in a court of equity. In the Jackson Case it was said by Justice Wiest, speaking for the court:

"If plaintiff Oursler became transferee of the policy, he took it subject to all of its terms and provisions, and he could not treat the finding of the arbitrators as void and bring suit at law and there attack such finding collaterally. Such finding can only be set aside, if at all, in a court of equity."—citing authorities.

And in the Palmer Case it was said by Chief Justice Steere, likewise speaking for the court:

"In the instant case plaintiff submitted to an award and exhausted that remedy. Leaving the award against him standing, he commenced an action at law in assumpsit to recover on his policy of insurance, and when the award was interposed as a defense, sought to attack it collaterally on the ground of fraud. This he may not do. His primary remedy is by direct proceedings against the award in a court of equity where rests special jurisdiction in matters of fraud, accident, mistake, etc. In this state distinct equitable jurisdiction over awards is not wanting, as in certain code states where the distinction between law and chancery courts has been abolished. Brown v. Cir. Judge. 75 Mich. 274.

"'A court of equity cannot abdicate its duty or submit its conscience to what a jury might do in any case, not even that of an individual against a corporation. Under the Constitution and laws of this state, a court of law is not the proper forum to determine whether an award under an arbitration, agreed to by the parties thereto, was corruptly and fraudulently made. Courts of equity alone are clothed with the power to set them aside.' Michels v. Underwriters' Ass'n, 129 Mich. 417."

We therefore conclude that the order of the Board approving the contract between plaintiff and the Mueller Company, which was under the law an award of compensation to plaintiff, was a bar to plaintiff's right to recovery in this case; that it may not be impeached for fraud in this collateral proceeding, but may be impeached in a direct proceeding in equity, in which proceeding every one interested should be made parties so that they will be bound by the decree.

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The judgment must be reversed, with a new trial. Defendant will recover costs of this court.

The late Justice Stone took no part in this decision.

WEBBER v. DORT MOTOR CO. ET AL. (No. 26.)

(Supreme Court of Michigan. March 30, 1922.)

187 Northwestern Reporter, 364.

MASTER AND SERVANT — COMPENSATION FOR PARTIAL DISABILITY HELD ALLOWABLE.

An employee compensated for loss by amputation of half the thumb and the third and fourth fingers under Comp. Laws 1915, § 5440, *held* entitled to further compensation for partial disability on showing that the inability to earn as great a wage as when injured was due to the results of the accident upon the two remaining fingers of his hand.

(For other cases, see Master and Servant, Dec. Dig. § 385[12].)

Certiorari to Department of Labor and Industry.

Proceedings under the Workmen's Compensation Law by Algernon Webber for compensation for injuries, opposed by the Dort Motor Company, employer, and the Michigan Mutual Liability Company, insurer. Award for claimants, and to review order denying petition of employer and insurer for termination of obligation to pay compensation. the employer and insurer bring certiorari. Affirmed.

Argued before Fellows, C. J., and Wiest, Stone, Clark, Bird, Sharpe, Moore, and Steere, JJ.

Beaumont, Smith & Harris, of Detroit (Hal H. Smith and Albert E. Meder, both of Detroit, of counsel), for appellants.

Fred L. Warner, of Belding, for appellee.

MOORE, J. The writ of certiorari seeks to review an allowance for compensation made by the Department of Labor and Industry to Algernon Webber.

In July, 1918, Mr. Webber entered the employ of the Dort Motor Company at its Belding plant, and a few days later started operating a shaper. December 12, 1918, his hand was caught in the machine, resulting in the amputation of one-half the thumb, the third and fourth fingers, and the stiffening of the first and second fingers of the left hand. After his accident and as his disability developed defendants entered into compensation agreements with the claimant. The final one provided:

"The employee's average weekly wage being $19.50, it is agreed that compensation be paid at the rate of $9.75 per week for 65 weeks (not to exceed 150 weeks), and at the proper rate per week during partial disability, if he becomes legally entitled to compensation for partial disability, all in accordance with the provisions of the Michigan Workmen's Compensation Law."

The agreement was approved by the Board, and compensation was paid for the 65 weeks.

About this time, or a few weeks earlier, applicant returned to work for the Dort Motor Company, working at a gluing machine until the Dort Company moved its plant from Belding to Kalamazoo.

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When injured, Mr. Webber was receiving $3.25 per day. After his injury he was paid the same wage for a time, and then the wages were raised to $3.50 a day. Wages had become higher during that time.

When the Dort Company left Belding in September, 1920, applicant expressed a willingness to go with the company. He then looked for work in Belding. He was unable to find any, and started truck farming on seven acres of land which he owns near Belding. He was so engaged when his testimony was taken in May, 1921.

Defendants on February 10, 1921, filed a petition stating that Mr. Webber "prior to the expiration of 65 weeks from the date of the * * * accident * * * returned to the employment in which he was working at the time of the accident, and that he was then, and ever since has been, and is now, and will always be in the future, able to resume the employment in which he was working at the time of the accident," and prayed that the case be closed. Mr. Webber's counsel filed an answer denying the allegations of the petition. The Department ordered:

"It is ordered and adjudged that the said petition should be and the same is hereby denied, and it is further ordered and adjudged that the applicant is not entitled to recover compensation from said respondents for the period from March 17, 1921 (1920), the date of last payment, until the date when he ceased to be employed by said respondents, and that from said date until the present time he is entitled to receive and recover for partial disability, in the sum of $4.87½ per week, and that he shall continue to receive compensation in the said amount so long as his disability continues to be the same as at the present time, all in accordance with the provisions of the Workmen's Compensation Law."

It is this order of which complaint is made.

In their petition for the writ of certiorari defendants alleged that the Department erred in holding as a matter of law that Mr. Webber was partially disabled. Counsel say:

"We must bear in mind that the mere fact that Webber has two partially stiff fingers does not entitle him to compensation. In Leitz v. Labadie Ice Co., 211 Mich. 565, 179 N. W. 291, applicant had to work seated, and in walking a crutch was necessary. In Kling v. National Candy Co., 212 Mich. 159, 180 N. W. 431, injured lost the motion of the third and fourth fingers, and the little finger was somewhat stiffened, which resulted, as the late Justice Brooke stated, in speaking for the court, in 'quite materially reducing the efficiency of the left hand.' And yet compensation was denied in both cases.

"Any inability to earn as great a wage as when injured must be due to the stiffness of Webber's two fingers. We say this because defendants have paid applicant for the loss by amputation of half the thumb and the third and fourth fingers, in accord with section 5440, C. L. 1915. * * *

"Therefore, having been paid in full for the two fingers and the thumb, Webber is only entitled to further compensation if the fact that he cannot get the tips of his first and second fingers closer to the palm of his hand than an inch is the sole cause of any incapacity. In other words, we have the same case here that we would have if Webber still had a whole thumb and the third and fourth fingers, but had his second and third fingers somewhat stiffened.

"Thus we have a case in which a common laborer has two fingers on his left hand somewhat stiffened as a result of an accident. * * *

"Webber is in precisely the same position as any common laborer who has two fingers of his left hand somewhat stiffened by an accident (because he has been paid in full for the amputations), and is then able to and does resume his employment as a common laborer at as least as high a wage as when injured. He is not entitled to compensation for any disability."

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It is true that to justify the order made by the Board it must be shown that the inability to earn as great a wage as when injured must be shown to be due to the results of the accident upon the two remaining fingers of claimant's left hand.

It is also true that claimant has been compensated for the loss of his thumb and the two fingers that were amputated, but the payment of this compensation did not restore the thumb and two fingers, and if claimant is to earn anything in the future he must do it with the hand he has got, so that the important question is: Has he less earning capacity because of the two stiffened fingers than he would have if the fingers were as good as they were before the accident. There is plenty of testimony from which the inference may be fairly drawn that the earning capacity of claimant to do either common labor or skilled labor is less than it would be if the fingers were normal. We think the case is within a line of cases of which Limron v. Blair, 181 Mich. 76, 147 N. W. 5466, Green v Buick Motor Truck Co., 201 Mich. 86, 166 N. W. 1028, and Schimmel v. Pressed Steel Co., 206 Mich. 449, 173 N. W. 206, and the cases cited therein are examples.

The award is affirmed, with costs to the claimant.

The late Justice Stone took no part in this decision.

WHITE v. MORGAN & WRIGHT. (No. 59.)

(Supreme Court of Michigan. March 30, 1922.)

187 Northwestern Reporter, 257.

1. MASTER AND SERVANT — LIMITATION AGAINST COMPENSATION CLAIM GOVERNED BY FACTS OF CASE.

Under Pub. Acts 1919, No. 64, amending the Workmen's Compensation Act so as to permit claim to be made within six months after the actual injury, disability, or incapacity develops or makes itself apparent, no hard and fast rule can be fixed to establish the date at which the statute begins to run, but each case must be governed by its own facts.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

2. MASTER AND SERVANT—FINDINGS ON EVIDENCE AS TO COMPENSABLE INCAPACITY CONCLUSIVE.

The finding of the Department of Labor and Industry as to the date when the actual injury, disability, and incapacity developed cannot be disturbed by the courts if there is any testimony, or legitimate inference therefrom, sustaining the conclusion, though the court might reach a different conclusion as triers of the facts.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

3. MASTER AND SERVANT—TIMELY COMPENSATION CLAIM SHOWN FROM INJURY.

Evidence that compensation claimant continued to work for more than six months after his arm was injured, with satisfaction to his employer, and was persuaded by the employer's physician no X-ray examination was necessary, and that thereafter an operation was decided upon as the result of examination by a specialist, but it was still hoped to save the usefulness of the arm until it was discovered in the course of the operation that the entire head of the diseased bone had to be removed, *held* to sustain a finding by the Department of Labor and In-

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dustry that the date of the operation was the date of actual incapacity within the limitation provided for in Workmen's Compensation Act as amended by Pub. Acts 1919, No. 64.

(For other cases, see Master and Servant, Dec. Dig. § 405[1].)

4. MASTER AND SERVANT — UNEQUIVOCAL CLAIM FOR COMPENSATION SHOWN.

Evidence that an injured employee asked the officer in charge of the employer's compensation department what the company was willing to do in giving him compensation, and that the employer replied by letter denying liability for compensation, *held* to sustain a finding that the employee had made an unequivocal claim for compensation.

(For other cases, see Master and Servant, Dec. Dig. § 405[1].)

Certiorari to Department of Labor and Industry.

Proceedings under the Workmen's Compensation Act by Arthur White, employee, opposed by Morgan & Wright, employers. The Department of Labor and Industry awarded compensation, and the employers bring certiorari. Award affirmed.

Argued before Fellows, C. J., and Wiest, Stone, Clark, Bird, Sharpe, Moore, and Steere, JJ.

E. Dean Alexander & Chas. H. Ruttle, of Detroit, for appellant.

Millis, Streeter, Murphy & Berns, of Detroit (Geo. B. Murphy, of Detroit, of counsel), for appellee.

Fellows, C. J. Plaintiff was in the employ of defendant from July, 1919, until June, 1920, in the mill and calendar department at its Detroit plant. On November 21st, he received a blow on the right forearm. He was given first aid, iodine being applied, and a report of noncompensable accident was made to the Industrial Accident Board; the claimed injury being stated as "sprained muscle of r. forearm." It is the claim of the plaintiff that he had intermittent pains in his arm, that he consulted the company's doctor from time to time, that he suggested to the doctor that he have an X-ray made of the arm, but he was dissuaded from so doing by the doctor as a useless expenditure of money. He continued working every day except four or five days in May, when he laid off. In June he applied for a month's vacation to visit his old home at Herculaneum, Mo. He had been suffering from pain in his arm for some time before that. He was granted a two weeks' vacation and went to Missouri. He there consulted doctors and received treatment, hypodermically and otherwise administered. He had an X-ray taken at a private sanitarium, and finally in July went to see Dr. Monroe, a surgeon in charge of a large hospital treating industrial cases at Bonne Terre. Dr. Monroe had an X-ray made, took blood tests, and reached the conclusion that plaintiff had a bone cancer—sarcoma. He, however, desired to be confirmed in his diagnosis before operating and sent plaintiff to a Dr. Hall, a specialist of high standing in X-ray work who was located at St. Louis. Dr. Hall took an X-ray and confirmed his diagnosis. On August 2d, Dr. Monroe performed an operation on plaintiff's arm. It is apparent from Dr. Monroe's testimony that he was at least hopeful of saving the usefulness of the arm. He testifies:

"We first removed about three inches of bone endeavoring to leave the head of the radius and a part of the lower staff. We discovered, however, that we had sawed through diseased bone at the upper portion and were compelled to remove the entire head of the radius."

This operation removed the cancerous growth, but it is claimed by the plaintiff that he cannot use his right arm and that he is incapacitated

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from labor. On August 21st, he wrote defendant, but the letter cannot be treated as a claim for compensation. On October 3d he visited defendant's plant at Detroit and had a talk with Mr. Brennan, who was in charge of defendant's compensation department; it was carrying its own risk. It is plaintiff's claim that at this conversation he made an unequivocal claim for compensation. Later a formal claim was served and filed with the Board. The defense is that the claim for compensation was not seasonably made. The Department of Labor and Industry found, among other things, that the statute began to run on the date of the operation, August 2d, and that the claim for compensation was made on October 3d. Defendant here assails both conclusions.

In passing on the provisions of sections 15 and 4 of part 2 of the original act (sections 5445 and 5434, C. L. 1915), this court in numerous cases (among them see Cooke v. Holland Furnace Co., 200 Mich. 192, 166 N. W. 1013, L. R. A. 1918E, 552; McMullen v. Gavette Construction Co., 200 Mich. 203, 166 N. W. 1019; Kalucki v. American Car & Foundry Co., 200 Mich. 604, 166 N. W. 1011, L. R. A. 1918F, 860; Dane v. Michigan United Traction Co., 200 Mich. 612, 166 N. W. 1017; Schild v. Pere Marquette R. Co., 200 Mich. 614, 166 N. W. 1018) was constrained to hold that the statute commenced to run with the happening of the accident. In some of the cases we pointed out that, if the statutory provisions worked hardships in particular cases, the remedy was with the Legislature. The Legislature at its 1919 session amended the Compensation Act in several particulars (Act 64, Public Acts 1919), among the amendments being the addition of the following proviso to section 15;

"Provided, however, that in all cases in which the employer has been given notice of the injury, or has notice or knowledge of the same within three months after the happening thereof, but the actual injury, disability or incapacity does not develop or make itself apparent within six months after the happening of the accident, but does develop and make itself apparent at some date subsequent to six months after the happening of the same, claim for compensation may be made within three months after the actual injury, disability or incapacity develops or makes itself apparent to the injured employee, but no such claim shall be valid or effectual for any purpose unless made within two years from the date the accidental personal injury was sustained. * * *"

[1-3] Manifestly, the purpose of this amendment was to afford relief from the rigor of the statutory limitation of six months in cases where the injury and disability did not develop until after the statutory period had expired. The amendment does not, and we cannot, fix as an arbitrary hard and fast rule the date of the operation as the date at which the statute begins to run. Each case must be governed by its own facts. In the instant case the Department of Labor and Industry reached the conclusion upon the facts that the actual injury, disability, and incapacity did not develop or make itself apparent to the plaintiff until the operation was had. If there is any testimony or legitimate inferences which may be drawn from the testimony sustaining this conclusion, it must be accepted by us, even though we might reach a different conclusion if we were the triers of the facts. Having in mind our duty and power, we think it cannot be said that the conclusion of the Department of Labor and Industry is without foundation in the testimony. Plaintiff continued in the discharge of his duties to defendant up to and including the 11th day of June, more than six months after the accident. That he faithfully discharged such duties is evidenced by the reluctance and final refusal of the employer to consent to a vacation for the time he wanted. The defendant's doctor had evidently concluded that his injury was inconsequential, as he had dissuaded plaintiff from having an X-ray made. After plaintiff reached his old home at Herculaneum he had some treatment from a local physician; this included

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hypodermic injections. Not improving, he consulted a man skilled in industrial surgery. But this doctor, after making blood tests, having an X-ray made and carefully examining it, and fully going over the history of the case, was not so sure of his diagnosis that he was willing to operate without having his diagnosis confirmed by a specialist of recognized standing in his profession. The injury was a hidden one; the operation revealed that it was more serious than the diagnosis had indicated. Under all the circumstances here disclosed, we cannot say that the finding of the Department has no support in the testimony or in the legitimate inferences to be drawn therefrom.

[4] We have held that the claim for compensation must be unequivocal. Based on that rule, we conclude that plaintiff's letter of August 21st was not a sufficient claim. Any doubt as to the propriety or force of an oral claim for compensation was set at rest by the amendment to section 15, part 2, by the act of 1919. On October 3d plaintiff came to Detroit and to defendant's plant. He there saw Mr. Brennan in charge of the compensation department. To him he fully related all that happened to him, his injury, and gave him a history of the case, and—

"Q. Did you make any demand at that time for compensation? A. Yes, I asked him what the company was willing to do for me in regard to compensation."

While on cross-examination plaintiff, who appears to have been a very fair witness, was not positive that he could state the exact words used, we think the testimony justifies the finding that a claim for compensation was then made. Defendant so regarded it, as, four days after the conversation took place and after it had time to investigate the matter and consider plaintiff's claim, it wrote him a letter concluding with the following:

"We cannot therefore see where there is any liability on the part of this company due you under the Michigan Compensation Law."

In this view of the case it becomes unnecessary to consider other questions in the briefs which have received very careful consideration by counsel but which are not here necessary to decide.

The award will be affirmed.

The late Justice Stone took no part in this decision.

WIIO v. QUINCY MINING CO. (No. 54.)

(Supreme Court of Michigan. March 30, 1922)

187 Northwestern Reporter, 249.

MASTER AND SERVANT—EVIDENCE AS TO SCRATCH HELD NOT TO SHOW COMPENSABLE INJURY.

In a proceeding under the Workmen's Compensation Act (Pub. Acts, Extra Sess., 1912 No. 10) to recover for the death of a miner from blood poisoning caused by a slight scratch on the thumb, evidence *held* not to permit an inference that the scratch arose out of and in the course of the employment.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Certiorari to Department of Labor and Industry.

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Proceeding by Ida Wiio against the Quincy Mining Company for an award. From a judgment for defendant of an arbitration board reversing a judgment of an arbitration committee and granting an award, defendant brings certiorari. Award set aside.

Argued before Fellows, C. J., and Wiest, Stone, Bird, Sharpe, Moore, and Steere, JJ.

Swaby L. Lawton, of Hancock, for appellant.

B. H. T. Burritt of Hancock, for appellee.

BIRD, J. Claimant's husband was engaged as a miner in the copper mine of defendant. He was an old employee and lived near the mine opening. On the evening of July 3, 1920, he came home from his work about 4:10 o'clock in the afternoon and exhibited to his wife and a lady visiting them a cut or scratch on his left thumb. The thumb and arm were somewhat swollen, and he had the appearance of being in pain. On the following day, July 4th, the condition of the thumb was worse and more painful. Defendant's doctor called upon him and expressed the opinion that he was threatened with pneumonia. Later another doctor was called, and he concluded the trouble was blood poison. In spite of all efforts to stay the poison, he steadily grew worse, and died on July 18th.

After the death of Mr. Wiio, claimant, his wife filed a claim for a death award with the department of labor and industry claiming that Mr. Wiio scratched or cut his thumb on a piece of copper rock, and that subsequently blood poison resulted which proved fatal. A hearing was had before an arbitration committee and compensation was denied. On appeal to the full board where additional testimony was taken the case was reversed and an award granted to her and her four dependent children on the theory that the deceased cut or scratched his thumb while engaged at his work and that it was an accidental injury.

It is the contention of defendant that there is no competent proof in the record which justifies the action of the board in finding that Mr. Wiio's blood poison grew out of an accident which arose out of and in the course of his employment. We have read the record very carefully, and we are persuaded that this point is well taken. If the hearsay testimony be eliminated, there is no proof as to how or where he got the scratch or cut on his thumb. Counsel argues that it is shown inferentially by the testimony that claimant's husband was well and made no complaint before he went away from home on the morning of July 3d, and that when he returned in the evening he exhibited the cut or scratch. From these facts counsel conclude that as he lived so close to his work he must have received the injury in the course of his employment. The proofs show that Mr. Wiio did chores about his home. He may have received the cut or scratch while doing his chores. He may have received it prior to July 3d and it was unnoticed by claimant. He may have received it in the mine during the dinner hour. But whatever the fact is, the duty was upon the claimant to make competent proof of the fact that he received his injury from an accident growing out of and in the course of his employment. There is no direct priof that he did, and the facts which are shown do not permit of the inference that the scratch or cut arose out of or during his employment.

The death award made by the department of labor and industry must be set aside. No costs will be allowed.

The late Justice Stone took no part in this decision.

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BUILDERS' LIMITED MUT. LIABILITY INS. CO. v. COMPENSATION INS. BOARD. (No. 22733.)

(Supreme Court of Minnesota. Feb. 17, 1922.)

186 Northwestern Reporter, 860.

(Syllabus by the Court.)

MASTER AND SERVANT—LAW CREATING COMPENSATION INSURANCE BOARD NOT RETROACTIVE.

Chapter 85 of the Laws of 1921, creating a Compensation Insurance Board and authorizing such board to establish rates for compensation insurance, is not retroactive, and the rates adopted by the board do not apply to contracts of insurance entered into before the act became operative.

(For other cases, see Master and Servant, Dec. Dig. § 349.)

Certiorari from District Court, Ramsey County; Hugo O. Hanft, Judge.

The Builders' Limited Mutual Liability Insurance Company applied to the district court to have an order of the Compensation Insurance Board fixing the rates for workmen's compensation insurance vacated, in so far as such order required the relator to collect, upon policies which it had issued before the law went into effect, a different and larger premium. On refusal to vacate or modify the order, the relator brings certiorari. Order of district court reversed, with directions to vacate order of insurance board.

Mead & Bryngelson, of Minneapolis, for relator.

L. K. Eaton, of Minneapolis, amicus curiæ.

C. L. Hilton, Atty. Gen., and C. H. Christopherson, Asst. Atty. Gen., for respondent.

TAYLOR, C. The relator is a mutual insurance company organized under the laws of the state of Wisconsin, and duly licensed to do business in the state of Minnesota. Between February 1, 1921, and June 1, 1921, the relator entered into contracts of insurance with various employers in the state of Minnesota by which the relator insured such employers, for one year from the date of the respective policies, against the liabilities imposed upon them by the so called Workmen's Compensation Laws of this state, for a specified and fixed percentage of the pay rolls of each employer so insured.

The first Compensation Law in this state was enacted in 1913 (Laws 1913, c. 467 [Gen. St. 1913, §§ 8195–8230]), and, as amended from time to time, remained in force until superseded by the laws enacted in 1921. In 1921 the Legislature enacted a series of laws covering the entire matter of workmen's compensation, and repealed the prior statutes. Chapter 82 of the Laws of 1921 embodies the substance of the prior laws with such changes, modifications and additions as the Legislature deemed desirable. This act was approved March 15, 1921, and took effect June 1, 1921. The act provides in section 28 that with certain exceptions not necessary to mention, employers liable under the act to pay compensation for injuries sustained by their employees—

"shall insure payment of such compensation in some insurance carrier authorized to insure such liability in this state."

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The carrying of such insurance was optional under the former act, but is compulsory under the present act unless the employer be one of those excepted from this provision. The act provides in section 29 that—

"Any employer who is responsible for compensation as provided under part 2 of this act may insure the risk in any manner then authorized by law. But those writing such insurance shall, in every case be subject to the conditions in this section hereinafter named."

The section then sets forth the obligations assumed by the insurer and the conditions to which he is subject. This section is not new; but, except for a few minor changes not here important, is section 31a of the original Compensation Law of 1913, which appears as section 8227 of the General Statutes of 1913.

Chapter 85 of the Laws of 1921, which also was approved March 15, 1921, and took effect June 1, 1921, created a compensation insurance board and also created a bureau of which all insurers writing compensation insurance in this state are required to be members, which bureau, among other things, is required to classify risks and to report proper rates to the board for approval. Section 7 of this act reads:

"To provide for the solvency of insurers writing workmen's compensation insurance in this state and to secure reasonable rates, the board shall approve a minimum and adequate and reasonable rate for each classification under which such business is written. The board shall, in approving such rates, make use of the experience which from time to time may be available, and of such other helpful information as may be obtainable. For the purpose of uniformity and equality the board shall, after consultation with insurers, approve a system of schedule, merit and experience rating for use in writing of such business in this state. No system of schedule, merit or experience rating except the one so approved shall be used in this state."

Section 10 of the act provides that:

"The board shall have power * * * to review the acts of any insurer, bureau or agent subject to the provision of this act, and to make findings and orders requiring compliance with the provisions hereof"

—and further provides that:

"Its findings or orders * * * in all cases shall be subject to summary review by the district court."

Sections 19, 20, and 21 of the act read:

"Sec. 19. No insurer shall make or charge any rate for workmen's compensation insurance in this state which discriminates unfairly between risks or classes, or which discriminates unfairly between risks in the application of like charges and credits in the plan of schedule, merit or experience rating in use; and no insurer shall discriminate by granting to any employer insurance against other hazards at less than its regular rates for such insurance, or otherwise.

"Sec. 20. Every insurer writing workmen's compensation insurance in this state shall, except as otherwise ordered by the board, file with the board its rates for such insurance and all additions thereto or changes therein. All rates so filed shall comply with the requirements of law and shall not be effective or used until approved as to such compliance by the board. A rate which is filed and approved shall not be changed until the substituted rate has been filed for at least fifteen days and has been approved by the board.

"Sec. 21. No insurer shall write insurance at a rate other than that made and put into force by such bureau and approved as adequate and reasonable by the board; provided, that the bureau may reduce or increase a rate by the application to individual risks of the system of schedule, merit or experience rating which has been approved by the

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board. Such reduction or increase shall be set forth in the policy or by indorsement thereon."

The act provides a penalty for any violation of its provisions or of any order of the board made thereunder.

On August 5, 1921, the Compensation Insurance Board made an order fixing the rates for workmen's compensation insurance, effective as of one minute after 12 o'clock a. m. of June 1, 1921; and made a further order to the effect that all policies in force at one minute after 12 o'clock a. m. of June 1, 1921, or issued thereafter, "must be indorsed to provide for" the rates so fixed. These rates were substantially higher than the rates charged for such insurance theretofore and substantially higher than the rates specified and fixed in the policies issued by the relator prior to June 1, 1921.)

The relator made an application to the district court, under section 10 of the act, to have the order of the board vacated in so far as such order required the relator to collect, upon the policies which it had issued before the law went into effect, a different anl larger premium than was specified and stipulated in such policies. The district court refused to vacate or modify the order and the matter is brought before this court by writ of certiorari.

The relator contends: (1) That the statute is not retroactive and does not authorize the insurance board to increase the rate on policies issued before the statute went into effect; (2) that, if the statute be construed as authorizing the board to increase such rates, it infringes the constitutional provisions against impairing the obligation of contracts.

The provisions of the statute hereinbefore quoted are those under which it is sought to sustain that part of the board's order which applies to policies issued before the statute became effective.

It is thoroughly settled that a statute will not be given a retroactive operation unless it appears "by express command or by necessary and unavoidable implication" that such was the legislative intent. And, where a statute affects rights and liabilities, it will not be construed as affecting those previously existing unless such construction is essential to give it effect, or its terms are so explicit as to preclude any other interpretation. Wilson v. Red Wing School District, 22 Minn. 488; State v. Waholz, 28 Minn. 114, 9 N. W. 578; State v. Hill, 32 Minn. 275, 20 N. W. 196; Gaston v. Merriam, 33 Minn. 271, 22 N. W. 614; Powers v. City of St. Paul, 36 Minn. 87, 30 N. W. 433; Brown v. Hughes, 89 Minn. 150, 94 N. W. 438; Stein v. Hanson, 99 Minn. 387, 109 N. W. 821; State ex rel. v. General A. F. & L. A. Corp., 134 Minn. 21, 158 N. W. 715, Ann. Cas. 1918B, 615; State ex rel. v. Dist. Court, 138 Minn. 213, 164 N. W. 812; State ex rel. v. Probate Court, 142 Minn. 283, 171 N. W. 928; Soderstrom v. Curry & Whyte, Inc., 143 Minn. 154, 173 N. W. 649; Nash v. M. & St. L. Ry. Co., 144 Minn. 322, 175 N. W. 610.

We find no provision in the statute here involved which expresses a legislative intention to change or disturb existing contracts of insurance, or which directs that the rates to be established as provided in the statute shall apply to policies issued before it went into effect. The statute speaks prospectively and can be given full effect without construing it as retroactive in its operation. The statute was passed March 15, 1921, but did not go into effect until June 1, 1921. Postponing the time when a statute shall take effect, in the absence of some other adequate reason therefor, evinces an intention to give it a retrospective operation. But, where the statute makes changes which affect the substantive rights of parties, the necessity or propriety of allowing the parties affected a reasonable time in which to adjust themselves to the changed conditions furnishes an adequate reason for postponing its operation without ascribing such postponement to an intention to give the act a retroactive effect. State ex rel. v. General A. F. & L. A. Corp., 134 Minn. 21, 158 N. W. 715, Ann. Cas. 1918B, 615.

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The case cited involved the provision limiting the time for making claims for compensation which was added to the prior compensation law by section 8 of chapter 209 of the Laws of 1915 (Gen. St. Supp. 1917, § 8214—1). This statute was passed April 21, 1915, but did not go into effect until July 1, 1915. The court remarked that, if the amending statute "had done nothing but give a limitation, the postponement of its operation might well enough be conclusive of an intent to give a retrospective operation," but held that the necessity of allowing those interested an opportunity to adjust themselves to other changes made by the statute furnished a sufficient reason for postponing its operation; that the statute was not retroactive; and that the limitation did not apply to existing claims. This decision was followed and applied in State ex rel. v. District Court, 138 Minn. 213, 164 N. W. 812, involving the same statute. See, also, Nash v. M. & St. L. Ry. Co., 144 Minn. 322, 175 N. W. 610, involving the Iowa Compensation Law and an order of the Industrial Commissioner of that state.

Our conclusion is that chapter 85 of the Laws of 1921 is not retrospective in its operation and did not authorize the insurance board to require the collection of a different rate than stipulated therein on policies which had been issued and were in force before the statute became effective. If the Legislature had intended that the rates, to be thereafter established in the manner provided in the act, should, when so established, be substituted in contracts existing before the act became effective for the rates agreed upon and specified in such contracts, we think it would have used language clearly expressing such intention.

Whether, acting under the police power, the Legislature could have made the rates, which should thereafter be adopted by the insurance board, applicable to contracts made before the act went into effect, we need not determine, as, in our opinion, the Legislature has made no attempt to do so.

The order of the district court is reversed with directions to vacate the order of the insurance board in so far as such order requires a change in the rate on policies issued by the relator before chapter 85 of the Laws of 1921 went into effect.

THORNTON BROS CO v NORTHERN STATES POWER CO.

(No. 22658.)

(Supreme Court of Minnesota. Feb. 24, 1922.)

186 Northwestern Reporter. 863.

(Syllabus by the Court.)

3. MASTER AND SERVANT — COMPENSATION ACT GIVING SUBROGATED EMPLOYER ATTORNEY'S FEES CONSTITUTIONAL.

The last paragraph of subdivision 1 of section 8229, making the third party liable for reasonable attorney's fees expended by the plaintiff in such an action, does not contravene any provision of the state or federal Constitution.

(For other cases, see Master and Servant, Dec. Dig. § 347.)

Appeal from District Court, Ramsey County; Chas. C. Haupt, Judge.

Action by Thornton Bros. Company against the Northern States Power Company. Findings and judgment for plaintiff, and defendant appeals. Affirmed.

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Briggs, Weyl & Briggs, of St. Paul, for appellant.
John J. Kirby, of St. Paul, for respondent.

LEE, C. Plaintiff is a contractor, and on November 18, 1920, was laying water pipes in the streets of South St. Paul. Nick Decker was one of a crew of men engaged in filling the trenches. Defendant maintained an electric light and power line in South St. Paul. Decker and both parties to this action were subject to the provisions of the Workmen's Compensation Law of this state (Gen. St. 1913, §§ 8195-8230). A machine was used to fill the trenches. To support the shovel, the machine had a rigid boom, the top of which was 17 feet above the ground. In doing the work it became necessary to move the machine under two of defendant's high power transmission wires. The poles supporting the wires were 20 feet above the ground. They sagged between the poles, and the boom would not clear them. A similar situation had been encountered a number of times before, and on each occasion one of plaintiff's employees climbed up the boom and lifted the wires over it. On this particular occasion the engineer operating the filling machine directed Decker to go up on the boom and lift the wires. He proceeded to do so, and lifted the first one over the top of the boom safely, but when he attempted to lift the second wire he received an electric shock which caused him to fall to the ground, thus seriously injuring him. Decker elected to claim compensation from plaintiff and, his claim having been duly adjusted, plaintiff brought this action to recover from defendant the amount it had paid. The action was brought pursuant to the third paragraph of subdivision 1 of section 8229, G. S. 1913.

The complaint charged defendant with negligence in suspending its wires too near the ground and failing to keep them properly insulated. A jury trial was waived, and the court made findings in plaintiff's favor, upon which judgment was entered. This appeal is from the judgment.

It was found that Decker's injuries were caused solely by reason of defendant's negligence in maintaining its power wires in a dangerous and defective condition. There was a specific finding that there were bare spots on the second wire, due to the fact that the insulation was worn and frayed, and that Decker's hands came in contact with one of the exposed portions of the wire.

[1] 1. The principal ground upon which a reversal is sought is that defendant was not guilty of negligence entitling Decker to recover had he brought an action for damages. The substance of the argument is that defendant was under no obligation to insulate its wires at the place in question; that it was plaintiff's duty to request defendant to raise them if they were too low, before attempting to move the filler under them; that plaintiff and Decker were trespassers; and that defendant could not reasonably anticipate that any one would be reckless enough to interfere with a high power electric wire suspended 20 feet above the street. By section 6247, G. S. 1913, defendant was required to locate its wires in such a way as not to interfere with the safety and convenience of ordinary travel over the street. Its contention is that it did all it was required to do in this regard when it suspended the wires 20 feet above the ground. At that height they would not interfere with vehicles passing along the street, and it is probably true that negligence could not be imputed to defendant on the sole ground that its wires were strung too low.

Chapter 366, Laws 1917 (Gen. St. Supp. 1917, §§ 2602—9, 2602—10), prohibits the moving of a building or other structure along a street in a manner which will unnecessarily interfere with electric wires, provides for compensation to the owner when required to displace them to permit a building or structure to be moved, and declares that the act shall not apply to work done upon a street by or for a municipality, or to the moving of a building or structure 18 feet or less in height. Section 8945,

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G. S. 1913, declares that it shall be a misdemeanor to interfere in any way with electric wires legally strung.

It is a matter of common knowledge that houses are moved along streets, and will rarely clear wires less than 18 feet above the ground. Excavating machinery is generally used in grading streets and laying water and sewer pipes, and such machinery may require as much clearance space as a house. It must be presumed that defendant had knowledge of these facts. The wires carried a deadly current of electricity. They were insulated. There was evidence tending to show, contrary to popular belief, that insulation affords no protection to one coming in contact with a wire of high voltage. There was also evidence that electric wires had been handled as these were without harm, and that it was customary to lift them as the machine was moved. Much is made of the fact that no bad results followed when Decker lifted the first of the two wires over the boom. If there was no protection in insulation, it is difficult to understand why there had been no accident before.

We are of the opinion that the evidence would not compel a finding that defendant was under no duty to insulate these wires. We are also of the opinion that the evidence supports the finding that the defective condition of the insulation was the cause of the accident. The degree of care which the law exacts of one who employs so dangerous an agency as electricity has been repeatedly stated. Gilbert v. Duluth, etc., Co., 93 Minn. 99, 100 N. W. 653, 106 Am. St. Rep. 430; Musolf v. Duluth, etc., Co., 108 Minn. 369, 122 N. W. 499, 24 L. R. A. (N. S.) 451; Hoppe v. City of Winona, 113 Minn. 252, 129 N. W. 577, 33 L. R. A. (N. S.) 449, Ann. Cas. 1912A, 247; Davidson v. Otter Tail Power Co., 185 N. W. 644. Applying the rule, we sustain the finding that defendant was negligent.

[2] 2. It is contended that Decker was guilty of contributory negligence as a matter of law. The argument is that he knew the wires carried an electric current, should have known that it might be of high voltage, if he had looked, must have seen that the insulation had come off, and hence whatever danger there might be was open and obvious to him. Plaintiff contends that defendant cannot assert the contributory negligence of Decker as a defense. It makes the point that by becoming subject to the Compensation Act defendant surrendered the right to interpose the so-called common-law defenses to actions brought by workmen of other employers also subject to the act.

The trend of our decisions is not in line with this contention. It has been held that the phrase "circumstances also creating a legal liability for damages" in section 8229 has reference to the workmen's common-law right of recovery, Carlson v. Minneapolis St. Ry. Co., 143 Minn. 129, 173 N. W. 405, that the statute gives no right to proceed against the third party under the Compensation Act, Hansen v. N. W. Fuel Co., 144 Minn. 105, 174 N. W. 726; and in Metropolitan Milk Co. v. Minneapolis St. Ry. Co., 183 N. W. 830, it was said that there must be negligence on the part of the third party, and it must not appear that the workman was contributorily negligent. Whether the workman was contributorily negligent was not involved in the case last cited. The effect of his being so could not be decided. The statement has only the force of a remark in the course of a discussion, and not the effect of a decision. The question is not discussed in defendant's brief. Until it arises in a case where it is directly involved, we prefer not to give it further consideration. It may still be regarded as an open question. It does not arise here, for the finding that Decker's injuries were caused solely by defendant's negligence is supported by the evidence, and conclusively negatives his alleged contributory negligence.

This finding also answers the contention that plaintiff was guilty of contributory negligence in directing Decker to lift the wires over the boom.

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[3] 3. The third paragraph of subdivision 1 of section 8229 gives an employer, subrogated to the right of his employee to recover from a third person, his reasonable attorney's fees expended in securing a recovery. This is attacked as class legislation amounting to a denial of the equal protection of tht law to persons in defendant's situation. The question is disposed of by Mathison v. Minneapolis St. Ry. Co., 126 Minn. 286, 148 N. W. 71, L. R. A. 1916D, 412, where, after referring to this provision, it was said;

"We find nothing in these provisions contravening any of the provisions of the Constitution. They apply to and bind only those who have voluntarily accepted and agreed to them."

The other assignments of error require no discussion.

Judgment affirmed.

FREEDMAN v. SPICER MFG. CORPORATION. (No. 36.)

(Court of Errors and Appeals of New Jersey. Feb. 9, 1922.)

116 Atlantic Reporter, 427.

MASTER AND SERVANT—INJURY TO EMPLOYEE FAINTING AFTER INOCULATION HELD COMPENSABLE AS "ARISING OUT OF AND IN COURSE OF EMPLOYMENT."

Accident to employee who fainted and fractured skull as the result of inoculation which he was induced to undergo by employer during influenza epidemic *held* to have arisen out of and in the course of the employment.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

Appeal from Supreme Court.

Petition by Nathan Freedman against the Spicer Manufacturing Corporation. Judgment for petitioner, and defendant appeals. Affirmed.

On appeal from the Supreme Court, in which the following per curiam was filed:

"The common pleas found the following facts:

"(1) That the said Harry Freedman, who was 21 years of age, was on the 23d day of October, 1918, employed by Spicer Manufacturing Corporation, at South Plainfield, N J., as a clerk in the production department.

"(2) That during the influenza epidemic in the fall of 1918, in an effort to check the spread of such disease, respondent obtained and administered through its company physician a vaccine to such of its employees as were willing to take the treatment, and also to the members of their families.

"(3) That on October 23, 1918, said Harry Freedman was invited, recommended, and induced by the respondent to accept such inoculation, and was inoculated at the plant along with the other men in his department; upon his returning to his desk after such inoculation, and as a result of the inoculation, he fainted and fell to the floor.

"(4) That, as a result of the fall, the deceased fractured his skull, and his death ensued on the following day, as a result of said accident.

"(5) That the injury was caused by an accident on the 23d day of October, 1918, arising out of and in the course of the employment.

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"We think this finding justified the judgment entered in favor of the petitioner. Let judgment be affirmed, with costs."

Clarencee B. Tippett, of Jersey City, for appellant.
William Newcorn, of Plainfield, for respondent.

PER CURIAM. The judgment under review herein should be affirmed for the reasons expressed in the opinion of the Supreme Court.

For affirmance: The Chancellor, the Chief Justice, Justices Trenchard Bergen, Minturn, Kalisch, Katzenbach, Judges White, Williams, Gardner, Ackerson, and Van Buskirk.

For reversal: None.

KAUFFELD v. G. F. PFUND & SONS. (No. 93.)

(Court of Errors and Appeals of New Jersey. March 6. 1922.

116 Atlantic Reporter, 487.

(Syllabus by the Court.)

MASTER AND SERVANT—COURT'S FINDINGS IN COMPENSATION CASE CONCLUSIVE.

In workmen's compensation cases the Supreme Court cannot review the facts as found by the common pleas, when there is any evidence to support the lower court's findings.

(For other cases, see Master and Servant, Dec. Dig. § 418[6].)

Appeal from Supreme Court.

Action by Louisa Kauffeld against G. F. Pfund & Sons. Judgment for plaintiff, and defendant appeals. Affirmed.

On appeal from the Supreme Court in which the following per curiam was filed:

"This is a workmen's compensation case. The Workmen's Compensation Bureau made an award in favor of the petitioner. On appeal to the Camden county court of common pleas, upon a trial de novo, the petitioner was again awarded compensation, under the statute. The only question before us for decision is, Is there legal evidence to support the judgment? The award was based upon the theory that exposure to artificial heat, in conjunction with the heat of the sun, had caused the death of petitioner's husband, William Kauffeld, on August 2, 1917, of thermic fever or sunstroke. The rule is that, when the employment brings a greater exposure than that to which persons generally in that locality are exposed, injury or death resulting therefrom, such injury or death does arise out of the employment. Larke v. John Hancock Mutual Life Ins. Co., 90 Conn. 303, 97 Atl. 322, L. R. A. 1916E, 584. The deceased was employed in making deliveries of smoked products for his employer, which necessitated his entering the smokehouse. We think, under the evidence in the record, it was permissible for the trial court to infer that the death of the petitioner's husband arose out of, and in the course of his employment. It is settled where a trial court's findings of fact are supported by evidence they will not be disturbed. Lundy v. George Brown & Co., 93 N. J. Law, 107, 106 Atl. 362, affirmed 93 N. J. Law, 469, 108 Atl. 252. The judgment is affirmed, with costs."

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Howard L. Miller, of Camden, for appellant.
Willis Tullis Porch, of Pitman, for respondent.

PER CURIAM, The judgment under review herein should be affirmed for the reasons expressed in the opinion of the Supreme Court, except that the Supreme Court made an error in holding that the deceased's employment necessitated his entering the defendant's smokehouse. The court of common pleas whose decision the Supreme Court reviewed. held that he did not enter the smokehouse. And the rule is that the Supreme Court may not review the facts as found by the common pleas in these cases, when there is any evidence to support the lower court's findings; and there was in this case.

On the whole case there was sufficient evidence to warrant the judgments arrived at, both in the common pleas and in the Supreme Court; and the judgment here under review will therefore be affirmed.

For affirmance: The Chancellor, the Chief Justice, Justices Trenchard, Bergen, Minturn, Kalisch, and Katzenbach, and Judges White, Heppenheimer, Williams, Gardner, Ackerson, and Van Buskirk.

For reversal: None.

LINCKS ET AL. v. ERIE R. CO.

(Court of Errors and Appeals of New Jersey. Feb. 9, 1922.)

116 Atlantic Reporter, 493.

1. MASTER AND SERVANT — COMPENSATION CLAIMANT MUST PROVE EMPLOYMENT WITHIN STATE STATUTE.

In proceedings under Workmen's Compensation Act for death of a railroad employee, the petitioner had the burden of affirmatively showing that the employee was not engaged in interstate commerce within the federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665) at the time of the accident.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

Appeal from Supreme Court.

Proceedings under the Workmen's Compensation Act (P. L. 1911, p. 134) by Regina Lincks, administratrix of the estate of Henry W. Lincks, for compensation for death of Henry W. Lincks, opposed by the Erie Railroad Company, employer. Award for petitioner, and employer appeals. Affirmed.

On appeal from the Supreme Court in which the following per curiam was filed:

[1] "This is a workman's compensation case. The petitioner's husband was employed by the defendant, as an engine tender or laborer; he was killed on the 24th day of September, 1914, in the railroad yard of the defendant company in Jersey City by engine No. 513, which was run between Waldwick, N. J., and Jersey City, N. J. The record shows compensation was awarded the petitioner on December 29, 1914, by the common pleas court of Hudson county. That judgment was reversed by the Supreme Court, July 6, 1915. The judgment of the Supreme Court in turn was affirmed by the Court of Errors and Appeals, 91 N. J. Law, 166. 103 Atl. 176. In that opinion it was said the fundamental question to be now decided is whether the engine upon which the deceased had

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just finished his work, or that upon which he was about to commence his work, was either of them intended to be presently used in interstate or intrastate commerce. The burden was upon the petitioner in the court of first instance to prove a case within the state statute—that is, to show affirmatively, that the plaintiff's decedent was engaged in a service which was not regulated by the federal statute; for that fact is not to be presumed, in the absence of proof.

[2, 3] "Subsequently a suit was commenced in the circuit court of Hudson county to recover damages under the federal statute against common carriers engaged in interstate commerce. To this the defendant filed an answer, in which it stated that, 'At times it was engaged solely in intrastate commerce within the limits of the state of New Jersey * * * it denies that Henry W. Lincks (the decedent who was the petitioner's husband) was employed by it in interstate commerce.' The circuit court on May 13, 1919, nonsuited the plaintiff. Subseqeuntly on April 16, 1920, an award of compensation was made by the court of common pleas of Hudson county, in which the record of the above suits was introduced as evidence. The question, therefore, is whether the admissions in the answer by the defendant in the suit for damages in the circuit court supplied the requisite proof, under the ruling of the Court of Errors and Appeals. We think the statement of fact in the answer in the circuit court is admissible in evidence as an admission of the fact that the decedent was not engaged at the time of accident in interstate commerce. Mr. Wigmore in his valuable book on Evidence at section 1066, says that the pleadings in prior causes, then, can be treated as the parties' admissions, usable, as evidence in later cases must be conceded. I. R. C. L. p. 499, par. 39, 40. See Bernard v. Adams, No. 82 Supreme Court, 116 Atl. —, February term, 1921. We also think this evidence was sufficient to make a prima facie case under the state statute, and justified the findings of the trial court. The judgment is affirmed, with costs."

Collins & Corbin, of Jersey City, for appellant.
Frank G. Turner, of Jersey City, for respondent.

PER CURIAM. The judgment under review herein should be affirmed for the reasons expressed in the opinion of the Supreme Court.

For affirmance: The Chancellor, the Chief Justice, Justices Trenchard, Bergen, Kalisch, and Katzenbach, and Judges White, Williams, Gardner, Ackerson, and Van Buskirk.

For reversal: None.

BAUDASSI v. MOLLA ET AL.

(New York Supreme Court, Appellate Division, Third Department. March 8, 1922.)

192 New York Supplement, 776.

MASTER AND SERVANT—INJURY BY HOT METAL FALLING FROM STRANGER'S PLACE OF BUSINESS HELD COMPENSABLE, AS "ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT."

Dependents of a forger, who was killed by hot metal emptied on him from an iron pipe which fell from a floor above his employer's place of business, while he was on his way "to top out some work" at 12:55 p. m.,

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held entitled to compensation under the Workmen's Compensation Law; deceased having been brought by the conditions of his work within the zone of special danger, so that the injury arose out of as well as in the course of his employment.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

Appeal from State Industrial Board.

Proceeding under the Workmen's Compensation Law (Consol. Laws, c. 67) by Marie Baudassi, claimant, opposed by Charles P. Molla and another, copartners, empolyers. From an award of compensation, the employers appeal. Affirmed.

Argued before Cochrane, P. J., and Henry T. Kellogg, Kiley, Van Kirk, and Hinman, JJ.

Almond D. Fisk, of New York City, for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, of counsel), for respondents.

KILEY, J. This case is peculiar, in that the award is based upon admissions contained in the report of the employer and on hearsay evidence given by one of the partners who was not present at the time of the accident. The date of the accident was November 22, 1920, at 12:55 p. m. The accident is described in the employer's report as follows:

"Iron pipe fell from eighth floor full of hot emery, through fire escape, skylight, and shafting that are in our shop. The emery emptied onto the deceased and immediately caught fire; he was a mass of flames."

He died next day. The business of the employers, a copartnership, was making tools for the manufacture of (artificial) flowers. Claimant's intestate was a forger. At the time of the accident the forge was out; this was 5 minutes of 1 o'clock p. m., and the employer swore that at the time he was injured "he was going to top out some work, some antique stands." Employer's place of business was on the ground floor of the building the pipe of hot metal came from the place of business of the General Specialty Company, on the seventh or eighth floor of the building, which business had no connection with or relation to the employer's business.

The defense is that the accident did not arise out of nor in the course of deceased's employment. The employer was not insured. The parties. without question, seem to have finally submitted the questions involved to the State Industrial Board. An award was made to the claimant and her three dependent children, which requires the employer to make provision to pay or secure the payment of a lump sum, to be distributed according to the provisions of the award. The lump sum totals about $9,000. Appellant has collated, upon his brief, a lot of cases that seem to uphold his contention that both elements—"arise out of" and "in the course of"—must be present to sustain an award. A late case, Matter of Leonbruno v. Champlain Silk Mills, 229 N. Y. 470, 28 N. E. 711, 13 A. L. R. 522, in which Judge Cardozo wrote for the court, seems to change that rule somewhat, and against contention of appellant. This phrase from the opinion contains the meat of the holding:

"He was brought by the conditions of his work within the zone of special danger."

This ruling is made on the authority of an English case decided by the House of Lords (Thom. v. Sinclair, [1917] App. Cas. 127-142), and from which the counsel for the Industrial Board quotes very ex-

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tensively. It would seem to sustain the award made herein. Court of Appeals case, cited above, arose out of the circumstance where an employee was struck in the eye by an apple thrown by a fellow servant. Before the citation from the opinion above quoted, the judge said:

"That it arose 'in the course of employment' is unquestioned. That it arose 'out of' employment, we now hold."

Under this decision, and from the English holding upon which it is based, applying the same to this case, this award can be maintained. I report in favor of the affirmance. All concur.

HERBOLD v. NEFF ET AL.

(New York Supreme Court, Appellate Division, Third Department. March 8, 1922.)

193 New York Supplement, 244.

MASTER AND SERVANT — COMPENSATION CLAIM FOR "SALOON" BARTENDER'S INJURY UNENFORCEABLE.

Compensation cannot be recovered under Workmen's Compensation Law for injury to a bartender employed in a saloon at a time, when the sale of intoxicating liquors was unlawful; a "saloon" being a place where intoxicating liquors are sold and drunk.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

(For other definitions, see Words and Phrases, First and Second Series, Saloon.)

Appeal from State Industrial Board.

Proceeding under the Workmen's Compensation Act by Frances M. Herbold for compensation for the death of Louis Herbold, opposed by Charles Neff, employer, and the Maryland Casualty Company, insurer. From an award of compensation, the employer and insurer appeal. Reversed, and claim dismissed.

Argued before Cochrane, P. J., and Henry T. Kellogg, Kiley, Van Kirk, and Hinman, JJ.

James J. Mahoney, of New York City, for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, of counsel), for State Industrial Board.

HENRY T. KELLOGG, J. The employee, for whose death an award has been made to the claimants, was employed as a bartender in a saloon conducted by his employer. While washing a bottle which was used at the bar, he sustained a cut from the breaking of the bottle, and thereafter died from an infection which set in at the site of the cut. The business of the employer was hazardous, provided four or more workmen or artisans were employed by him. He employed a general manager, a chauffeur, a porter, and three bartenders. The point taken by the appellant is that bartenders are neither workmen nor artisans, within section 2, group 45, of the Workmen's Compensation Law (Consol. Laws, c. 67), and therefore could not be counted to make up the necessary four. There is a more vital objection to the award. The employer testified as follows:

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"Q. What was your business at that time? A. I was in the wine business. Q. That is, you ran a saloon? A. Wine and beer. Q. You ran a saloon and wine store? A. Yes."

A "saloon" is defined to be "a place where intoxicating liquors are sold and drunk; a grog shop." Century Dictionary; Webster New International Dictionary. It follows that the occupation of the deceased was that of a bartender in a saloon selling intoxicating liquors. The accident occurred in December, 1919. It is a fact familiar to all that at the time of the accident the sale of intoxicating liquors was unlawful. The deceased and his employer were therefore engaged in an unlawful occupation. This court cannot lend its aid to the enforcement of any claim growing out of a contract of employment, one of the purposes of which is the violation of a law of the land making the sale of intoxicating liquors a criminal offense. Therefore the award cannot stand.

The award is reversed, and the claim dismissed. All concur.

McNAMARA v. McHARG-BARTON CO. ET AL.

(New York Supreme Court, Appellate Division, Third Department. March 8, 1922.)

192 New York Supplement, 743.

1. ADMIRALTY—REPAIRING BOILER ON COMPRESSOR SCOW USED IN PIER CONSTRUCTION IS "MARITIME SERVICE."

Where an employee of a contractor engaged in constructing a pier was, at the time he was injured, engaged in repairing a boiler on a scow, which was a navigable craft in navigable waters, though used to assist in the construction of the piers, his work was maritime in its nature and within admiralty jurisdiction, and not within the state Workmen's Compensation Law.

(For other cases, see Admiralty, Dec. Dig. § 13.)

(For other definitions, see Words and Phrases, First and Second Series, Maritime Service.)

2. MASTER AND SERVANT — LOSS OF VISION, CORRECTED BY GLASSES, NOT COMPENSABLE.

No award of compensation can be made for an injury resulting in a loss of vision, which may be corrected or supplied by the use of glasses.

(For other cases, see Master and Servant, Dec. Dig. § 385[11¼].)

3. MASTER AND SERVANT — FINDING OF COMPENSABLE LOSS OF VISION HELD UNWARRANTED.

A finding that there were times when claimant could not wear glasses while engaged in the regular course of his employment, and therefore had sustained a partial loss of the use of an eye, is not supported by claimant's testimony that it was very inconvenient for him to wear glasses, that he did not wear goggles at the work he was doing when injured, because it was dark in the room and he could not have seen through goggles.

(For other cases, see Master and Servant, Dec. Dig. § 405[6].)

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4. MASTER AND SERVANT—MERE INCAPACITY FOR PARTICULAR EMPLOYMENT NOT COMPENSABLE.

An injury incapacitating an employee for a particular employment does not establish his right to compensation, if the injured member could fulfill in a reasonable degree its normal functions in any employment for which the claimant was fitted, and if the evidence shows no depreciation in earning capacity had been actually suffered.

(For other cases, see Master and Servant, Dec. Dig. § 385[1].)

Appeal from State Industrial Commission.

Proceeding under the Workmen's Compensation Law (Consol. Laws, c. 67) by Charles McNamara to recover compensation for injuries, opposed by the McHarg-Barton Company, employer, and the Travelers' Insurance Company, insurance carrier. From three separate awards of compensation made by the State Industrial Commission, the employer and the insurance carrier appeal. Reversed, and claim dismissed.

Argued before Cochrane, P. J., and Henry T. Kellogg, Kiley, and Van Kirk, JJ.

Benjamin C. Loder, of New York City (E. C. Sherwood and William B. Davis, both of New York City, of counsel), for appellant.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

COCHRANE, P. J. The accident occurred on a compressor boat stationed in the East River at Brooklyn. It was there being utilized in the construction of a concrete pier by the employer, whose business was that of a contractor. The claimant was a master mechanic and superintendent of the work of construction. He was cutting a bead off a boiler tube on the boat, when a piece of the bead struck him in the left eye, impairing his vision, on account of which the awards in question have been made for a loss of one-third of the use of the eye.

[1] First. The work in which claimant was engaged at the time of his injury was maritime in its nature and within admiralty jurisdiction. Claimant described the compressor boat as follows:

"Just a small scow, 10x20—have a boiler, and compressor supplying the compression going from one place to another."

It was the boiler thus mentioned which he was repairing at the time of the accident. He described the accident and the work he was at the time doing as follows:

"I was taking a tube out of a boiler. Q. What happened? A. Cutting off the bead off the top, a piece of the bead flew and hit the side cheek and my eye."

The compressor boat was a vessel in navigable waters, and as such within admiralty jurisdiction. Rheinhardt v. Newport Flying Service Corporation, 232 N. Y. 115, 133 N. E. 371, and cases there cited; Newham v. Chile Exploration Co., 232 N. Y. 37, 133 N. E. 120. Although the general nature of the claimant's work may have had reference to the construction of the pier, he was at the time of the accident repairing or readjusting this navigable craft. This circumstance distinguishes the case from those where awards have been sustained for injuries arising out of work in constructing or repairing docks or piers, but without reference to any change or modification of a vessel, although such vessel at the time may have been utilized in the work of such dock construction or repair. We think, for the reasons stated, this case falls within the authority of Matter of Doey v. Clarence P. Howland Co., Inc., 224 N. Y. 30, 120 N. E. 53, and North Pacific

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Steamship Co. v Hall Brothers Marine Railway & Shipbuiding Co., 249 U. S. 119, 39 Sup. Ct. 221, 63 L. Ed. 510. In the case last cited it was said:

"There is no difference in character as to repairs made upon the hull of a vessel dependent upon whether they are made while she is afloat, while in dry dock, or while hauled up by ways upon land."

[2] Second. The Commission found that "the defective vision of the claimant can be corrected to normal with glasses." This court has repeatedly held that, where the loss of vision may be corrected or supplied by the use of glasses, no award can be made therefor. Valentine v. Sherwood Metal Working Co., 189 App. Div. 410, 178 N. Y. Supp. 494; Frings v. Pierce Arrow Motor Car Co., 182 App. Div. 445, 169 N. Y. Supp. 309; Cortina v. Lathrop & Shea Co., 191 App. Div. 928, 180 N. Y. Supp. 855; Smith v. F. & B. Construction Co., 185 App. Div. 51, 172 N. Y. Supp. 581.

[3] The Commission has sought to obviate the effect of those cases by finding that—

"Inasmuch as there are times that the claimant cannot wear glasses while engaged in the regular course of his employment, due to the nature of the employment, the claimant has sustained a loss of one-third of the use of the left eye."

There is no evidence to support this finding. The claimant stated that it was very inconvenient for him to wear glasses. That is always true. No one wear glasses because of their convenience. He further stated, in answer to a question as to why he did not wear goggles when doing such work as occasioned his injury, that it was very dark in the boiler room, and he required all the light possible, and that if he covered his eyes with goggles he could not see. The question is not, however, as to the use of goggles, but as to the use of glasses.

[4] Furthermore we think this latter finding is within the condemnation of Grammici v. Zinn, 219 N. Y. 322, 114 N. E. 397, where it was held that it was not the legislative intent that an injury incapacitating an employee for a particular employment established his right to an award, if the injured member could fulfill in any reasonable degree its normal functions in any employment for which the claimant was fitted. Amendments to the statute since the decision in the Grammici Case do not affect the principle above stated. If, because of the nature of his employment, claimant cannot at all times wear glasses, he might be entitled to an award based on depreciated earnings; but the evidence shows that he has not suffered any depreciation in his earning capacity. There is, therefore, no basis for an award because of the injury to the eye.

For the foregoing reasons, the awards should be reversed, and the claim dismissed, with costs. All concur.

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McNERNEY v. HELLER ET AL.

(New York Supreme Court, Appellate Division, Third Department. March 8, 1922.)

192 New York Supplement, 882.

MASTER AND SERVANT — EMPLOYEE ABLE TO DO SOME WORK NOT ENTITLED TO FULL COMPENSATION.

An injured employee unable to do his regular work, but who could and did do other work, was not entitled to an award for full compensation under Workmen's Compensation Law, § 15, subds. 3, 4.

(For other cases, see Master and Servant, Dec. Dig. § 385[15].)

Appeal from State Industrial Commission.

Proceeding by Joseph McNerney under the Workmen's Compensation Law to obtain compensation for personal injuries opposed by Solomon Heller employer and the Ocean Accident & Guarantee Corporation, Limited, insurer. From an award allowing compensation from January 8, 1921, to March 1, 1921, the employer and insurer appeal. Award reversed and rehearing ordered.

Argued before Cochrane, P. J., and Henry T. Kellogg, Kiley, Van Kirk, and Hinman, JJ.

Robert H. Woody, of New York City (N. F. Towner, of Albany, of counsel), for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, of counsel), for respondent.

VAN KIRK, J. The appellants question whether or not the claimant was disabled during the period covered by the award. He was injured August 7, 1920, when he fell from a board or scaffold, a distance of about seven feet, and struck a pail of water. Several physicians had reported that, prior to January 8, 1921, the claimant was able to do his usual work. Awards were made from time to time, and have been paid, the last of these on January 7, 1921, when the claimant tesified that he was not able to work at his trade, that he had sought other lighter work and been unable to find it, and an award was then made to date, and the case continued. Hearings were appointed for February 18 and March 18, 1921, at which the claimant did not appear; but he did appear at a hearing May 4, 1921, and testified that he began regular work on March 1st; that on January 8th he was told to get light work, and that he went down and worked as a janitor. Referee Curtis remarked:

"The doctor did not say light work; the doctor said you were able to do your regular work January 7th. Unless you can show further medical proof that you had disability that long, you got all the compensation that you are entitled to. This is the examination, and under the decision of the court we could not give you another cent, without your submitting further medical proof.

"Claimant: If I was able to do work, I'd do it; I am still wearing a belt; I am a plasterer by trade; as long as I can get a light job, it is all right; I can't work out a week doing my regular work."

The claimant was then sent to the medical department for examination. The report of the medical examination was:

"Examination of the abdomen shows a median scar above the umbilicus for the surgical repair of a hernia, which was healed with excellent

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result from a surgical point of view. Claimant at this date calls my attention that he has pain along the spinal column, and therefore is not able to do his usual laborious work. Examination of spinal column does not show remaining evidence of an injury, nor do I find any sensitive area, which is increased on pressure. The claimant is able to elevate both arms to a vertical line, bends completely forward, and elevates either leg in an extended position without restriction. I therefore suggest that claimant make an attempt to resume his usual work for about two weeks. If not able to so continue, to be re-examined. Partial disability to continue."

Claimant was then asked:

"Did you do any work till March 1st? A. Yes; I went to work at $20 a week January 12th for Roger Peet."

Referee Curtis then remarked.

"We will pay you from January 12th to March 1st, when you went back to do your regular work, at full, and claimant is to continue his work, and if he has to stop to come in for an examination."

The record in the case does not make an impression entirely favorable to claimant. There was some evidence that, up to March 1st, the claimant was unable to do his regular work, but he could do other work, and did some—the evidence does not show how much. Under such circumstances he is not entitled to an award for full compensation, at least until further proof is taken. Workmen's Compensation Law (Consol. Laws, c. 67) § 15, subds. 3 and 4.

Under the authority of Matter of Jordan v. Decorative Co., 230 N. Y. 522, 130 N. E. 634, the award should be reversed, and a rehearing ordered, with costs to abide the event. All concur.

VAUGHN v. BUENA VISTA OIL CO. ET AL.

(New York Supreme Court, Appellate Division, Third Department. March 8, 1922.)

192 New York Supplement, 726.

MASTER AND SERVANT—INCREASE IN COMPENSATION TO CHILDREN ON REMARRIED WIDOW'S DEATH EFFECTIVE FROM TIME OF DEATH.

Where widow receiving compensation remarries and becomes entitled to two years' compensation in one sum, under Workmen's Compensation Law, § 16, subd. 2, the increase of the compensation due the deceased's children to 15 per cent. of his wages under such statute, providing for such increase to take effect "at the time" of the death of the surviving wife, is effective from her death, though she dies within the two years after her remarriage for which she has received compensation in a lump sum.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

Appeal from State Industrial Board.

Proceeding under the Workmen's Compensation Law by Herbert W. Vaughn and another for compensation for death of Charles W. Vaughn, deceased, opposed by the Buena Vista Oil Company, employer, and the Ætna Life Insurance Company, insurance carrier. Award for claimants by the State Industrial Board and the employer and insurance carrier appeal. Affirmed.

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Argued before Cochrane P. J., and Henry T. Kellogg, Kiley, Van Kirk. and Hinman, JJ.

William H. Foster, of Syracuse, for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of Counsel), for State Industrial Board.

COCHRANE, P. J. The deceased employee lost his life November 27, 1919. An award of 30 per cent. of his average wages was made to Maude Vaughan, his widow, and of 10 per cent. to each of their two minor children. On July 30, 1920, the widow remarried. On September 19, 1920, she died. On her remarriage under the statute (Workmen's Compensation Law [Consol. Laws, c. 67] § 16, subd. 2) she became entitled to "two years' compensation in one sum." The same statute further provides:

"In case of the subsequent death of such surviving wife (or dependent husband) any surviving child of the deceased employee, at the time under eighteen years of age, shall have his compensation increased to fifteen per centum of such wages."

The award appealed from makes such increase to the two children effective from the death of their mother. The appellants contend that, the mother on her remarriage having received two years' compensation in advance or having become entitled to the same, the increased compensation to the children should not be made effective until the expiration of such two years. The statute does not say so. Its plain reading is that the increase begins "at the time" of the "subsequent death of such surviving wife." It is true that in a case like this, where the widow dies within two years after her remarriage, there is a period during which the increased percentage is being paid to the children, as well as the full 30 per cent. to the widow. But the statute limits the extent of liability by providing:

"That the total amount payable shall in no case exceed sixty-six and two-thirds per centum of such wages."

On the other hand, in the much more numerous cases where the remarried widow outlives the two-year period the employers are essentially benefited, because the payment of 30 per cent. to the widow then ceases and the employer is only required to make an additional payment which cannot exceed 15 per cent. to each child. The statute is rather awkwardly constructed but I think its purpose is reasonably plain and that no other interpretation can be placed thereon in respect to the question now under consideration without doing violence to its phraseology.

The award should be affirmed with costs. All concur.

GOLDBERGER v. GOLDBERGER ET AL.

(New York Supreme Court, Appellate Division, Third Department. March 8, 1922.)

192 New York Supplement, 727.

MASTER AND SERVANT—REPAIRS TO FAMILY RESIDENCE BY FATHER, EMPLOYING SON INJURED, HELD NOT FOR "PECUNIARY GAIN," WITHIN COMPENSATION LAW.

Where, father who together with the mother and two children owned all of the stock of a corporation and occupied a building owned by the

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corporation as a residence entered into a contract with the corporation to keep the building in repair, a son, who was injured while proceeding with a truck to procure painting materials for the building, was not entitled to compensation on the theory that the father, as his employer, was engaged in the business of construction, repair, and demolition of buildings, and that the employment was therefore hazardous, under Workmen's Compensation Law, § 2, group 42, in the absence of a showing that the father, in making repairs, was engaged in the construction, repair, and demolition of buildings for pecuniary gain, within section 3, subd. 5, and not merely in making repairs for the convenience, enjoyment or comfort of the family; such repairs not being for pecuniary gain within the statute.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

Appeal from Award of State Industrial Board.

Proceeding under Workmen's Compensation Law, by Louis Goldberger, for compensation for injuries, opposed by B. M Goldberger, employer, and the Ætna Life Insurance Company, insurance carrier. From an award of the State Industrial Board for the claimant, the insurance carrier appeals. Award reversed, and matter remitted to the State Industrial Board.

Argued before Cochrane, P. J., and Henry T. Kellogg, Kiley, and Van Kirk, JJ.

T. Carlyle Jones, of New York City, for appellant.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Board.

COCHRANE, P. J. The employer does not appeal. He is the father of the claimant. He was president and treasurer of three corporations, known as Goldberger Manufacturing Corporation, Salsbury & Thomas Needle Factory Corporation, and Double Century Needle Factory Corporation. All of the stock of all of those corporations, not owned by himself, was owned by his wife, son and daughter. He was the only employee of the Salsbury & Thomas Needle Factory Corporation. This latter corporation owned the property at 887 East 176th street, New York City. It was the residence of the employer and his family, including this claimant. Two other families occupied apartments in the same building. At the time of the accident the claimant was proceeding with a Ford automobile truck to procure some painting material to be used in or about said building. The truck did not work properly, and in connection with its operation or manipulation by the claimant and another, whom he had summoned to his assistance, the claimant received the injuries in question. Only one painter was engaged in the work of painting the building, and his work did not exceed two day's duration.

The State Industrial Board has held that the employer was engaged in the business of construction, repair, and demolition of buildings, and that the employment of the claimant was therefore hazardous. Workmen's Compensation Law (Consol. Laws, c. 67) § 2, group 42. "It is not sufficient that the employment be hazardous, but it should also appear that the employment was "carried on by the employer for pecuniary gain." Section 3, subd. 5. In Matter of Hungerford v. Bonn, 183 App. Div. 818 171 N. Y. Supp. 280, the claimant was engaged in making some minor repairs in the apartment of the employer in a three-family house owned by the wife of the employer. It was said by this court:

"It cannot be said that the appellant, with reference to this house, was engaged in 'construction, repair and demolition of buildings,' or in any other employment declared hazardous by the Workmen's Compen-

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sation Law. * * * The work did not differ from the ordinary work done periodically by all householders of kalsomining certain rooms in the house. The evidence is undisputed. It was error of law to say that the alleged employer was carrying on a hazardous employment at this time and place for profit."

It is contended in behalf of the claimant that the employer had a contract for the renovation of this house. The record discloses a contract—

"between the Goldberger Manufacturing Company and the Salsbury Needle Corporation, or any other corporation that may be a subsidiary corporation of the Goldberger Manufacturing Corporation, with B. M. Goldberger, of the borough of the Bronx, city of New York, as follows: That Benjamin Goldberger shall renovate and keep in order any buildings of the above-named corporation on the following terms: For the term of one year, receiving a bonus of 10 per cent. of the costs of the entire costs for renovating any of the buildings present in the face of the contracts and schedules."

It is signed by this employer, as president and treasurer of both corporations. There is not a word as to the nature of the repairs to the building in question, or any other building. It appears, therefore, that this building was owned by a corporation, all of the stock of which was owned by the employer, and his family; that he, with his family, including the claimant, resided there. The painting in question was such as was being done to the residence of both the employer and the employee. No contract for the painting appears to have been made. The real nature of the transaction, or the relations of the parties to each other or to the property, cannot be covered up or obscured by corporate forms or methods. The court will look beneath the form of the transaction to ascertain the real substance.

We think the reasoning of the Hungerford Case applies here. There, as here, title to the property was not in the employer; but it was the residence of his family. The claimant has not established facts from which it appears that the work which was being done differed "from the ordinary work done periodically by all householders." The burden was on the claimant to establish, with reference to this particular house, that his father was engaged in "construction, repair, and demolition of buildings" for pecuniary gain. If the repairs were for the convenience, enjoyment, or comfort of the family they were not for pecuniary gain, within the meaning of the statute. If they were not for the convenience, enjoyment, or comfort of the family, the claimant should have so demonstrated.

The award should be reversed, and the matter remitted to the State Industrial Board, with costs to the appellant to abide the event. All concur.

CAMERON COAL CO. ET AL. v. DUNN ET AL. (No. 12721.)

(Supreme Court of Oklahoma. March 14, 1922.)

205 Pacific Reporter, 503.

(Syllabus by the Court.)

1. MASTER AND SERVANT — INDUSTRIAL COMMISSION'S ORDER ON EVIDENCE IN COMPENSATION CASE CONCLUSIVE.

When there is any evidence reasonably tending to support the order of the State Industrial Commission, such order is final and conclusive on

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this court. Under section 10, art. 2, c. 14, Session Laws 1919, the decision of the State Industrial Commission is final as to all questions of fact, and cannot be reviewed by this court on appeal.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

2. MASTER AND SERVANT—COMPENSATION NOT LIMITED TO LOSS OF EARNING POWER.

The test of the right to an award under the Workmen's Compensation Law (Laws 1915, c. 246) is not limited to the loss of earning power in the industrial world.

(For other cases. see Master and Servant, Dec. Dig. § 385[11].)

Original action by the Cameron Coal Company and Consolidated Underwriters, as petitioners, against Jeff Dunn and the State Industrial Commission, as respondents, to reverse and vacate an award made by the State Industrial Commission to Jeff Dunn. Award affirmed.

Moss & Tumilty, of Oklahoma City, for petitioners.

R. E. Wood, of Oklahoma City, and C. C. Williams and H. V. Lewis, both of Poteau, for respondents.

MILLER, J. This action was commenced in this court by the Cameron Coal Company and Consolidated Underwriters, as petitioners, against Jeff Dunn and the State Industrial Commission, as respondents, to reverse and vacate an award made on September 12, 1921, by the State Industrial Commission to Jeff Dunn, awarding him 35 weeks for the loss of use of his first finger and 20 weeks for the loss of use of third finger.

On February 24, 1921, the State Industrial Commission awarded Jeff Dunn 30 weeks for the loss of his second finger, which was amputated following an injury received while in the employ of the Cameron Coal Company. The award made on February 24, 1921, for the loss of the middle finger is not complained of.

On March 12, 1921, Jeff Dunn filed a motion in the State Industrial Commission to review the award made on February 24, on the ground that he was entitled to additional compensation for the loss of the use of his first and third fingers. A hearing was had on August 31, 1921, and the award thereafter made on September 12 is the one complained of. The only complaint made by petitioners is that there is not any evidence to support the award.

[1] The petitioners in their brief have set out excerpts taken from the evidence given by Jeff Dunn and by Dr. Plumlee. The evidence thus set out by petitioners fully sustains the award made by the State Industrial Commission.

"When there is any evidence reasonably tending to support the order of the State Industrial Commission, such order is final and conclusive on this court. Under section 10, article 2, chapter 14, Session Laws 1919, the decision of the State Industrial Commission is final as to all questions of fact and cannot be reviewed by this court on appeal." Consolidated Fuel Co. & Consolidated Underwriters v. State Industrial Commission et al. (No. 12640, Okl.) 205 Pac. 170, opinion handed down February 28, 1922.

See Markham et al. v. State Industrial Commission et al. (No. 12,376 Okl.) 205 Pac. 163, opinion handed down February 14, 1922.

[2] The petitioners contend that, because the claimant is performing the same work now that he had been performing before the injury, and his earning capacity had not been decreased, but, on the other hand, because of a change in the schedule of pay he is now being paid more money for his services than he was receiving at the time of the injury under the former schedule, he is not entitled to an award.

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Under the testimony of Dr. Plumlee, the injury to the first and third fingers is permanent in quality. The criterion of disability is not limited to loss of earning capacity. In Winona Oil Co. et al. v. John Clark Smithson et al. (No. 12,448, Okl. 205 Pac. ——, opinion handed down February 28, 1922, not yet officially reported, paragraph three of the syllabus reads:

"Workmen's Compensation Law, section 6, subdivision 3, c. 246, Session Laws 1915, as amended by section 9, subdivision 3, c. 14. Session Laws 1919, held, where the injured employee lost all practical use of an eye as a result of an injury, such employee is entitled to compensation irrespective of the ability of the employee to continue to perform his work in which he was engaged at the time of his injury. The test as to the rights of an injured employee to receive compensation is only dependent upon such employee having received an accidental personal injury resulting in such a permanent partial disability as is provided for in the schedule of the act."

In Hercules Powder Co. v. Morris County Court of Common Pleas et al., 93 N. J. Law, 93, 107 Atl. 433, the syllabus reads:

"Within Workmen's Compensation Act. § 11, defining a 'permanent injury' as one where the usefulness of a member is permanently impaired or where any physical function is permanently impaired, an injury to an employee which resulted in the loss of one of his testicles held a 'permanent injury'; the criterion of disability partial in character and permanent in quality not being limited to loss of earning capacity."

In the opinion by Minturn, J., it is stated:

"The lower court found that as a result of the injury, the defendant's morale, courage, and marital efficiency were lessened. Whatever view medical experts may entertain upon that phase of the case, the indisputable fact remains that the injured defendant has suffered the loss of a portion of his anatomy, which nature implanted in the human organism, as a dual reservoir of complete efficiency equally with eyes, ears, and limbs, and that to deprive him of one of these natural attributes is to take from him a component portion of the perfect genus homo, and to that extent at least impair the physical attributes of his manhood. This impairment may not prove to be so conspicuous in the ability to produce wages, in the industrial world, but there are other spheres for the employment of human energy, talents, and the possession of physical attributes besides the industrial world into the activity of which the defendant is entitled to bring, possess, and enjoy all the physical attributes with which nature endowed him.

"In harmony with these considerations, it has been held that the sole criterion of a disability, partial in character and permanent in quality, under the statute, is not limited to the loss of earning power. De Zeng Co. v. Pressey. 86 N. Y. Law, 469. 92 Atl. 278, affirmed 96 Atl. 1102; Burbage v. Lee, 87 N. J. Law, 36, 93 Atl. 859."

The award of the State Industrial Commission is affirmed.

Harrison, C. J., and Johnson, Kennamer, and Nicholson, JJ., concur.

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MARKHAM ET AL. v. STATE INDUSTRIAL COMMISSION ET AL. (No. 12376.)

(Supreme Court of Oklahoma. Feb. 14, 1922.)

205 Pacific Reporter, 163

(Syllabus by the Court.)

1. MASTER AND SERVANT — COMPENSATION AWARD REVIEWABLE BY COMMISSION.

Upon its own motion or upon the application of any party in interest, on the ground of a change in conditions, the Commission may at any time review any award, and, on such review, may make an award ending, diminishing or increasing the compensation previously awarded, subject to the maximum or minimum provided in this act, and shall state its conclusions of fact and rulings of law, and shall immediately send to the parties a copy of the award. No such review shall effect such award as regards any money already paid. Chapter 246, § 12, art. 2, Session Laws of 1915.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

2. MASTER AND SERVANT—AWARD FOR ADDITIONAL COMPENSATION SUSTAINED.

The evidence examined, and *held*, that it supports the order of the State Industrial Commission.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

3. MASTER AND SERVANT—COURT WILL CORRECT ERROR IN COMPUTATION OF COMPENSATION.

When it is apparent that the order of the State Industrial Commission is correct except, on account of an oversight, a party is not given a credit to which he is entitled, or on account award is incorrect, this court will correct such of an error in computation the amount of the oversight or error and with the corrections so made affirm the order.

(For other cases, see Master and Servant, Dec. Dig. § 417[9].)

Appeal from State Industrial Commission.

Application by L. A. Mulholland for an award under the Workmen's Compensation Act, opposed by J. H. Markham, Jr., employer, and the Commercial Underwriters, insurance carrier. An award was made, and subsequently an additional award was made, by the State Industrial Commission, from which the employer and insurance carrier appeal. Affirmed.

Chas. E. Bush, A. F. Moss, and L. G. Owen, all of Tulsa, for petitioners.

Rainey & Flynn, of Oklahoma City, for respondents.

MILLER, J. [1, 2] This is an appeal from an order of the State Industrial Commission made on May 14, 1921, allowing L. A. Mulholland, as claimant, additional compensation over and above the compensation allowed said claimant under an order of the State Industrial Commission made July 28, 1917, and reviewing said order of 1917. From this order the petitioners, J. H. Markham, Jr., and Commercial Underwriters, appeal. The State Industrial Commission and L. A. Mulholland appear here as respondents.

The order appealed from discloses the facts upon which the claimant bases his claim for the additional allowance; therefore we will set it out in full:

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"Now on this 14th day of May, 1921, this cause coming on to be considered pursuant to a hearing held in the city of Tulsa, Okl., on the 8th day of February, 1921, before a member of the State Industrial Commission on the motion of the claimant to review the award and grant further compensation, at which hearing the claimant appeared in person, and the respondent and insurance carrier were represented by their attorneys, Bush, Moss, Owen, and Graybill, the Commission, after examining the testimony taken at said hearing and the reports of the physicians who examined the claimant and all the records on file, finds that the claimant, while in the employ of the respondent and in the course of his employment, was injured on the 25th day of April, 1917, and that he returned to work on the 1st day of June, 1917, and that he is entitled to compensation commencing on the 9th day of May, 1917, at the rate of $10 per week for a period of 3 weeks and 2 days, being for a total sum of $33.33, and the Commission further finds that said sum has already been paid; and the Commission further finds that the claimant was again disabled on the 24th day of May, 1918, as a result of the injury, and that he returned to work on the 24th day of August, 1918, and that he is entitled to compensation commencing on the 24th day of May, 1918, at the rate of $10 per week for a period of 13 weeks and 1 day, being for a total sum of $131.67, in addition to $33.33 heretofore paid under the award of July 28, 1917; and the Commission further finds that the claimant was again disabled from work on the 1st day of January, 1919, as a result of the injury, and that he is still disabled, and that he is entitled to compensation commencing on the 1st day of January, 1919, at the rate of $10 per week continuing until the termination of disability, in addition to any compensation heretofore awarded.

"It is therefore ordered that within 10 days from this date J. H. Markham, Jr., or the Commercial Underwriters pay to the claimant compensation computed from the 24th day of May, 1918, at the rate of $10 per week and continue said payments weekly for a period of 13 weeks and 1 day, or until the sum of $131.67 has been paid. in addition to $33.33 heretofore paid. under the award of July 28, 1917.

"It is further ordered that within 10 days from this date J. H. Markham, Jr., or the Commercial Underwriters pay to the claimant compensation commencing on the 1st day of January, 1919, at the rate of $10 per week, and continue said payments weekly until the termination of disability, in addition to any compensation heretofore awarded."

The petitioners set out six assignments of error. All of these except the last one are based on the claim of petitioners that there was not any evidence to support the order of the State Industrial Commission. In their brief they make the following statement:

"The petitioner has filed this appeal on the ground that the award is wholly unsupported by the evidence, and other reasons which will be hereinafter stated. It will not be contended that the award was against the weight of the evidence, but that there was no evidence whatever which warranted the Commission in making an award of compensation.

"We understand that the findings of the Commission as to questions of fact are conclusive where there is any evidence whatever to support the same, but, on the other hand, we believe the law to be well settled that, if there is no evidence which supports the award, then the Commission has exceeded its jurisdiction, and the award will be reversed. Herbert v. Lake Shore & M. S. Ry. Co., 200 Mich. 566, 166 N. W. 923; Saunders et al. v. New England Collapsible Tube Co. et al., 95 Conn. 40, 110 Atl. 538; Lezala v. Industrial Commission et al. and Wojoiechowski et al. v. Lezala et al., 170 Wis. 532, 175 N. W. 87; Pacific Coast Casualty Co. et al. v. Pillsbury et al. and Industrial Accident Commission, 171 Cal. 319, 153 Pac. 24; In re Gorski and In re Golon, 227 Mass. 456, 116 N. E. 811; In re Savage and In re Ætna Life Ins. Co., 222 Mass.

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205. 110 N. E. 283; Reimers v. Proctor Publishing Co., 85 N. J. Law, 441, 89 Atl. 931.

"Statement of Facts.

"The evidence introduced at the hearing before the Commission disclosed that the claimant received an injury on April 25, 1917, when he was struck by some object which fractured some of his ribs. It appears from the claimant's evidence that he went back to work on the 1st day of June, 1917, and that he worked until May 24th of the following year, 1918, and that the ailment that he had in May, 1918, for which compensation was allowed, was bladder and bowel trouble, and that from May, 1918, on, he was confined in bed for a period of about three weeks on account of such ailment. and that he did not go to work again until September, 1918, and that he worked from September, 1918, to January 1, 1919, at which time he was so disabled from ataxia that he was unable to continue work, and has not been able to work since such time.

We .o not agree with petitioner's contention that there is not any evidence upon which to base the findings and order of the State Industrial Commission. On the other hand, we think the evidence strongly supports the findings and order. In order to pass upon this question it will be necessary to review a part of the testimony. Dr. H. G. Crawford testified as follows:

"Q. Just state for the records the nature of his injury that he received April 25, 1917? A. When I saw him first, first aid had been rendered by another doctor. and his side strapped around the back, and some trusses on his back and side. He had not been covered with the plaster yet. He complained with inability to urinate, and I found that he could not. I waited about 36 hours after the injury for him to void it, but he could not. I catheterized him and had to keep it up two weeks. His bowels did not act until five days after the injury. I saw this man quite a few times for about four or five weeks. He went to work again about five or six weeks after the injury. I next began treating him about six or eight months after he returned to work. He came to my office complaining with his bladder, and upon examination I noticed what we call ataxia; he could not walk straight and shut his eyes. With this condition I readily expected syphilis. I had a blood test made which was negative. His symptoms became worse, and the ataxia more marked, but I gave him specific treatment with three injections with '606,' and there was no improvement. with his condition. He was under my care for three or four months, and during that time he was able to get around some. and he went back to his work. By having help he was able to draw his wages. I did not see him again until three or four months, and he came in again in a worse condition than before, and I treated him at intervals. until 1919. His condition at that time was such that he could work very little, could do practically no work at all, and I could not do any more for him; I did not see him after that; I do not remember of having seen him at all until to-day. * * *

"Q. Now, Doctor, between the 25th of April and the 31st of December, 1918, his condition was due to the injury that he received, do you think? A. Well, I cannot help but think there is a connecting link there, for he gave history as being in perfect health up to the time of the injury, and I knew the family for several years prior to the injury, and it seems to me there must be a connecting link there.

"Q. At that time did he fully recover from the injury; did he at any time fully recover from the injury? A. He went to work five or six weeks after the injury, and all he complained of was a weakness -- not feeling as strong as before. But at the time I figured that he would get his strength back and would be all right, and I was surprised as he came back to me several months later with the same trouble.

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"Q. Now state for the records the condition you found him in to-day? A. His condition is one of ataxia to-day. He cannot walk without his crutches and cannot walk much with them. He is an invalid at the present time.

"Q. His condition is due, do you think, to that injury received April 25. 1917? A. I cannot say, only that I think there is a connecting link somewhere."

On cross-examination Dr. Crawford testified:

"Q. Doctor, what did you say was the matter with him April 25th? A. What did I say was the matter?

"Q. Yes. A. He was suffering then with fractured ribs. He was in a cast of adhesive plaster and bandages, and he showed some bruises not covered by the adhesives. His trouble was an injury due to having been struck by some object, or with some object.

"Q. Was there any evidence of ataxia? A. No; not to my knowledge at that time.

"Q. What is ataxia? A. You cannot control your gait.

"Q. What causes that? A. Traumatism, excessive drinking, and the majority of cases are caused by syphilis."

Dr. Fred Y. Cronk testified:

"Q. Are you acquainted with L. A. Mulholland? A. I was introduced to him to-day.

"Q. Have you made an examination of this man lately? A. I made an examination to-day.

"Q. State for the records the condition you found this man in. A. This man, to look at him sitting, seems to be in very good health. To see him walking, it is quite an exertion. He does so by the use of crutches and the assistance of some one to help balance. The gait is of the shuffling type, which we speak of as being due to ataxia. The upper part of the body, so far as I am able to make out, shows practically nothing abnormal; that is, from the waist up. The examination of the spine seems to be regular. The hip motions are good. except that they are restricted by pains in the muscles. In other words, we feel that there is a little spasm of the muscles. The muscular parts of the thigh and legs show some little atrophy. although not more than we might expect from the disuse. The voluntary movements are carried out very well in the patient when he is in certain positions. But in attempting to get in or out of a car, get up steps, he cannot; he is unable to, raise the feet or legs, and the movements are jerky and exaggerated. The reflexes are exaggerated. At the knee there is a clonus. That would suggest some injury to the spine or some condition in the spine. Sensation has been gone over by Dr. Dwyer. An X-ray examination by Dr. Stewart. which included from the fifth dorsal to the sacral spine. shows no abnormalities. Two plates were made anteriorly and posteriorly. and none of which we found there has been any signs of an old injury.

"Q. Are the X-rays always correct. Doctor? A. Yes, sir; if properly made.

"Q. From this man's condition would you say that it was due to an injury that he might have received three or four years ago? A. From my examination to-day, I am not able to connect up his present condition with the injury.

"Q. Can you give any cause of his condition? A. I think that he has an inflammatory condition; that there is a condition which may be caused by severe infections, fevers, and the one which we consider syphilis.

"Q. Assuming that this man was strong and healthy on April 25. 1917, and he received an injury on that date and has never been completely recovered, would you say there is any connection between that injury and his present condition? A. If he has never completely re-

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covered at any time, I would feel there might be some connection. * * *

"Q. Can you connect it up in any way? A. There is a possibility of the injury being so severe as to cause a slight laceration of the substance of the cord with a possible hemorrhage.

"Q. Would it be unusual to have an injury as described to bring about a condition such as this? A. I do not think so, if the man had returned to work about a year and a half after the injury, that it would cause the present trouble.

"Q. Assuming that he has never entirely recovered from that injury and he worked at different times, would that bring it about? A. From the history I was able to obtain from him, he never entirely recovered from this condition. He tells me he was able to take up the duties of pumping, but he stumbled and fell a great many times. Most of the time he used a cane.

"Q. With that history, would there be some connection? A. With that history of the injury and not improving, there would be some connection with this condition."

Dr. J. E. Dwyer testified:

"Q. Are you a specialist? A. Yes; of mental and nervous diseases.

"Q. Have you had occasion to examine Mr. Mulholland? A. I started to examine him last evening in my office. He was later sent to the Tulsa Hospital, where we had a spinal fluid examination made. I concluded the examinattion in the hospital.

"Q. Now state for the records the result of your examination of this man? A. I examined Mr. Mulholland and found the man apparently in good health. The pupils of—the right pupil was slugglish to the light reaction; left pupil normal. The upper chest—that is, the heart and lungs —apparently normal; blood pressure about 1/30 normal; muscles of the face and neck normal. I found the muscle tone of the arms good. The sensory disturbances in the chest and abdomen, the patient was unable to distinguish clearly what we term temperature sensation. In placing the tube containing hot water at various portions of the chest and abdomen, the cold water—the patient invariably called the tube containing the hot water. The tactical sensation, using a sharp-pointed instrument; at times he told me he did not know whether it was hot or cold. When lying on his back he had his eyes closed, and this sensation was just the same. Lying on his face he was not able to see what I was doing. I found he was still unable to distinguish between hot and cold, and tell me when I was using the pin or instrument. The muscles of the leg, both upper and lower, are somewhat flabby and wasted. The knee jerks are exaggerated. The convulsive twitching of the ankle was marked in both ankles. The toe reflex, what we term the babinski, was absent on the left great toe; on the right great toe, doubtful. The patient was unable to distinguish between hot and cold in the water in these tubes. and also unable to state whether or not the pin pricks were sharp or dull. The patient on his own statement says that he has had some difficulty both with rectum and bladder, alternating with retention and incondite. This applies especially to the bladder. He was unable to control the urinal flow. He stated that he has been catheterized a number of times. This was not necessary in the hospital last night. I have a report of the examination by Dr. Terrell of the cerebro-spinal fluid. This report I received a short time ago is negative. The Wasserman reaction for syphilis is negative. It was with difficulty that the man was able to get out of bed and walk across the floor. With the assistance of both crutches he was able to do so, the trunk of his body being thrown forward, the feet being thrown to the floor, and on his return from one side of the room from the other, there was a slight dragging of the right foot. The tremor in both hands were decidedly marked. With the eyes closed the patient was unable to place the point of the index finger on

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the nose. This was in both hands. The muscles of the leg are very rigid. He seems to have a little more use of the left than the right.

"Q. Assuming this man was injured April 25, 1917, by receiving a blow in the side, which with a possible fracture of the eighth, ninth, and tenth ribs, and that he was disabled for several weeks and has worked practically a year and a half at different times since that time, would you consider his condition now as due to that injury he received in 1917? A. Not absolutely; no, sir."

The testimony of the claimant was, in substance: He was injured the 25th day of April, 1917; went back to work on the 1st day of June, 1917; kept going until May 24, 1918; from that time for three months he was unable to do anything; then worked again from September, 1918, until January 1, 1919. During the time beginning with the 24th day of May to the first of September, 1918, he was confined to his bed three weeks. He was working as a pumper in the oil field. Part of the time he was just a figurehead on the job, and part of the time he did all the work. He was not strong. With the assistance of his wife, who did about one-half of the work, he was able to keep going and hold the job. He had bladder and bowel trouble at the time he was sick from May 24 to September 1, 1918. His first trouble about the unsteadiness in his limbs was in November or December, 1917. Prior to his injury he had never had any trouble of that kind, but noticed this condition immediately following his injury in April, 1917. His original statement filed with the State Industrial Commission July 19, 1917, shows the nature of his injury, "four ribs broken, left side; temporary paralysis of bowels."

The statement of Dr. H. G. Crawford filed with the State Industrial Commission on May 24, 1917, shows the following:

"Give an accurate description of the nature and extent of the injury. Seventh, ninth, and tenth ribs on left side broken; complicated by a slight paralysis of the bowels."

The petitioners in their brief lay stress on the testimony given by the doctors, and from which they quote the following excerpts:

Testimony of Dr. Crawford:

"Q. His condition is due, do you think, to any injury received April 25, 1917? A. I cannot say, only that I think there is a connecting link somewhere. * * *

"Q. You did not—you do not pretend to say that his present condition now is due to that injury received? A. No; I would not say that. I would not say that, but it looks as though here is a connecting link there somewhere on account of he being so healthy. * * *

"Q. Did you ever know a case where ataxia resulted in a person from injuries of this character? A. No, sir."

Testimony of Dr. Cronk:

"Q. From this man's condition would you say that it was due to an injury that he might have received three or four years ago? A. From my examination to-day I am not able to connect up his present condition with the injury. * * *

"Q. Assuming that this man was strong and healthy on April 25, 1917, and he received an injury on that date and has never been completely recovered, would you say there is any connection between that injury and his present condition? A. If he has never completely recovered at any time, I would feel there might be some connection. * * *

"Q. Then you think that an injury would not? A. It may be possible, but it is not the rule, so far as my knowledge goes. * * *

"Q. Can you connect it up in any way? A. There is a possibility of the injury being so severe as to cause a slight laceration of the substance of the cord with a possible hemorrhage. * * *

"Q. Assuming that he has never entirely recovered from that injury and he worked at different times, would that bring it about? A. From the history I was able to obtain from him he never entirely recovered

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from this condition. He tells me he was able to take up the duties of pumping but he stumbled and fell a great many times. Most of the time he used a cane.

"Q. With that history would there be some connection? A. With that history of the injury and not improving there would be some connection with this condition."

The petitioners complain that the last answer of Dr. Cronk was based upon an assumption that there was no improvement in the claimant's condition after he met with the injury April 25, 1917, and that the ataxia was affecting the claimant from the time of the original injury. This complaint is purely technical for the preceding answer quoted discloses that Dr. Cronk understood that he never entirely recovered, but was able to take up the duties of pumping.

The petitioners cite Reimers v. Proctor Publishing Co.. 85 N. J. Law, 441, 89 Atl. 931, from which they quote:

"The accident happened October 4th. Decedent had a compound fracture of the skull. He was discharged October 30th as improved. He returned to the dispensary from time to time for dressing and redressing, was readmitted November 12th and discharged December 5th as improved. This was the hospital record. The attending surgeons at the hospital testified that decedent got well. On December 7th he was taken with headache and vomiting. The attending physician testified that he could not give the cause of death; that he could not state whether there was anything in the nature of the injuries to produce vomiting; that vomiting could be caused by compound fracture of the skull; that pressure on the brain would cause vomiting; or vomiting might come on from indiscretion in eating, or from several causes. Another surgeon who had had charge of decedent at the hospital testified that his head had practically healed three or four weeks, as he guessed, prior to death; the witness saw him just at the point of dissolution, and he says he could not give the cause of death, and did not think he could do so if he had been there sooner. The witness saw nothing particularly wrong about his head when he returned to the hospital, and gave the decedent directions when he was discharged from the hospital the second time to be prudent in his eating. He said it was possible that the vomiting might have been caused by indigestion, or by the injury to the head. He also testified that there was nothing about the boy's brain to indicate what the cause of death actually was. We think the furthest this testimony goes is to show a possibility that the death was due to the accident. Where the doctors refuse to state that death was caused by the accident, there is no basis for an inference to that effect by the court. The burden of proof is in accordance with the ordinary rule upon the petitioner. That the Legislature did not mean to shift it to the defendant in a case like the present is shown by the fact that in the very same paragraph (section 2, pl. 7) it expressly enacted that the burden of proof that injury or death was intentionally self-inflicted, or that intoxication was the natural and proximate cause of the injury, shall be upon the employer. 'Expressio unius. exclusio alterius.'

"The judgment must be reversed, without costs. and the record remitted for a new trial."

This decision is based on section 1, c. 95. of the Laws of New Jersey of 1911, which reads:

"When personal injury is caused to an employee by accident arising out of and in the course of his employment, of which the actual or lawfully imputed negligence of the employer is the natural and proximate cause, he shall receive compensation therefor from his employer, provided the employee was himself not willfully negligent at the time of receiving such injury, and the question of whether the employee was willfully negligent shall be one of fact to be submitted to the jury, sub-

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ject to the usual superintending powers of a court to set aside a verdict rendered contrary to the evidence."

Petitioners cite In re Savage, decided by the Supreme Justice Court of Massachusetts, reported in 222 Mass. 205, 110 N. E. 283, wherein the court held:

"Under the Workmen's Compensation Act, it is not enough for plaintiff dependent to show a state of facts equally consistent with no right of compensation as with such right."

The statute of Massachusetts providing for appeals from an award of the Industrial Accident Board is contained in Acts of 1911, c. 751, pt. 3. § 11:

"There shall be a right of appeal to the Supreme Judicial Court on questions of law, and the Industrial Accident Board may report questions of law to the Supreme Judicial Court for its determination."

They cite Saunders et al. v. New England Collapsible Tube Co. et al., 95 Conn. 40, 110 Atl. 538, decided by the Supreme Court of Errors of Connecticut June 10, 1920. The right of appeal under the Workmen's Compensation Act in Connecticut is provided for in section 27, Public Acts of 1913, c. 138, which is as follows:

"At any time within ten days after entry of such finding and award by the commissioner either party may appeal therefrom to the superior court for the county in which the injury was sustained. The clerk of said court shall notify the adverse party of such appeal. No bond for prosecution shall be required on any such appeal unless property of the defendant is attached therein. Actions brought into the superior court under the provisions of this section shall be privileged in respect to their assignment for trial over all other actions except writs of habeas corpus and actions brought by or on behalf of the state, including informations on the relation of private individuals. No costs shall be taxed in favor of either party on any such appeal." They also cite Lezala v. Industrial Commission et al., 170 Wis. 532. 175 N. W. 87, decided by the Supremee Court of Wisconsin December 2, 1919. The right of appeal from an order of the Industrial Commission of Wisconsin is provided for by section 2394—21 on page 1625 of Wisconsin statutes of 1913, and reads as follows:

"Said commission, or any party aggrieved by a judgment entered upon the review of any order or award, may appeal therefrom within the time and in the manner provided for an appeal from the orders of the circuit court, except that it shall not be necessary for said commission or any party to said action to execute, serve or file the undertaking required by section 3052 of the statutes in order to perfect such appeal; but all such appeals shall be placed on the calendar of the supreme court and brought to a hearing in the same manner as state causes on such calendar."

The petitioners cite Tucillo v. Ward Baking Co., 180 App. Div. 302, 167 N. Y. Supp. 666, from which we quote the second syllabus:

"Under Workmen's Compensation Law, § 3, subd. 8, providing that 'death when mentioned as a basis for the right to compensation means only death resulting from such injuries,' proof of injury, of an operation therefor, and that after apparent recovery from effects of operation and anæsthesia, the servant died from a disease existing before the injury, is clearly insufficient to establbish death resulting from the injury."

Not any of the cases cited by petitioner are based upon a statute like that of Oklahoma. Section 10, art. 2, c. 246, Session Laws of 1915, as amended by section 10, art. 2, c. 14, Session Laws of 1919, provides in part:

"* * * The decision of the Commission shall be final as to all questions of fact, and except as provided in section 13 of this article as to all questions of law."

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Petitioners next rely on Associated Employers' Reciprocal et al. v. State Industrial Commission et al. (Okl. Sup., No. 12124) 200 Pac. 862, opinion filed September 13, 1921, and reported in the Oklahoma Appellate Court Reporter of September 29, 1921. They quote paragraphs 1 and 2 of the syllabus:

"By the provisions of section 10 of the Workmen's Compensation Law (chapter 14, Sess. Laws 1919) the decision of the State Industrial Commission is made final as to all questions of fact; but this is so only when there is some evidence to support such decision, and where there is absolutely no evidence to support such finding and decision, the same may be reviewed as a matter of law.

"In a proceeding before the State Industrial Commission, seeking compensation for an alleged injury, the burden of proof is upon the claimant to show by the evidence that the injury complained of was accidental and arose out of and in the course of his employment."

Nicholson, J., in the body of the opinion, says:

"It appears from this order that the award was made solely upon the report of the medical examination of Dr. W. P. Lipscomb, there being no other evidence introduced. This report reads as follows;

"'Oklahoma City, Okl., December 10, 1920.

"'State Industrial Commission, State Capitol, Oklahoma City—Gentlemen: Examination of John Kuhn, December 19, 1920. Ear: Right—Drum is slightly retracted and thickened. No other abnormality is found. Left—There is a large, round perforation of the drum, with a small amount of mucopurulent discharge. There is total deafness in this ear.

"'Nose—A little thickening and irregularity of septum. Mucous membrane in state of moderate catarrhal inflammation, with small amount of mucopurulent discharge.

"'Throat—Tonsils are enlarged and diseased. Teeth—Are in very good condition.

"'The loss of hearing in the left ear may improve to some extent when the infection in the middle ear is completely overcome, and the drum healed; however this is uncertain.

"'The loss of hearing and the perforation of the drum is due to infection of the middle ear.

"'It is impossible to state whether this is due to disease or injury.

"'W. P. Lipscomb, M. D.'"

Under said section 10, art. 2, c. 14, Session Laws 1919, in all appeals from the Industrial Commission to this court the decision of the Commission is final as to all questions of fact. If there is any evidence that will sustain the decision of the Industrial Commission, then the decision is binding upon this court. If there is not any evidence to sustain the decision, then the appeal presents a question of law. The question of law thus presented is: Can the decision of the Industrial Commission be upheld without any evidence to sustain it. This court will only go behind the decision of the Industrial Commission to ascertain whether or not there is any evidence reasonably tending to sustain such decision. We do not consider it necessary for this court to review the evidence in this class of cases as we have done in this case. But, because in this case there was no affirmative statement of any witness to the effect that the present condition of the respondent was the result of his previous injury, we deem it advisable to show by an analysis of the evidence that it is not necessary that such affirmative evidence be given in order to sustain the decision of the Industrial Commission.

The record in this case does not substantiate the claim of the petitioners that there is not any evidence to support the order of the State Industrial Commission. Not any one of the doctors testify positively that the injury was the cause of his present condition, and, because the

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record lacks that positive statement, the petitioners say there is not any evidence to support the order.

From a medical standpoint, the diagnosis of a case may be made either by synthesis or by analysis and elimination. The first method is probably more frequently used than the second. When the first method fails to disclose the cause of the affliction, the second method may be called into use and serve the purpose as accurately as the first. At the time of the injury the first method was used. A physical examination disclosed a fracture of certain ribs.

It is admitted that claimant was injured. The history of the case shows conclusively that he never fully recovered. At the inception it shows more than the fracture of the ribs. Dr. Crawford says in his report filed May 24, 1917: "It is complicated by a slight paralysis of the bowels." The doctors all admit that, if he had never fully recovered from the injury, his present condition would indicate a connection with the injury. The evidence shows that he never did fully recover.

We will now consider the diagnosis by analysis and elimination. It is admitted that he is suffering from what is known as ataxia. On cross-examination Dr. Crawford was asked these questions and gave these answers:

"Q. What is ataxia? A. You cannot control your gait.

"Q. What causes that? A. Traumatism, excessive drinking, and the majority of cases are caused by syphilis."

This last statement is not contradicted by any physician who testified at this hearing; therefore, under the evidence, there are but three things that could produce ataxia.

Dr. Crawford gave the following testimony in reference to Mr. Mulholland:

"He went to work again about five or six weeks after the injury. I next began treating him about six or eight months after he returned to work. He came to my office complaining with his bladder, and upon examination I noticed what we call ataxia; he could not walk straight and shut his eyes. With this condition I readily expected syphilis. I had a blood test made which was negative."

Dr. Dwyer testified:

"I have a report of the examination by Dr. Terrell of the cerebrospinal fluid. This report I received a short time ago is negative. The Wasserman reaction for syphilis is negative."

These two tests, one made by Dr. Crawford in the last part of 1917 or the first part of 1918, the other by Dr. Dwyer and Dr. Terrell at the time of this hearing, February, 1921, eliminate the possibility of his condition being the result of syphilis.

The next step in the analysis and elimination is to determine whether or not his condition is the result of excessive drinking. Dr. Crawford testified as follows:

"Q. Now, Doctor, between the 25th of April and the 31st of December, 1918, his condition was due to the injury that he received, do you think? A. Well I cannot help but think there is a connecting link there, for he gave history as being in perfect health up to the time of the injury, and I knew the family for several years prior to the injury, and it seems to me there must be a connecting link there."

In Dr. Crawford's report to the State Industrial Commission filed May 24, 1917, he gives negative answers to each of the following questions:

"Has previous sickness or injury contributed to his disability? No.

"If so, to what extent?

"Is there evidence of syphilis? No.

"Alcoholism? No.

"Occupational disease? No.

"Hypochondriasis? No.

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"Exaggeration? No.
"Tubercular infection? No.
"Any infectious disease? No.
"Neurasthenia? No.
"Hysteria? No.
"Is there evidence of malingering? No."

With the knowledge Dr. Crawford had of the family for several years prior to the injury, and having examined the patient, and observed his condition, he reported to the State Industrial Commission there was no evidence of alcoholism, and it is not even suggested that he ever used intoxicants. Therefore we must eliminate the possibility of his condition being the result of excessive drinking.

Under the testimony of Dr. Crawford there remains but one thing that could be the cause of Mr. Mulholland's present condition. That is traumatism. Webster's International Dictionary defines "traumatism" as: "The morbid condition of the system due to a trauma." "Trauma" is defined as: "An injury or wound."

Dr. Cronk testifies:

"The reflexes are exaggerated. At the knee there is a clonus. That would suggest some injury to the spine or some condition in the spine. * * *

"There is a possibility of the injury being so severe as to cause a slight laceration of the substance of the cord with a possible hemorrhage."

This explains how the trauma could have been caused. During the process of time the trauma brought about traumatism. Under the facts disclosed in the record traumatism is the only thing that could have produced it. All other things that would cause it must be eliminated for they did not exist in the claimant.

After analyzing the testimony, we are forced to the conclusion that it affirmatively and conclusively shows the injury sustained by L. A. Mulholland on April 25, 1917, produced the ataxia.

[3] Petitioners' sixth specification of error is:

"It appears from the records of the Commission covering the proceedings on such claim that the claimant was paid the sum of $30 per month for June, July, and August, 1918, and the Commission in making its findings failed to give the petitioner the benefit of such payment, and the Commission otherwise failed to give the petitioner the benefit of the payments made to the claimant which are proper, and as a matter of law should be allowed, if the order of the Commission is in any wise sustained."

The evidence discloses that claimant received $30 per month for the months of June, July, and August, 1918. Petitioners are entitled to a credit of $90, the sum so paid the claimant, and this should be deducted from the amount awarded.

The evidence shows that claimant was disabled from May 24, 1918, to September 1, 1918. This would make 14 weeks and 1 day or the sum of $141.67. The order is made on the theory that claimant was disabled from May 24, 1918, to August 24, 1918, making a period of 13 weeks and 1 day. The order is erroneous in that it should have allowed 14 weeks and 1 day instead of 13 weeks and 1 day, and it will be so modified. The claimant will be entitled to interest at the rate of 6 per cent. per annum on each weekly allowance of $10 from the date if was due until paid.

With the modifications above specified, the order of the State Industrial Commission made on the 14th day of May, 1921, is hereby affirmed.

All the Justices concur, except Harrison, C. J., not participating

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CONSOLIDATED FUEL CO. ET AL. v. STATE INDUSTRIAL COMMISSION ET AL. (No. 12640.)

(Supreme Court of Oklahoma. Feb. 28, 1922.)

205 Pacific Reporter, 170.

(Syllabus by the Court.)

1. MASTER AND SERVANT—NOTICE OF COMPENSABLE INJURY NOT JURISDICTIONAL.

The notice provided for in section 8, art. 2, c. 246, Session Laws 1915, is not jurisdictional.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

2. MASTER AND SERVANT—COMPENSATION AWARD CONCLUSIVE IF NOT APPEALED FROM.

Where an employee files his complaint with the State Industrial Commission under the Workmen's Compensation Act and the employer or the insurance carrier has been properly served with notice of the time and place of hearing such complaint, and at the time specified in such notice the State Industrial Commission proceeds to hear such complaint and makes an award thereon, such award is conclusive against the employer or insurance carrier, if not appealed from.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

3. MASTER AND SERVANT—DEFENSES WAIVED BY NONAPPEARANCE IN COMPENSATION PROCEEDING.

When neither the employer or the insurance carrier appear before the State Industrial Commission, pursuant to notice duly given, and set up any defense to the complaint of an employee, they will be deemed to have waived such matters of defense as they could have reasonably presented at such hearing.

(For other cases, see Master and Servant, Dec. Dig. § 417[4].)

4. MASTER AND SERVANT — FINDING ON QUESTION OF WANT OF NOTICE OF COMPENSABLE INJURY HELD UNNECESSARY.

When on the hearing of a complaint filed by an employee under the Workmen's Compensation Act no objection is made that such employee failed to give notice of his injury to the employer, it is unnecessary for the State Industrial Commission to make any finding or in any way excuse the failure to give such notice.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

5. MASTER AND SERVANT—FINDING ON EVIDENCE IN COMPENSATION CASE CONCLUSIVE.

When there is any evidence reasonably tending to support the order of the State Industrial Commission, such order is final and conclusive on this court. Under section 10, art. 2, c. 14, Session Laws 1919, the decision of the State Industrial Commission is final as to all questions of fact, and cannot be reviewed by this court on appeal.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Appeal from State Industrial Commission.

Proceeding by Emery Evans for an award under the Workmen's Compensation Act (Laws 1915, c. 246) opposed by the Consolidated Fuel Company, employer, and the Consolidated Underwriters, as insurance car-

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rier. An award was made, and from an order of the State Industrial Commission overruling the motion of the petitioners, employer, and insurance carrier to vacate the award, the petitioners appeal. Affirmed.

Simpson, Hummer & Foster, of Okmulgee, for petitioners.
R. E. Wood, of Oklahoma City, for respondents.

MILLER, J. This is an appeal from an order of the State Industrial Commission made on July 26, 1921, overruling the motion of the Consolidated Underwriters, as insurance carrier, to vacate an award made to Emery Evans on the 7th day of February, 1921. The Consolidated Fuel Company and the insurance carrier, Consolidated Underwriters, appear here as petitioners. The State Industrial Commission and the claimant, Emery Evans, appear here as respondents.

On January 25, 1921, Emery Evans filed his claim as employee of the Consolidated Fuel Company asking compensation for disability caused by an injury occurring on the 20th day of November, 1920. The claim was against the Consolidated Fuel Company, as employer, and the Consolidated Underwriters, as insurance carrier. The cause of the complaint was an injury to the right leg at the knee.

The Consolidated Fuel Company and Consolidated Underwriters were each duly notified by the State Industrial Commission that a hearing on said claim would be had on the 7th day of February, 1921. They failed to appear, and on said date the State Industrial Commission made an award to Emery Evans in the sum of $18 per week.

Thereafter, and on March 3, 1921, the petitioners filed a motion with the State Industrial Commission to set aside the award made to Emery Evans on February 7, 1921. A hearing was had on the motion and on August 19, 1921, the State Industrial Commission made the order sought to be reversed by this appeal. The order reads as follows:

"Now on this the 19th day of August, 1921, the above cause coming on for consideration pursuant to a hearing held in Okmulgee on July 26, 1921, on the motion of the insurance carrier to vacate award, at which hearing the claimant appeared in person, and the respondent and insurance carrier were represented by Mr. Hummer, the Commission, having examined the testimony and all the records on file, and being well advised in the premises, finds that the claimant, while in the employ of the respondent and in the course of his employment, was injured on November 20, 1920; that he was receiving a wage of $7.50 per day; and that he is entitled to compensation at the rate of $18 per week for a period of 21 weeks and 3 days, being for a total sum of $387. The Commission is therefore of the opinion that the motion of the insurance carrier to vacate the award should be overruled.

"It is therefore ordered that the motion of the insurance carrier to vacate award be, and the same is hereby, overruled, and that within 10 days from this date the Consolidated Fuel Company or the Consolidated Underwriters pay to the claimant the sum of $387 in full and final settlement of this cause, and also pay all medical expenses incurred by the claimant as a result of the injury."

[1, 2] The first error complained of by petitioners is:

"Proposition No. 1. The Commission was not authorized to make an award in this case for the reason that the respondent failed to give the notice to the employer as required by law, and there is no evidence in the record upon which the commission could excuse such notice."

The petitioners admit they had notice of the complaint being filed and the date set for the hearing, but attempt to explain their nonappearance at the hearing by stating they did not think the claimant would claim compensation unless he had been disabled by an injury received during the course of his employment. The State Industrial Commissioin having

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acquired jurisdiction by a complaint regularly filed, notice duly issued thereon and served on the parties interested, on a hearing had pursuant to such notice, in the absence of fraud, the award made, if unappealed from, is conclusive as against the employer and insurance carrier.

[3] Not having made timely objection to an award being made on account of claimant failing to give notice to the employer, this defense is deemed to have been waived, and cannot be urged on appeal from an order refusing to vacate the award.

[4] Petitioners' second complaint is:

"Proposition No. 2. The Industrial Commission has not excused the respondent's failure to give the employer notice of injury as required by law, and such failure is therefore a bar to recovery."

When the State Industrial Commission made its award on February 7, 1921, the question of claimant's failure to give notice was not raised; therefore it was unnecessary for the State Industrial Commission to make any order or recitals excusing the failure to give the notice.

[5] A general complaint is made that the evidence does not support the award or the order of the State Industrial Commission refusing to vacate the award. We have examined the record, and find there is evidence which reasonably tends to support the order complained of.

Under section 10, art. 2, c. 14, Session Laws 1919, the decision of the State Industrial Commission is final as to all questions of fact. Markham et al. v. State Industrial Commission et al. (Okl. Sup., No. 12376) 205 Pac. 163, opinion handed down February 14, 1922.

The order of the State Industrial Commission made on August 19, 1921, is affirmed. The respondent will be entitled to interest on the amount specified in said order as provided by law.

Harrison, C. J., and Kane, Johnson, and Kennamer, JJ., concur.

SENECA COAL CO. ET AL. v. CARTER ET AL. (No. 12764.)

(Supreme Court of Oklahoma. March 14, 1922.)

205 Pacific Reporter, 495.

(Syllabus by the Court.)

1. MASTER AND SERVANT — COMPENSATION ALLOWABLE FOR DISFIGUREMENT IN ADDITION TO ALLOWANCE FOR LOSS OF EYE.

Section 6, art. 2, c. 246, Sess. Laws 1915, as amended by section 9, c. 14, Sess. Laws 1919, construed and held to authorize the State Industrial Commission to award an injured employee compensation for a permanent disfigurement of the face, although such injured employee had been awarded compensation for the loss of an eye.

(For other cases, see Master and Servant, Dec. Dig. § 387.)

2. MASTER AND SERVANT — LOSS OF EYE ELEMENT OF COMPENSATION FOR PERMANENT DISFIGUREMENT.

Where an injured employee has been awarded compensation for specific injuries, such as the loss of an eye, the State Industrial Commission, in awarding compensation for a permanent disfigurement of the face, must consider to what extent the loss of the eye has contributed to the disfigurement of the injured employee in determining the proper amount to be awarded such injured employee.

(For other cases, see Master and Servant, Dec. Dig. § 387.)

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3. MASTER AND SERVANT — COMPENSATED INJURY NOT PART OF PERMANENT DISFIGUREMENT.

Where an injured employee has been compensated for a specific injury, such injured employee is not entitled to compensation again for such injury as constituting a part of a permanent disfigurement.

(For other cases, see Master and Servant, Dec. Dig. § 387.)

Original action by the Seneca Coal Company and the Consolidated Underwriters against Weep Carter and the State Industrial Commission of the State of Oklahoma, to reverse and vacate an award made by the State Industrial Commission. Award affirmed.

Moss & Tumilty, of Oklahoma City (Con Murphy, Jr., of Kansas City, Mo., of Counsel), for petitioners.

KENNAMER, J. This action was commenced in this court October 25, 1921, by the Seneca Coal Company and Consolidated Underwriters, petitioners, against Weep Carter and State Industrial Commission of the state of Oklahoma, to reverse and vacate an award made by the State Industrial Commission on the 3d day of August, 1921, awarding Weep Carter $1,000 for permanent disfigurement of his face. The petitioners filed an application with the State Industrial Commission for a rehearing upon the award made, which, upon a hearing had on the 26th day of September, 1921, was by the Commission denied.

The essential facts appearing from the record in this cause necessary to be considered in reviewing the award of the Commission are in substance as follows: Respondent, Weep Carter, was employed by the petitioners, Seneca Coal Company, and received an accidental injury December 21st, 1920, while tamping a shot in coal when a live cinder from steam shovel boiler dropped into the shot causing it to explode. The petitioner's face was burned and shot full of coal resulting in a permanent disfigurement of the face and the loss of an eye.

[1] The undisputed testimony conclusively shows, in addition to the loss of an eye, the claimant received permanent disfigurement of his face, for which the Commission awarded him the sum of $1,000. Counsel for the petitioners insist that the Commission awarded the claimant compensation at the rate of $12.98 per week for 100 weeks for the loss of his left eye, and that by reason of the award for loss of his eye, under section 6, art. 2, c. 246, Session Laws 1915, as amended by section 9, c. 14, Session Laws 1919, the Commission is without jurisdiction to award the claimant $1,000 for permanent disfigurement to his face. There is no merit in this contention. That part of the statute supra relied upon by counsel for a reversal of the award herein is as follows:

"In case of an injury resulting in the loss of hearing or in serious and permanent disfigurement of the head, face or hand, compensation shall be payable in an amount to be determined by the Commission, but not in excess of three thousand dollars. Provided, that compensation for loss of hearing or permanent disfigurement shall not be in addition to the other compensation provided for in this section, but shall be taken into consideration in fixing the compensation otherwise provided."

Counsel for petitioners correctly state the rule of construction of statutes to be:

"The great cardinal rule in the construction of statutes is to ascertain and give effect to the intention of the Legislature. Leflore v. Sanders, 24 Okl. 301, 103 Pac. 858; Territory v. Clark, 2 Okl. 82, 35 Pac. 882; School District v. Long, 2 Okl. 460, 37 Pac. 601."

We have no fault to find with the rule of construction as contended for by counsel for the petitioners. An analysis of that part of the statute supra applicable to this case to our minds clearly evidences an intention on the part of the Legislature to allow the injured employee compensation

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for a serious and permanent disfigurement of the head, face, or hands in any sum not to exceed $3,000, and the Industrial Commission is vested under the Statute with jurisdiction to make such an award.

[2] Counsel for petitioners insist that the proviso providing "that compensation for loss of hearing or permanent disfigurement shall not be in addition to other compensation provided for in this section, but shall be taken into consideration in fixing the compensation otherwise provided," evidences an intention on the part of the Legislature of denying to the injured employee compensation for permanent disfigurement where he has been allowed compensation for a specific injury provided for in the first part of the section of the statute , such as the loss of an eye or hand, etc. Such a construction of the statute is unreasonable and would lead to an absurdity. The phrase "should not be in addition to other compensation provided for in this section" makes plain the intention of the Legislature that the compensation allowed for permanent disfigurement has reference to other injuries not compensable as specific injuries provided for specifically, such as the loss of an eye, hand, or foot, etc. The phrase "but shall be taken into consideration in fixing the compensation otherwise provided" vests the Commission with jurisdiction in allowing compensation for a permanent disfigurement to consider any compensation that may have been allowed for specific injury. For instance, just as in the case at bar, where the injured employee has been compensated for the loss of an eye in awarding compensation for a permanent disfigurement of the face to the extent that the loss of an eye has to do with permanent disfigurement, the Commission, in making the award, must eliminate from such disfigurement to the face the loss of an eye, or such loss as the impaired eye contributed to the disfigurement of the face. The loss of an eye having been compensated under the first part of the statute, supra, prescribing a specific amount for the loss of an eye is not to again be compensated as constituting a part of a permanent disfigurement.

[3] It is obvious that the compensation for permanent disfigurement must be independent of, and not in addition to, any compensation allowed for a specific injury. But, in determining the amount of the award to be allowed for such disfigurement under the proviso of the act. the Commission is vested with jurisidiction to consider and qualify the amount that may be awarded under the statute for permanent disfigurement to the extent an awardable specific injury has contributed to the permanent disfigurement of the employee. It would be unreasonable to hold under section 6, art. 2, c. 246, Session Laws 1915, as amended by section 9, c. 14. Session Laws 1919, supra, that the Commission is without jurisdiction to compensate an injured employee for a permanent disfigurement of the head, face, or hands where the same exist independent of some compensable specific injury. To so hold would be to deny the Commission jurisdiction to compensate an injured employee for permanent disfigurement where he lost his right eye, but suffered a permanent disfigurement to the left side of his face, entirely independent and apart from the loss of the eye. The authorities uniformly hold that statutes must be construed so that as not to lead to absurd consequences. 25 R. C. L. § 223.

In the case of Leahy v. Indian Territory Illuminating Oil Co., 39 Okl. 312, 135 Pac. 416, this court held:

"A statute must be given the meaning apparent on its face where the words used convey the distinct meaning which involves no absurdity or contradiction."

Other cases in point are: Hutchinson v. Canon, 6 Okl. 725, 55 Pac. 1070; Falter v. Walker, 47 Okl. 527, 149 Pac. 1111.

"The natural and appropriate office of a proviso is to restrain or qualify the generality of the language that it follows." 25 R. C. L. 231.

Applying this rule to the statute under consideration. it is quite clear that the natural office of the proviso providing that "compensation for loss of hearing or permanent disfigurement shall not be in addition to the

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other compensation provided for in this section, but shall be taken into consideration in fixing the compensation otherwise provided," was to qualify the preceding part of the section of the statute vesting the Industrial Commission with jurisdiction to compensate a permanent disfigurement in any sum not exceeding $3,000 by authorizing the Commission to consider any amount which the Commission may have awarded to the injured employee for a specific injury where such specific injury might appear as a part of the disfigurement sought to be compensated.

We are of the opinion that the award made was authorized under the statute, and should be affirmed. It is therefore so ordered.

Harrison, C. J., and Johnson, Miller, and Nicholson, JJ., concur.

SUPERIOR SMOKELESS COAL & MINING CO. et al. v. BISHOP et al. (No. 13720.)

(Supreme Court of Oklahoma. March 14, 1922.)

205 Pacific Reporter, 497.

(Syllabus by the Court.)

2. MASTER AND SERVANT—COMPENSATION DECISION ON EVIDENCE FINAL.

It is well settled in this jurisdiction that the decision of the Commission as to all matters of fact is final, if there is any evidence whatever tending to support it.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

3. MASTER AND SERVANT—FINDINGS IN COMPENSATION CASE SUSTAINED.

We have examined the record carefully, and are convinced that the evidence sufficiently supports the findings of fact of the Commission.

(For other cases, see Master and Servant, Dec. Dig. § 405[6].)

4. MASTER AND SERVANT—COMPENSATION FOR PERMANENT DISABILITY NOT DEFEATED BY EARNING CAPACITY.

When it appears that an injured workman suffers the loss of both hands or both feet or both legs or both eyes or any two thereof or the permanent loss of the use of such members, he cannot be denied the compensation provided in the act because he obtains employment even at better wages at a task which he is physically able to perform.

(For other cases, see Master and Servant, Dec. Dig. § 385[11].)

Appeal from State Industrial Commission of Oklahoma.

Proceeding by Jack Bishop for compensation under the Workmen's Compensation Law, opposed by the Superior Smokeless Coal & Mining Company, employer, and the Consolidated Underwriters, insurance carrier. From an order of the Industrial Commission allowing compensation, the employer and insurance carrier appeal. Order affirmed.

Moss & Tumilty, of Oklahoma City, for petitioners.

Williams & Lewis, of Poteau, for claimant.

S. P. Freeling and R. E. Wood, both of Oklahoma City, for State Industrial Commission.

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KANE, J. This is an appeal from an order of the Industriaal Commission allowing the respondent, Jack Bishop, compensation for injuries under the Workmen's Compensation Law (Laws 1915, c. 246).

The Commission found that as the result of an accidental injury the respondent lost the use of his right foot and his right hand and the partial use of his left ankle; that by reason of such injury respondent is permancently totally disabled and entitled to compensation at the rate of $18 per week for a period of 500 weeks. This award was made on the 23d day of February, 1921, and became final on the 12th day of September, 1921, after a motion to diminish compensation had been overruled by the State Industrial Commission.

The sole ground for reversal relied upon by counsel for petitioners is that the evidence was wholly insufficient as a matter of law to support an award for total permanent disability, and they present this ground for reversal for review under two heads as follows: (1) That the evidence adduced in this case was wholly insufficient, as a matter of law, to show that claimant has lost the use of his hand and a foot; (2) even if it be considered that claimant had permanently and totally lost the use of his hand and foot, there is still conclusive testimony that he is not permanently totally disabled.

[1] This contention is based on the undisputed facts that claimant was regularly employed at the time of the hearing, and had been for some time prior thereto, and that he was earning more wages at that time than he was prior to the injury. We will now consider these propositions in the light of the evidence and the applicable provisions of the Workmen's Compensation Act. Paragraph 1, § 6, Compensation Act, defines permanent and total disability as follows:

"Loss of both hands, or both feet, or both legs, or both eyes or any two thereof shall, in the absence of conclusive proof to the contrary, constitute permanent total disability."

And paragraph 3 of the same section provides in part that:

"Permanent loss of the use of a hand, arm, foot, leg, or eye, shall be considered as the equivalent of the loss of such hand, arm, foot, leg or eye."

[2] A casual reading of these provisions of the Workmen's Compensation Act renders it fairly obvious that a consideration of the first proposition presented by counsel merely involves an examination of the record for the purpose of determing whether it contains any evidence whatever tending to support the finding of fact of the Commission that the plaintiff suffered a permanent loss of the use of a hand and a foot. It is well settled in this jurisdiction that the decision of the Commission as to all matters of fact is final, if there is any evidence whatever tending to support it.

[3] In view of this rule it is sufficient to say of the first proposition that we have examined the record carefully and are convinced that the evidence sufficiently supports the findings of the Commission.

[4] It is true, as counsel contend in support of their second proposition, that the undisputed evidence shows that the claimant recovered from his injuries sufficiently to return to work for the same company in another capacity at a greater wage than he was receiving at the time of his injury. But it was also shown that, while the new employment was of a different nature than the former and required greater skill and commanded an increased wage, it did not require the use of plaintiff's injured members.

The question thus arising was recently before this court for decision in Winona Oil Co. et al. v. Smithson et al., 205 Pac. ——. In that case the claimant suffered an acidental injury to his eye, for which the Commission allowed him compensation, although he continued in the service of his employer without loss of time or any diminution in wages or salary. The court held that the fact that his employer continues his employment,

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or that he secures employment from some other person at an increased or decreased wage, in no way affects the right of an injured workman to the compensation specifically provided for in the act.

If the injured employee receives such an injury as is specifically provided for in the act, such as the loss of a hand, toe, arm, foot, finger, leg, etc., the same constitutes a permanent partial disability for the simple reason that the act specifically so provides, and the injured employe is entitled to the compensation as provided in the schedule of the act. So we must conclude that, when it appears that an injured workman suffers the loss of both hands or both feet or both legs or both eyes or any two thereof or the permanent loss of the use of such members, he cannot be denied the compensation provided in the act because he obtains employment even at better wages at a task which he is physically able to perform.

For the reason stated, the order of the Industrial Commission must be affirmed.

Harrison, C. J., and Johnson, Miller, and Kennamer, JJ., concur.

DELANEY v. PHILADELPHIA & READING COAL & IRON CO.

(Supreme Court of Pennsylvania, Feb. 6, 1922.)

116 Atlantic Reporter 537.

MASTER AND SERVANT—MINOR'S COMPENSATION AGREEMENT HELD TO BAR RECOVERY AT LAW.

Where a wrongfully employed minor under 16 was injured and with his father's consent agreed to accept benefits under Workman's Compensation Act, June 2, 1915 (P. L. 736; Pa. St. 1920, § 21916 et seq.), and after attaining the age of 16, with like consent, entered into a supplemental agreement under the amendatory Act June 26, 1919 (P. L. 642; Pa. St. 1920, § 21993 et seq.), which agreements were approved by the Workmen's Compensation Board and compensation paid thereunder, neither the minor nor his father could thereafter bring suit at law for the injuries; the suplemental agreement, unmodified and in force, being binding and operating as a surrender of their right to recover for the injuries in any other manner, in view of Act June 2, 1915 (P. L. 740, § 303, Pa. St. 1920, § 21990), and of Act June 26, 1919 (P. L. 660, § 407; Pa. St. 1920, § 22025).

(For other cases, see Master and Servant, Dec. Dig. § 357.)

Appeal from Court of Common Pleas. Philadelphia County; Noris S. Barrett, Judge.

Action by William Delaney, a minor, by his father and next friend, Patrick Delaney, and by Patrick Delaney in his own right, against the Philadelphia & Reading Coal & Iron Company. Judgment for each plaintiff, and defendant appeals. Reversed in each case.

Argued before Frazer, Walling, Simpson, Kephart, and Schaffer, JJ.

Wm. Clarke Mason, of Philadelphia, for appellant.

Victor Frey and A. T. Ashton, both of Philadelphia, for appellee.

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SIMPSON J. William Delaney, a minor, by his father and next friend, Patrick Delaney, and the said Patrick Delaney in his own right. sued the Philadelphia & Reading Coal & Iron Company to recover damages for injuries received by the minor while employed by defendant at one of its washeries. The statement of claim sets forth that the minor was under the age of 16 years at the time of the employment and injury, and, without naming the Act of May 13, 1915 (P. L. 286; Pa. St. 1920, §§ 13285—13308), specifies certain particulars in which the statute had been violated in his employment and in the character of work he was required to do. Defendant pleaded, inter alia, that plaintiffs had "elected to accept from this defendant the compensation provided by the Workmen's Compensation Act." that this had been paid to them, and hence they were "barred from bringing this action at law against the said defendant for the said injuries." A verdict and judgment having been recovered by each plaintiff, these two appeals followed.

Several interesting questions are raised by the assignments of error. but only one need be considered. It appears that 17 days after the accident happened, the minor, with the consent of his father and next friend, entered into an agreement with defendant, in accordance with the provisions of the Workmen's Compensation Act of June 2, 1915 (P. L. 736; Pa. St. 1920, § 21916 et seq.). and on December 29. 1919. after the minor had passed the age of 16 years, with like consent he entered into a supplemental agreement with defendant under the amendatory Act of June 26, 1919 (P. L. 642; Pa. St. 1920, § 21993 et seq.). These agreements were approved by the Workmen's Compensation Board, were filed with the Bureau, and the payments therein specified were made by defendant to the minor and accepted by him down to February 21, 1921 (which was the last due date previous to the trial on March 15. 1921). though this suit had been brought March 17. 1920, and the affidavit of defense, averring the applicability of the act and the payments in accordance with its terms, had been filed May 14, 1920. So far as the record of the trial is concerned, the agreements and payments appear only by offers of proof overruled by the court below, but it was frankly admitted, by plaintiffs' counsel that the facts were as stated, that the moneys received were used by the minor's mother for the support of the family, and that the later payments were refused because of the counsel's advice to that effect; the moneys actually paid, however, were not returned or tendered to defendant.

It is clear that the facts stated would ordinarily operate as an estoppel to the maintenance of this suit; plaintiffs would not be permitted to receive and retain compensation on an agreed basis, and at the same time prosecute a suit to recover additional compensation for the same injuries on an entirely different basis; by their agreements and receipt of the moneys they declared the Workmen's Compensation Acts applied and they were entitled to compensation under them; by the suit they denied the applicability of the acts and all right to have or retain compensation ascertained according to their terms. Relying, however, upon our decision in Lincoln v. National Tube Co., 268 Pa. 504, 112 Atl. 73, plaintiffs claim that these acts cannot be invoked as a defense where, as here, the employment was in express violation of a statute. The facts in the two cases are, however, essentially different, for there the employer sought to compel the wrongfully employed minor to proceed under the original act, while here the minor, with the consent of his father and next friend, voluntarily accepted relief under it and the amendatory act of 1919. Though this distinction is vital and controlling, it is not necessary to further consider it, for here the supplemental agreement between the minor and defendant was made under the amendatory act, 14 months' payment were accepted in accordance therewith, and it provides in section 407 (P. L. 660; Pa. St. 1920, § 22025), that—

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"All agreements for compensation and all supplemental agreeements for the modification, suspension, reinstatement, or termination thereof, and all receipts executed by an injured employe of whatever age, * * * shall be valid and binding, unless modified or set aside as hereinafter provided," that is (section 408; section 22026) "by a supplemental agreement approved by the Board," or (section 413; section 22031) because it is proved to the satisfaction of the Board that the agreement was "procured by the fraud, coercion, or other improper conduct of a party, or was founded upon a mistake of law or of fact."

In the present instance the supplemental agreement of December 29. 1919, has never been "modified or set aside," and hence is "valid and binding," and must "operate as a surrender by the parties thereto of their rights to any form or amount of compensation or damages for any injury or death occurring in the course of their employment, or to any method of determination thereof, other than as provided in article 3 of this act." Section 303 of the Act of June 2, 1915 (P. L. 736, 740; Pa. St. 1920, § 21990). This, of course, covers the father's claim also, for when the act applies defendant is liable only for the payments thereby required.

The judgment in each case is reversed.

GAIRT v. CURRY COAL MINING CO. ET AL.

(Supreme Court of Pennsylvania. Jan. 3, 1922.)

116 Atlantic Reporter, 382.

MASTER AND SERVANT—COMPENSATION BOARD AUTHORIZED TO REINSTATE DISABILITY AGREEMENT AFTER ORDER REFUTING AGREEMENT SHOULD TERMINATE.

A total disability agreement under the Workmen's Compensation Act (Pa. St. 1920, §§ 21916—22112) contemplates a total payment of compensation to the claimant for the period of 500 weeks, and when the board, either of itself or by one of its referees, relieves the employer of such payment, although it uses the word "terminate," it merely suspends that payment or that obligation awaiting further development of injuries, and the Legislature recognized this fact when it included in the amended law (Act June 26, 1919 [P. L. 661, § 6; Pa. St. 1920, § 22032]), the word "suspend," and the board, on ascertaining that the injured employee is totally and permanently disabled, may reinstate the agreement, notwithstanding that it has denied motions for review and modification in the interim, in view of Act June 2, 1915 (P. L. 750, 754), art. 4, §§ 408, 423.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

Appeal from Court of Common Pleas, Cambria County; Charles E. Evans, Judge.

Proceeding by Joe Gairt under Workmen's Compensation Act to reinstate a compensation agreement, opposed by the Curry Coal Mining Company, the employer, and the Aetna Life Insurance Company, the insurance carrier. There was an order reinstating the agreement, which was affirmed by the common pleas, and the employer and insurance carrier appeal. Affirmed.

Argued before Moschzisker, C. J., and Frazer, Simpson, Kephart, Sadler, and Schaffer, JJ.

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William A. Challener and Clarence Burleigh, both of Pittsburgh, and F. J. Hartmann, of Ebensburg, for appellants.

Chas. J. Margiotti. of Punxsutawney, and McCann & McCann and James W. Leech, all of Ebensburg, for appellee.

MOSCHZISKER, C. J. Joe Gairt, claimant and appellee. on October 10, 1919, presented a petition to the Workmen's Compensation Board to reinstate a compensation agreement. which had been entered into May 4, 1917, between him and the Curry Coal Mining Company, defendant, and the Ætna Life Insurance Company, insurance carrier (intervener), for injuries which Gairt had sustained, on March 10, 1917, while in the course of his employment as a coal miner for defendant.

On July 29, 1918. the compensation authorities made an order that the agreement of May 4, 1917, should "terminate." for "total disability," as of July 9, 1918, and that further compensation, "to be determined after claimant has returned to work and his loss of earning power has been established," should be paid for "partial disability." Payments ceased as of July 9. 1918. Between December 2, 1918, and March 24, 1919, three separate petitions were presented by Gairt, asking for review and modifications, all of which were refused. On August 24, 1920, the board, acting on the petition of October 10, 1919, first above mentioned, found that claimant was totally and permanently disabled; and it made an order reinstating the compensation agreement as of July 9. 1918. This was affirmed by the common pleas, and thereupon defendant and the insurance carrier appealed.

Appellants contend that the compensation authorities were without jurisdiction to make the order now before us, because claimant's right to receive compensation covering the period since July 9, 1918, was finally adjudicated against him by the refusal of the three prior petitions, and the board's power to act in that regard was exhausted. As to this, the court below held that the original order, stopping payments to claimant, "clearly left open." to be fixed at a subsequent date, "the payments to be made on acount of the injury, the amount of these payments to be determined on a later investigation," adding.

"The last investigation satisfied the board, on the question of fact, that the claimant had never been able to resume [his normal] work, * * * and it made, inter alia, the following findings of fact, amply supported by testimony: 'These injuries are permanent, and have rendered him unfit for the occupation in which he was engaged at the time of the injury, namely, that of a miner. * * * Claimant made a real effort to work, but was unable to do so, frequently being compelled to move about on his hands and knees because of the pain and inconvenience suffered in his efforts to comply with the referee's order. * * * [He] has demonstrated in his efforts, as well as by the medical testimony taken in these proceedings, that he is totally and permanently disabled.' [Again it may be said] the questions as to the extent of the injury, and the extent of its interference with the ability of the claimant to labor, were clearly left open by the order and decree of July 29, 1918, and the investigation subsequently made satisfied the board that the injury resulted in total disability. * * * The referee, in the first instance, very properly undertook to relieve the defendant from the obligation to pay until the exact status of the claimant could be determined * * * [and] * * * the testimony in the proceedings [for review and modification] did not develop what the present testimony clearly reveals."

We quite agree with the conclusion reached by the compensation board and affirmed by the learned court below; and, since the chairman of the former, in his opinion filed in this case, so correctly states the law, we quote therefrom as follows:

"The act gives to the board jurisdiction over an agreement [for purpose of review] at any time during the life of the agreement, or

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during the period of time [it has] to run. A disability agreement contemplates a total payment of compensation to the claimant for a period of 500 weeks. If, for any good cause * * * by action of the board, the employer is relieved of payment of compensation, at any time during the period, such action is entirely to the benefit of the employer, and he cannot complain if, subsequently, during the 500 weeks, a changed status of the claimant revives the employer's liability to pay compensation. When the referee made his order [stopping payments] the use of of the word 'terminate' was unfortunate, as it [likewise] was in the original act. It was beyond the power of the referee to find that total disability had so absolutely ceased that there could be no further liability on the part of the employer to pay the injured man on that basis. All the referee could [properly] find, as a fact, under the medical testimony at the time, was that the malignant features of total disability had disappeared; he could not find, nor could any human being know that, at some time in the future within the running of the agreement as contemplated by the laws, there would not be a recurrence of total disability [as there has been in this case]. When a workman is injured and a compensation agreement is entered into, it is within the minds of the parties, or at least the law imputes the intention to the parties, that such agreement may run 500 weeks, if the injury develops total disability for that length of time; so that, when the board, either of itself, or by one of its referees, relieves the employer of such payment, it merely suspends that payment or that obligation, waiting further developments of injuries. The Legislature recognized this fact when it included in the amended law (see section 413, Act of June 26, 1919, P. L. 642, 661 [Pa. St. 1920, § 22032]) the word 'suspend.' Many times previous to that amendment the board had made suspensory orders to relieve an employer from present payment, but preserving at the same time the right of payment to the injured man, should there be a recurrence of disability."

As said in the matter quoted above, the first order, stopping payments. merely suspended the obligations to pay, and, during the period indicated, it was within the power of the compensation authorities to revise their order to accord with the requirements of the case as the facts might demand.

The fundamental error of appellants lies in their idea that a proceeding under the Workmen's Compensation Law (Pa. St. 1920, §§ 21916—22112) is "litigation," and that established rules and principles of common-law practice should be applied thereto; whereas the fact is quite the contrary.

Although the arrangement, inaugurated by the Act of June 2, 1915, P. L. 736, to pay standardized compensation in cases of injury or death, rests on the theory of contract between employer and employee (Anderson v. Carnegie Steel Co., 225 Pa. 33, 39, 40, 99 Atl. 215) yet, in administering this plan, those vested with authority act for the state, in its capacity of parens patriae, and the relevant legislation clearly contemplates that, after a compensation agreement has been filed, or an order for compensation made, persons affected may apply for review and modification during the time the agreement or order has to run. Article 4, § 423, Act of 1915; article 4, § 408, and particularly article 4, § 413, Act of 1919; Hughes v. American Int. S. S. Corp., 270 Pa. 27, 30, 112 Atl. 433; also see Kuca v. Lehigh V. C. Co., procedural parts of the act of 1919 apply to pending cases. Under this benevolent piece of legislation, one in the position of the present claimant may, from time to time, come to those in authority saying, "Since you stopped payments to me, facts have developed which show my need of, and right to, compensation; I pray you to look into those facts and determine what, if anything. I am now entitled to receive;" and that, in substance, is what the present claimant did.

We need to refer to but one remaining point suggested by appellant; While the board makes reference to the fact that it had not been

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demonstrated whether or not claimant had capacity to work other than as a miner, since no different position has been given him by defendant, yet, as shown by the quotations hereinbefore recited from the opinions of the board below, the conclusions of neither of those tribunals depend on the circumstance that defendant had failed to place claimant at different work, but upon other facts which prove him to be totally and permanently disabled.

The assignments of error are overruled, and the judgment is affirmed.

McNEILL v. DIRECTOR GENERAL OF RAILROADS.

(Supreme Court of Pennsylvania. Feb. 6. 1922.)

116 Atlantic Reporter, 476.

1. COMMERCE—CUTTING CAR INTO INTERSTATE TRAIN "IN STATION ORDER" HELD TO RENDER TRAIN INTERSTATE.

Where an interstate train was being cut so that another car might be made a part thereof "in station order" so that each car when it reached its destination might readily be detached and the train sooner proceed, and thus interstate as well as intrastate transportation be better effected, the entire train, so far as liability is concerned, was an interstate train.

2. MASTER AND SERVANT—BURDEN ON COMPENSATION CLAIMANT TO SHOW RAILROAD EMPLOYEE'S INJURY WITHIN STATE LAW.

In a proceeding under the Workmen's Compensation Act (Pa. St. 1920, § 21916 et seq.) for death of a brakeman on an interstate train, the burden was on claimant to prove that some other railroad than deceased's employer was responsible for the injury, in order to recover on the theory that the federal law did not apply.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

Appeal from Court of Common Pleas, Philadelphia County; Norris S. Barratt. Judge.

Proceedings under the Workmen's Compensation Act by Frances M. McNeill, for the death of Joseph V. McNeill, opposed by the Director General of Railroads. United States Railroad Administration, Philadelphia & Reading Railroad, employer. Ruling of referee that decedent was employed in interstate commerce and claim not compensable affirmed by the Workmen's Compensation Board and common pleas court, and plaintiff appeals. Affirmed.

Argued before Moschzisker, C. J., and Frazer, Walling. Simpson, Kephart, and Sadler, JJ.

Harry A. Gorson and John J. McDevitt, Jr., both of Philadelphia, for appellant.

George Gowen Parry and Charlemagne T. Wolfe, both of Philadelphia, for appellees.

SIMPSON, J. [1] Joseph V. McNeill, a brakeman of defendant, while working on its right of way, was struck by another train and received injuries from which he died the same day. His widow, on behalf of her-

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self and their minor children presented a claim petition under the Workmen's Compensation Act (Pa. St. 1920, § 21916 et seq.), the referee held that decedent was engaged in interstate commerce at the time of the injury, and hence the claim was not compensable; the Workmen's Compensation Board and the court below sustained this ruling and from the judgment of the latter tribunal plaintiff appeals.

It is admitted that there were interstate cars in the train on which decedent was working, but it is alleged the train crew were engaged in a "purely shifting operation or local movement," and hence, under Murray v. Pgh.. C., C. & St. L. R. R. Co., 263 Pa. 398, 107 Atl. 21, interstate commerce was not affected, and the rules applicable thereto do not apply. to another, to be left at the latter point; while in the instant case, as case cited a purely local car, which had not been and was not intended to be a part of the train, was being shifted from one part of the yard to another, to be left at the latter point; while in the instant case, as appellant herself says, this interstate train was being "cut so that another car might be made a part" thereof "in station order;" that is, so that each car when it reached its destination might readily be detached and the train sooner proceed. thus the interstate as well as the intrastate transportation being the better effected. This necessarily had a direct bearing upon interstate commerce, and makes the entire train, so far as liability is concerned, an interstate train. Northern Pacific Railway Co. v. State of Washington, 222 U. S. 370, 32 Sup. Ct. 160, 56 L. Ed. 237; Phila. & Reading Ry. Co. v. Hancock, 253 U. S. 284, 40 Sup. Ct. 512, 64 L. Ed. 907. It is true that, after the train had gone a little further, it was to be broken up into several trains, which would proceed separately to the ultimate destination of the cars therein; but this progress towards the point of division was as much a movement in interstate commerce. as was the further movement of those cars to the place to which they were routed. Phila. & Reading Co. v. Hancock, supra.

[2] It is further contended by appellant that since decedent was injured by the negligent act of a railroad which was not his employer, the federal law does not apply, and hence she may invoke the provisions of our Workmen's Compensation Act. To this it need only be said that the evidence fails to disclose the basic fact upon which the claim is made, namely, that decedent was injured by a railroad which was not his employer. All that is shown touching this point is that decedent was killed by "a train from Washington to New York, operated over the Royal Blue Line; over the Reading, B. & O., and Central Railroad of New Jersey;" it does not apapear which of them was operating it at the time of the accident. The burden of establishing her right to recover being upon appellant. her failure to prove that some other railroad than defendant was responsible for the injury occurring on its right of way necessarily compels us to hold that her contention upon this point fails for this reason at least.

The judgment of the court below is affirmed.

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NUPP v. ESTEP BROS. COAL MINING CO. ET AL.

(Supreme Court of Pennsylvania. Jan. 3, 1922.)

116 Atlantic Reporter, 391.

MASTER AND SERVANT—COMPENSATION TO SURVIVING CHILDREN NOT REDUCED BY THE PERIOD DECEASED RECEIVED COMPENSATION.

Workmen's Compensation Act, § 306 (Pa. St. 1920, § 21998), providing that should the employee die from injury, "the period" during which compensation shall be payable to his dependents, under section 307 compensation shall be payable to his dependents. under section 307 (Pa. (Pa. St. 1920, §§ 21999—22002), shall be reduced by the period during which compensation was paid to him in his lifetime, applies to the widow, but has no application to the surviving children of an employee receiving compensation, section 307, subsec. 7. providing that in the event of death of the employee the compensation of each child shall continue after the period of 300 weeks, until such child reach the age of 16 years.

(For other cases, see Master and Servant, Dec. Dig. § 386[2].)

Appeal from Court of Common Pleas, Indiana County; J. N. Langham, President Judge.

Proceedings under the Workmen's Compensation Act by Alice Nupp for the death of Irvin Nupp. opposed by the Estep Bros. Coal Mining Company. employer, and another, insurer. On appeal to the court of common pleas the award and finding of Compensation Board was approved, and defendants appeal. Affirmed.

Argued before Moschzisker, C. J., and Frazer, Walling. Simpson, Kephart, Sadler. and Schaffer, JJ.

Frank P. Martin, of Pittsburgh, for appellants.

J. W. Leech (of Leech & Leech), of Ebensburg, Pa., for appellee.

SCHAFFER, J. The amending Workmen's Compensation Act of June 26, 1919 (P. L. 642, 646, § 306 [Pa. St. 1920, § 21998]) provides:

"Should the employee die as a result of the injury. the period during which compensation shall be payable to his dependents, under section three hundred and seven of this article, shall be reduced by the period during which compensation was paid to him in his lifetime, under this section of this article."

Irvin Nupp. an employee of defendant, was injured on December 23, 1918, and died March 3, 1920, as a result of his injuries. He had received compensation for a period of 58 weeks at the rate of $10 per week under the act of 1915. He left to survive him a widow and four children.

The insurance carrier of defendant claimed, under the section of the act quoted, that the period during which compensation is payable to the widow, 300 weeks, should be reduced 58 weeks, by reason of the payments made to the husband while he lived, and that, at the end of the 242-week period, during which the widow will be entitled to receive compensation, payment should be commenced to the children, but that payment to them should terminate, with respect to each child, 58 weeks prior to its sixteenth birthday. An agreement to this effect having been tendered the widow, she refused to sign it, and a claim petition was filed with the compensation referee, who declined to find as defendant requested, and held that the only period which should be reduced by reason of payments to the decedent in his lifetime was the period of 300 weeks during which

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compnsation was payable to the widow, and that at the end of the 242-week period during which payments were to be made to her payments should be made to the children until each child not then 16 years of age should reach that age. The finding was approved by the Compensation Board and by the common pleas on appeal to it. From the action of the latter the defendant brings this appeal.

To give effect to the contention of appellant would be in the teeth of explicit terms of the act (section 307, subsec. 7 [Pa. St. 1920, § 22002]), which provides:

"The compensation of each child shall continue after said period of three hundred weeks until such child reach the age of sixteen."

Two of the children will be under 16 years of age, when payments cease to the widow. The effect of giving to the section of the act under consideration the construction contended for would be to stop the payments, not when the act says they shall cease, when these children are 16 years old, but when they are 14 years and 10 months old. The answer to this contention is that the law is not so written.

The act does not provide for the double deduction from the widow and the children, but that "the period," thereby meaning in this case the 300-week period, shall be reduced "by the period" during which the deceased received compensation in his lifetime.

The judgment of the court below was correct. and we affirm it.

PATTEN HOTEL CO. v. MILNER.

(Supreme Court of Tennessee. Dec. 17, 1921.)

238 Southwestern Reporter 75.

1. MASTER AND SERVANT—DEATH OF FAINTING COOK INJURED BY TRUCK HELD "ARISING OUT OF AND IN COURSE OF EMPLOYMENT" WITHIN COMPENSATION ACT.

Where a cook employed in a hotel kitchen became overheated and fainty, and stepped into the alley to get fresh air, fainted and fell, and his arm was run over by the wheels of a passing truck. from which injury he died, and it was shown that the kitchen was always warm. and it was necessary for employees to step into the alley for air, the fainty condition arose out of employment and a causal connection between the employment and injury appeared justifying recovery under the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

2. MASTER AND SERVANT—WANT OF NOTICE PRESENTED BY RECORD IN COMPENSATION CASE.

Where in the record there was no minute entry of the court which showed that an amendment to an answer setting up as a defense that failure to give the notice required by the Workmen's Compensation Act was ordered made, but the recital in the final judgment showed that the amended answer was considered by the court in determining the case, a motion to strike the amended answer from the record must be overruled, and the defense treated as properly presented by the record.

(For other cases, see Insurance. Dec. Dig. § 412.)

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3. MASTER AND SERVANT—COMPENSATION CLAIM BARRED BY WANT OF NOTICE.

Workmen's Compensation Act, § 30, subs. 6, provides that compensation shall be paid to deceased's widow, and failure to give the 30-day notice required by sections 22 and 23, for injury occurring May 24, 1920. until August 4, 1920, or show excuse for not giving such notice. defeats a recovery, notwithstanding a minor child of five was one of the claimants.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

Appeal from Circuit Court, Hamilton County; Oscar Yarnell, Judge.

Proceedings under the Workmen's Compensation Statute by James Milner, administrator of Wilson Milner, deceased. against the Patten Hotel Company, to recover compensation for decedent's death, in which Sudie Milner, deceased's widow, filed a cross-petition and James Milner amended, his petition to sue as of guardian of deceased's minor son. From judgment for plaintiff as guardian of deceased's minor son and the widow, defendant appeals. Reversed, and petitions dismissed.

Allison, Lynch & Phillips. of Chattanooga, for appellant.

W. A. Schoolfield, of Chattanooga, for appellee.

HALL. J. This appeal involves a claim for compensation under the workmen's compensation statute (Pub. Acts 1919, c 123).

Wilson Milner, deceased, was a cook for the Patten Hotel in the city of Chattanooga, Tenn., which is operated by the defendant hotel company. On May 24. 1920. he was engaged in the performance of his duties in the kitchen of the hotel. Evidence was offered tending to show that it was very warm in the kitchen, and that the deceased became too hot and was stricken with a fainty feeling. He went through a doorway that opened from the kitchen into an alley that was used principally in conveying supplies and baggage to the hotel by trucks and other vehicles, and merchandise to and from a wholesale mercantile house situated on the opposite side of the alley from the hotel, for the purpose of getting some fresh air. While standing in the alley at or near the door he fainted, or swooned, and fell, and his arm was run over by the rear wheel of an automobile truck that was passing along the alley and being operated and controlled by the American Railway Express Company, and was severely bruised and lacerated. He was immediately carried to the hospital in an unconscious condition, and soon thereafter lockjaw set up from the injury and caused his death. He left surviving him a widow and a minor son by a former marriage, Wilson Milner, Jr., who was five years of age.

Deceased's widow, Sudie Milner, instituted suit in the circuit court of Hamilton county against the American Railway Express Company to recover damages for her husband's death. This suit was later tried and determined in the circuit court in favor of the express company.

The deceased's brother, James Milner, qualified as administrator of the deceased's estate in the county court of Hamilton county. and on August 16, 1920, filed his petition, as such administrator, in the circuit court of said county against the hotel company, seeking compensation for the benefit of the son under the workmen's compensation statute.

The hotel company answered this petition, averring, among other things, that the widow Sudie Milner, was at that time prosecuting a common law action in the circuit court of Hamilton county against the American Railway Express Company to recover of it damages for her husband's death, which suit had not been finally determined.

The hotel company further averred in its answer that if it were liable to the dependents of the deceased, Wilson Milner, for compensation under the workmen's compensation statute, the widow of the deceased alone as entitled to sue for such compensation for the benefit of herself

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and the deceased's dependnt child; that by reason of thes facts the action brought by the administrator should not proceed to final hearing without said widow being made a party thereto, and that she be given ana opportunity to assert in said action whether or not she would elect to claim compensation under the workmen's compensation statute for the benefit of herself and said minor child, or would continue her suit gainst the American Railway Express Company. The defendant denied, however, that it was liable under the workmen's compensation statute to the widow or minor child of the deceased for any amount whatsoever on account of the injury and subsequent death of the deceased.

The defendant filed its answer in the nature of a cross-petition, and prayed that process issue and be served on the widow, whom the answer averred was a resident of Hamilton county; that she be required to answer said cross-petition. but not under oath; that she be required to elect whether she would assert claim against the hotel company in said pending action for compensation, as the widow of the deceased, or prosecute her suit against the American Railway Express Company; that if she would elect to claim compensation for her husband's death under the workmen's compensation statute that she be required to set up her claim by a proper petition in said compensation proceeding, and that defendant hotel company be permitted to answer said petition and set up its defenses.

In acordance with the prayer of the petition of the hotel company process was issued and served upon Sudie Milner, and she answered the petition of the hotel company. In her answer she claimed the right to prosecute her suit against the express compaany, and at the same time claim compensation under the workmen's compensation statute for the benefit of herself and the minor, son, Wilson Milner, Jr. She filed her answer in the nature of a cross-petition, and prayed for a judgment for the compensation provided for by the workmen's compensation statue in such cases.

The hotel company answered the widow's petition, and denied that the injury to the deceased arose out of and in the course of his employment within th meaning of said workmen's compensation statute, and denied that it was liaable for any compensation whatsoever for said injury.

In the meantime James Milner, who filed the original petition as administrator of the deceased's estate, qualified as guardian of the minor, Wilson, Milner, Jr., and, with leave of the court amended his petition so as to sue in his capacity as guardian.

Later, and before the case was heard, the hotel company, with leave of the court, amended its answer, and set up the additional defense that neither of the petitioners could recover of it compensation in said case for the reason that they had failed to give defendant notice of their claim in writing, as required by the provisions of sections 22 and 23 of the Workmen's Compensation Statute.

The court, upon final hearing, rendered a judgment in favor of James Milner, guardian of Wilson Milner, Jr., and in favor of Sudie Milner, widow of the deceased, for 40 per cent. of the average weekly wages of the deceased, which the proof showed were $18 per week, for a period of 400 weeks, subject to the death of the minor beneficiary, and the death or remarriage of the widow.

The hotel company made a motion for a new trial, which was overruled, and it has appealed to this court, and has assigned errors. By its assignments of errors it insists:

((1) That there is no evidence tending to show that the accident, which resulted in the deceased's death, arose out of and in the course of his employment.

(2) That the trial court erred in rendering judgment against defendant for any sum whatsoever, because the undisputed evidence shows

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that no notice was given it of the injury by the claimants, or any one on their behalf, as required by the provisions of section 22 and 23 of the workmen's compensation statute.

[1] We think there is material evidence tending to show that the injury which resulted in the deceased's death arose out of and in the course of his employment. There was material evidence introduced tending to show that he became overheated while performing his duties as cook in the kitchen and became fainty, and stepped into the alley to get some fresh air, and fainted and fell, and his arm was run over by one of the wheels of the passing truck. There is also evidence tending to show that the kitchen in which deceased worked was always very warm, and that it was frequently necessary for the employees who worked in the kitchen to step into this alley for the purpose of getting fresh air. It is shown that this was regularly done by the employees working in the kitchen.

In Connell v. Daniels Co., 203 Mich. 73, 168 N. W. 1009, 7 A. L. R. 1304, it is said:

"An injury arises out of the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury."

To the same effect is McNicol's Case, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A. 306.

In Baum v. Industrial Com., 288 Ill. 516. 123 N. E. 625, 6 A. L. R. 1245, it was said:

"While there must be some causal relation between the employment and the injury, it is not necessary that the injury be one which ought to have been foreseen or expected. It must, however. be one which, after the event, may be seen to have had its origin in the nature of the employment."

To the same effect is the holding of the court in Pekin Cooperage Co v. Industrial Com., 285 Ill. 31, 120 N. E. 530.

The deceased's overheated and fainty condition arose out of his employment, and it was on acount of this condition that he became exposed to the danger which produced the injury. We, therefore, think the necessary causal conection between the employment and the injury appears.

[2] The question of notice presents a more serious question. It is insisted by appellees that there is no proper pleading in the case raising the question of the failure to give the necessary notice. It is conceded by appellees that a motion was made by the hotel company to amend its answer so as to set up the defense of a failure on the part of appellees to give notice. It is said, however, by appellees that there is nothing in the record to show that this motion of defendant was ever granted by the court, and they, therefore, moved to strike said motion, which appears as a part of the record on page 17,

It is true that there is no minute entry of the court which shows that said amendment was ordered to be made. It does appear. however, in the final judgment rendered by the trial court, that the case was heard upon the pleadings, including the amended answer of the hotel company, and the motion of the widow Sudie Milner, to strike that portion of the amended answer of the hotel company which offered as a defense to said action the election of the widow to sue the American Railway Express Company, and the oral proof heard in open court.

We think the recital in the final judgment shows that the amended answer of the hotel company, which averred a failure to give the required notice, was considered by the court in the determination of the case, and that appellee's motion to strike must be overruled. and the defense of the hotel company on account of appellee's failure to give notice must be treated as properly presented by the record.

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Section 22 of the Workmen's Compensation Act provides as follows:

"That every injured employee or his representative shall, immediately upon the occurrence of an injury or as soon thereafter as is reasonable or practicable, give or cause to be given to the employer written notice of the injury. and the employee shall not be entitled to physician's fees nor to any compensation which may have accrued under the provisions of this act from the date of the accident to the giving of such notice, unless it can be shown that the employer had actual knowledge of the accident; and no compensation shall be payable under the provisions of this act unless such written notice is given the employer within thirty days after the occurrence of the accident, unless reasonable excuse for failure to give such notice is made to the satisfaction of the tribunal to which the claim for compensation may be presented."

By section 23 it is provided:

"That the notice required to be given of the occurrence of an accident to the employer shall state in plain and simple language the name and address of the employee, the time. place and nature and cause of the accident resulting in injury or death, and shall be signed by the claimant or by some person in his behalf, or by any one or more of the claimant's dependents if the accident resulted in death to the employee. But no defect or inaccuracy in the notice shall be a bar to compensation unless the employer can show to the satisfaction of the tribunal in which the matter is pending that he was prejudiced by the failure to give the proper notice and then only to the extent of such prejudice."

It is conceded by claimants that no notice whatsoever was given to the hotel company of the injury within 30 days after its occurrence, and no excuse was offered for their failure to give notice.

The accident happened on May 24, 1920. The first and only notice that was ever given the hotel company of said accident is contained in a letter from Messrs. Crutchfield & Chamlee, attorneys for appellees, of date of August 9, 1920, which was more than two months after the accident.

This court, in the case of Black Diamond Collieries v. Deal, decided at Knoxville on October 27, 1921 (Tenn.) 234 S. W. 322 (opinion for publication), held that sections 22 and 23 of the workmen's compensation statute mean just what they say, and that written notice must be given within 30 days after the injury, or else a reasonable excuse for failure to give the notice must be made to the satisfaction of the tribunal trying the case. In that case the court said:

"There must be written notice within 30 days, or there must be a satisfactory excuse. Otherwise compensation cannot be enforced."

In Bloomfield v. November, 219 N. Y. 374, 114 N. E. 805. it was said:

"This requirement ought not to be treated as a mere formality or be dispensed with as a matter of course whenever there has been a failure to serve such notice."

In Smith v. C. N. R., 7 West. W. Rep. 596, it was neld that the reason for requiring notice is to give the employer an opportunity to investigate the cause of the accident and the nature of the injury at an early stage.

In the following cases it was held that the want of notice of the injury is by force of the statute a bar to compensation unless excused: Mercer v. Dublin Co., 6 B. W. C. C. (Eng.) 441; Murphy's Case, 226 Mass. 60, 115 N. E. 40.

It is said in the instant case that notice was unnecessary because the hotel company was shown to have had actual knowledge of the accident and injury to the deceased.

In Black Diamond Collieries v. Deal (Tenn.) 234 S. W. 322, this court said:

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"Unless the employer has actual knowledge of the accident the employee shall not be entitled to any compensation which may have accrued prior to written notice to the employer. Unless such written notice is given within 30 days after the occurrence of the accident no compensation shall be payable under the provisions of the act, except a reasonabale excuse for failure to give the notice is made to the satisfaction of the tribunal trying the case. Such is the effect of section 22."

[3] It is next said that it appears that Wilson Milner, Jr., the minor son of the deceased, was only five years of age at the time of his father's injury and death, and was without a regular guardian until March 26, 1921, and that this fact itself was sufficient to excuse him from giving the employer notice of the injury required by sections 22 and 23 of the Workmen's Compensation Act.

By subsection 6 of section 30 of said act it is provided that if the deceased employee leave a widow and dependent child the compensation provided by said act shall be paid to the widow for the benefit of herself and such child. The right, therefore, was in the widow to make claim for the compensation due in the instant case, and it was her duty to give the notice required by sections 22 and 23 of said act, and, not having done so and having offered no reasonable excuse for not giving said notice she cannot recover in this action.

It, therefore, results that, for the want of notice as required by sections 22 and 23 of the statute, and the widow's failure to show a sufficient excuse for not giving such notice, the judgment of the court below will be reversed, and the petitions of appellees will be dismissed, with costs.

TENNESSEE CHEMICAL CO. v. SMITH ET UX.

(Supreme Court of Tennessee. March 11, 1922.)

238 Southwestern Reporter, 97.

1. MASTER AND SERVANT — FINDING OF ACCIDENTAL DEATH WITHIN COMPENSATION ACT SUSTAINED.

In a proceeding under the Workmen's Compensation Act to obtain compensation for death of a servant, evidence *held* to sustain a finding that death was caused by accident arising out of and in the course of employment: body of deceased being found in reservoir near plant.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

2. MASTER AND SERVANT — ACCIDENTAL DEATH WITHIN COMPENSATION ACT PROVABLE BY CIRCUMSTANTIAL EVIDENCE

That death of servant was caused by accident may be shown by circumstantial evidence in a proceeding under the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

3. MASTER AND SERVANT — INJURY WHILE WASHING AFTER WORK HELD ONE "ARISING OUT OF AND IN COURSE OF EMPLOYMENT" WITHIN COMPENSATION ACT.

A servant who fell into a reservoir and was drowned while washing up preparatory to going home according to custom, died as the re-

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sult of an accident "arising out of and in the course of employment" under the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

4. MASTER AND SERVANT — DEPENDENCY WITHIN COMPENSATION ACT QUESTION OF FACT.

Question of the dependency of a father and mother is one of fact under Workmen's Compensation Act. § 30, subsecs. 3, 3a. and a finding of dependency will not be disturbed if there is any evidence to support it.

(For other cases, see Master and Servant, Dec. Dig. § 412.)

5. MASTER AND SERVANT—FINDING OF PARTIAL DEPENDENCY WITHIN COMPENSATION ACT SUSTAINED.

In proceeding by parents under the Workmen's Compensation Act to obtain compensation for the death of 19 year old son. a finding that the parents were partial dependents *held* sustained by the evidence.

(For other cases, see Master and Servant, Dec. Dig. § 405[5].)

6. MASTER AND SERVANT — COMPENSATION TO PARENTS FOR MINOR SON'S DEATH NOT LIMITED TO MINORITY.

Parents, who were partial dependents of a minor son, were entitled to compensation for a period extending beyond minority under the Workmen's Compensation Act.

(For other cases, see Master and Servant. Dec. Dig. § 386[1].)

Error to Circuit Court, Davidson County; Chester K. Hart, Special Judge.

Proceeding by Robert Smith and wife under the Workmen's Compensation Act to obtain compensation for the death of their son, Robert Smith, Jr. Opposed by the Tennessee Chemical Company, the employer. There was an award of compensation, and the employer brings error. Affirmed.

Levine & Levine, of Nashville, for plaintiff in error, Tenn. Chemical Co.

Thos. G. Watkins and Thos. H. Malone, both of Nashville, for defendants in error Smith.

McKinney, J. This proceeding was instituted by Robert Smith and wife, Roxie Smith, against the plaintiff in error, Tennessee Chemical Company, for the purpose of recovering compensation for the accidental death of their son, Robert, Jr., while in its employ.

Their petition was filed in the circuit court of Davidson county. and alleged that the deceased met his death by accidental injury which arose out of and in the course of his employment by the company, and alleged that they were partially dependent upon deceased for their support prior to and at the time of his death.

The circuit judge found these issues in favor of said petitioners, and the company has appealed to this court, and has assigned 13 errors.

No question is made as to the amount adjudged as compensation provided the company is liable for any sum.

It will be unnecessary to take up each assignment of error, since they may be grouped under three or four heads, and we will dispose of the questions raised by said assignments of error. The first question raised is that the death of Robert Smith, Jr., was not caused by acci-

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dent arising out of and in the course of his employment by the company. This involves a brief statement of the facts.

The Tennessee Chemical Company is a corporation with its plant located near Nashville. At the time of Smith's death, and for some years prior thereto, it was engaged in the manufacture of fertilizer. At the time deceased was killed he was employed by said company, and had been for about six years.

In the manufacture of fertilizer the company used water to cool its sulphuric acid chambers, and in the course of the process it became hot. This water so heated is piped from the plant to a reservoir into which it sprays. Said reservoir is 60 feet in diameter, 12 to 14 feet in depth, and is located on the premises of the company at a distance of about 150 feet from its office building. The top of said reservoir rises from 12 to 14 inches above the level of the surrounding surface. However, about the top or coping of the reservoir dirt has been thrown or filled in so that the surface immediately surrounding the reservoir slopes abruptly to the top coping, and, circling the inside of this pool and flush with its top is a 4-inch pipe, from which, at regular intervals, smaller goose neck pipes project towards the center of the reservoir. From these smaller goose neck pipes the water heated in the process of cooling the acid chambers in the company's plant spray into the reservoir. The reservoir is filled with water to the brim at all times. This reservoir is situated in plain view of the office of the company.

The fertilizer is mauufactured by the company from animal carcasses, bone meal, street sweepings, and other constituents, and the handling of the finished products results in considerable soiling, and makes bathing in hot water desirable, if not necessasry. The company furnishes lockers for its employees, and upon coming to the plant they go to their lockers and exchange their street clothes for their work clothes, and when the day's work is over. after proper bathing, they change their work clothes for their street clothes. The company furnishes hot water for the white employees, but the custom was for the colored employees to take their buckets and go to said reservoir and obtain water for bathing purposes. This custom was well known to the company, and was acquiesced in by it without protest.

[1, 2] On the evening of September 22, 1919. at the close of the day's work. Robert Smith, Jr., went to his locker, obtained his bucket, and started to said reservoir to get hot water with which to bathe. That was the last time he was ever seen alive. His companion, who had a locker next to his, Eugene West, was with him when he started to the reservoir, but thought nothing of his failure to return promptly, as deceased frequently cleaned the laboratory of the company after regular hours. The next morning the body of deceased, with his working clothes on, together with said bucket and a small piece of pipe, was found in the bottom of said reservoir; and, without detailing the evidence, we are satisfied from the evidence that the deceased accidentally fell into said reservoir and was drowned. While there is some evidence to the effect that his neck was broken, from which it is argued that he was killed or assaulted by some other party or employee, this insistence is not supported by the weight of the evidence; and, in any event, there is ample evidence to support the finding of the circuit judge that his death was caused by accident arising out of and in the course of his employment. That his death was so caused may be shown by circumstantial evidence just as any other fact is proven. Corpus Juris Treatise on Workmen's Compensation Acts, p. 127; Flucker v. Carnegie Steel Co., 263 Pa. 113, 106 Atl. 192; Donlon v. Kips Bay Brewing & Malting Co., 189 App. Div. 415, 179 N. Y. Supp. 93; Hollenbach Co. v. Hollenbach, 181 Ky. 262, 204 S. W. 152, 13 A. L. R. 524; Manziano v. Public Service Gas Co., 92 N. J. Law, 322, 105 Atl. 484; Steel Sales Corporation v. Industrial

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Commission of Illinois et al.. 293 Ill. 435, 127 N. E. 698, 14 A. L. R. 274.

[3] It is none the less an injury by accident arising out of and in the course of employment, though it occurred to the employee while not actually engaged in the work of the master.

In Johnson Coffee Co. v. McDonald, 143 Tenn. 505, 226 S. W. 215, this court said:

"As to the first point, the cases arising under workmen's compensation laws are practically unanimous in holding that injuries received by employees while in the act of leaving, or preparing to leave, the place of employment to get lunch or refreshment, or while eating lunches on the premises, as allowed by the employer, arises out of and in the course of emppployment."

In the case of Terlecki v. Strauss, 85 N. J. Law, 454, 89 Atl. 1023, the court held that where a factory employee quit work at her machine shortly before noon, and was, in accordance with custom, combing particles of wool out of her hair preparatory to going home at a point away from her machine, when her hair was caught in other machinery and she was injured, she was entitled to compensation, the court through Judge Swayze saying:

"We have no doubt that the accident happened in the course of employment. It would be entirely too narrow a construction to limit the benefit of the statute to the time the workman is actually employed at his machine. He must have time to reach his machine and to get away from his employer's premises. In fact, it is a necessary implication of the contract of employment that the workman shall come to his work and shall leave with reasonable speed when the work is over. The preparation reasonably necessary for beginning work after the employer's premises are reached and for leaving when the work is over is a part of the employment. A workman is none the less in the course of employment because he is engaged in changing his street clothes for his working clothes, or in changing his working clothes for his street clothes. In the present case it is reasonably necessary that the petitioner should comb her hair and remove the particles of wool before leaving the factory."

In Steel Sales Corporation v. Industrial Commission of Illinois, supra, the court said:

"An employee while at work for his employer may do those things which are necessary to his own health and comfort, even though they are personal to himself, and such acts will be considered incidental to his employment."

In Whiting-Mead Commercial Co. v. Industrial Accident Commission of California, 178 Cal. 505, 173 Pac. 1105, 5 A. L. R. 1518, the court held that an accident incident to the attempt by one employed in the business of wrecking houses to light a cigarette in working hours arises out of his employment within the operation of the Workmen's Compensation Act (St. Cal. 1917, p. 831) so as to entitle him to compensation for injury to his hand through ignition of a bandage saturated with turpentine to alleviate the pain of a nail wound in his hand. The court said:

"Such acts as are necessary to the life, comfort, and convenience of the servant while at work, though strictly personal to himself, and not acts of service, are incidental to the service, and injury sustained in the performance thereof is deemed to have arisen out of the employment. A man must breathe and occasionally drink water while at work. In these and other conceivable instances he ministers unto himself, but in a remote sense these acts contribute to the furtherance of his work. * * * That such acts will be done in the course of employment is necessarily contemplated, and they are inevitable incidents. Such dangers as attend them, therefore, are incident dangers. At the same time in-

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juries occasioned by them are accidents resulting from the employment.'

In re Ayers, 66 Ind. App. 458, 118 N. E. 486, the court said:

"A workman who receives an injury while at a place on, or reasonably near, the premises where he is to work, or at a place to which his employment requires him to go while doing something incident to or connected with his employment, or which is reasonably necessary for, and preparatory to, the beginning of his work, or while doing something reasonably connected with his employment, or incident thereto, after his actual labors in his employment are completed for the day, or for any particular period, may be allowed compensation for such injury"—citing numerous cases.

And, again, the court in the same case said further:

"Where an employee is injured while on duty, or while doing something incident to his employment, and reasonably necessary to his personal health or comfort, though not strictly necessary to his employment, such injury will ordinarily be held to arise out of the employment" —citing authorities.

And in Hollenbach Co. v. Hollenbach, supra, it was stated:

"Undoubtedly one who is washing, dressing, and preparing himself on the master's premises at the close of the day's work, to leave the premises is, in the meaning of the act, in the course of his employment, because all these things are reasonably incident to the day's work."

In the case of Milne v. Sanders, 143 Tenn. 602, 228 S. W. 702, this court said:

"It is well settled in cases of this character that the circuit judge will not be reversed if there is any evidence to support his finding."

Applying this rule to the case under consideration, we find ample evidence to support the finding of the circuit judge, and the assignments of error relating to the question which we have been discussing will be overruled.

[4] The next contention, and the one upon which counsel for the company chiefly rely, is that the father and mother of deceased are not dependents within the meaning of our statute.

Many authorities have been cited by counsel for the respective parties upon this question, but the provision of our statute is so very clear and plain that it speaks for itself, and makes a citation of authority from other jurisdictions unnecessary.

Subsections 3 and 3a of section 30 of chapter 123 of the Acts of 1919 are as follows:

"(3) Wife, child, husband, mother, father, grandmother, grandfather, sister, brother, mother-in-law, and father-in-law who were wholly supported by the deceased workman at the time of his death and for a reasonable period of time immediately prior thereto shall be considered his actual dependents, and payment of compensation shall be made to them in the order named.

"(3a) Any member of a class named in subdivision (3) who regularly derived part of his support from the wages of the deceasaed workman at the time of his death and for a reasonable period of time immediately prior thereto shall be considered his partial dependent, and payment of compensation shall be made to such dependents in the order named."

The first inquiry is, Did the father and mother derive a part of their support from the deceased; and, second, were such contributions by the deceased regularly made?

The question of dependency is one of fact. In the Corpus Juris Treatise of the Workmen's Compensation Acts, p. 59, the annotator, in discussing the question of dependence, states:

"And except as to those persons who stand in such relation to the employee as, under the terms of the statutes, to be conclusively pre-

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sumed to be dependent on him, the question of dependency is one of fact."

Many authorities are cited in support of this text.

The circuit judge having held that the original petitioners were partial dependents, his judgment will not be disturbed if there is any evidence to support it.

The evidence shows that the deceased was 19 years of age at the time of his death; that he had been in the employ of the company for about 6 years; that at the time of his death and for some months prior thereto he had received regular wages of $3.50 per day; that he frequently did extra work, and that his weekly wage ranged from $20 to $24 per week. The evidence further shows that upon receipt of his weekly wage he always turned same over to his mother, and that she would occasionally give him $5 for spending money, and about twice a year, when he wanted to purchase clothes, she would return to him $2 additional. The evidence also shows that the father of deceased, who is an old man, received about $80 per month as an employee of the company. and that he turned over most, if not all, of his wage or wages to his wife, and that out of the sums so received from her husband and son she paid the expenses of the household, including taxes and insurance, paid the grocery bills, and "put a little by for the medicine and doctor," but she testified that, living as they did, they consumed practically all of said income, and that she was unable to save any money. It will thus be seen that their income will be largely reduced, and it is to meet a case of this character that provision is expressly made by the statute.

[5] We are of the opinion, therefore, that the petitioners are partial dependents within the meaning of our statute, and the assignments of error raising this question will be overruled.

[6] Error is also assigned upon the action of the trial court in awarding compensation for a period that would have extended beyond the minority of the deceased.

We find no provision in the statute limiting such compensation to the minority of the deceased, and it is not our province nor right to read such provision into the statute. In other jurisdictions compensation has been awarded where the deceased was of age at the time of his death. We have not had an opportunity to read the statutes upon which said decisions were based. Some of the cases so holding are: Parson v. Murphy et al., 101 Neb. 542, 163 N. W. 847, L. R. A. 1918F, 479; Belcher v. Campo, 1 Conn. Com. Dec. Dig. 612; In re McMahon, 229 Mass. 48, 118 N. E. 189.

This assignment of error will therefore be overruled.

The remaining assignment of error relates to the action of the trial court in excluding certain testimony of a witness by the name of Nappier.

In this the trial court was not in error, and this assignment of error will be disallowed.

Upon the whole, we find no error in the judgment of the circuit court. and it will be affirmed, with costs.

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MILLERS' INDEMNITY UNDERWRITERS v. PATTEN ET AL. (No. 1892.)

(Court of Civil Appeals of Texas. Amarillo. Feb. 8, 1922. Rehearing Denied March 15, 1922.)

238 Southwestern Reporter, 240.

1. MASTER AND SERVANT—PARTNER NOT AN "EMPLOYEE" WITHIN COMPENSATION LAW.

One who is a partner with a company operating a cotton gin wherein he is accidentally killed is not an employee of the company within the Workmken's Compensation Law (Vernon's Ann. Civ. St. Supp. 1918, arts. 5246—1 to 5246—91).

(For other cases. see Master and Servant. Dec. Dig. § 361.)

(For other definitions, see Words and Phrases, First and Second Series, Employee.)

7. MASTER AND SERVANT — OBJECTION TO INSTRUCTION IN COMPENSATION SUIT HELD TOO GENERAL.

In a suit to set aside an award of compensation under the Workmen's Compensation Law (Vernon's Ann. Civ. St. Supp. 1918, arts. 5246—1 to 5246—91) for death involving the issue as to whether deceased was a partner, an objection to a charge defining partnership that it was not the law, was confusing, and calculated to influence the jury to make an improper answer to a special issue submitted. *held* too general to require a reversal.

(For other cases, see Master and Servant, Dec. Dig. § 418[3].)

9. MASTER AND SERVANT—FINDING OF NOTICE OF CLAIM FOR COMPENSATION SUSTAINED.

Evidence *held* to show that the insurance carrier had received due notice of claim for compensation under the Workmen's Compensation Law (Vernon's Ann. Civ. St. Supp. 1918, arts. 5246—1 to 5246—91).

(For other cases, see Master and Servant, Dec. Dig. § 405[1].)

10. MASTER AND SERVANT — STRICT COMPLIANCE WITH REQUIREMENTS OF COMPENSATION LAW AS TO NOTICE OF CLAIM MAY BE WAIVED.

Under the Workmen's Compensation Law (Vernon's Ann. Civ. St. Supp. 1918, art. 5246—43) the Industrial Accident Board may waive strict compliance with the requirements as to notice and the filing of claims before it.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

Appeal from District Court, Hall County; J. A. Nabers, Judge.

Suit by the Millers' Indemnity Underwriters against Maggie May Patten and others, to set aside an award of the Industrial Accident Board granting compensation under the Workmen's Compensation Law. Judgment for defendants. and plaintiff appeals. Affirmed.

Harry P. Lawther, of Dallas, for appellant.

A. T. Cole, of Clarendon, for appellees.

BOYCE, J. The appellant, Millers' Indemnity Underwriters, brought this suit against appellees, Maggie May Patten and her minor children, to set aside an award of the Industrial Accident Board, which granted

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the appellees compensation under the Workmen's Compensation Law (Vernon's Ann. Civ. St. Supp. 1918, arts. 5246—1 to 5246—91) for the death of W. H. Patten, the husband and father of appellees.

W. H. Patten was killed while operating some of the machinery in a cotton gin at Brice, Tex. The Memphis Cotton Oil Company, a corporation, held the legal title to the gin at such time, and had a policy written by the appellant providing compensation insurance for its employees under the provisions of the Workmen's Compensation Law. The award of compensation was based on allegations that W. H. Patten was an employee of the Memphis Cotton Oil Company within the meaning of said law. The appellant denied that he was an employee of the oil company, and specially pleaded that he was a part owner of the said Brice gin, and in partnership with the oil company in the operation thereof. The only issue submitted to the jury was as to whether W. H. Patten was a "partner of the Memphis Cotton Oil Company in the operation of the Brice gin at the time of the accident which caused his death." The jury answered this issue in the negative.

The principal questions raised on appeal center around the submission of the issue of partnership. Appellant contends, under the first two propositions presented, that the trial court should have directed a verdict in its favor on the theory that the evidence conclusively established a partnership between Patten and the oil company. Its fourth proposition attacks the finding of the jury on the issue of partnership, and the fifth proposition complains of the trial court's definition of partnership. The appellee's counter propositions are: (1) That there was no consummated partnership, because the agreement, if any, for partnership contemplated the conveyance to Patten of an interest in real property and the agreement was not expressed in writing and in conveyance actually made; (2) that there would be no partnership because the oil company was a corporation without the power to form a partnership; (3) that the agreement, if any was made, was only to share profits, and created no partnership; (4) that there was sufficient conflict in the evidence as to present an issue for decision by the jury as to the real nature of the agreement between the deceased and the oil company. We make the following statement of the facts to be considered in the disposition of these propositions:

The Brice gin was located in the vicinity of Memphis, Tex., and consisted of seven acres of land, on which was located a cotton gin, also a dwelling, used for the residence of the manager of the gin, and perhaps some other improvements. Prior to July, 1919, it was owned and operated by the Brice Gin Company, a corporation. In the early part of July, 1919, W. H. Patten had some negotiations with the owners of this gin for the purchase thereof, and at this time had some conversation with F. U. Foxhall, president of the Memphis Cotton Oil Company, in reference to securing Foxhall's financial aid in the purchase of said property. Nothing definite was agreed on, but Foxhall stated that he would investigate the matter and communicate with Patten later During the latter part of the month Foxhall bought the gin for the Memphis Cotton Oil Company, and the property was conveyed to said corporation. He informed Patten by letter of the negotiations, and later of its purchase by the oil company, stating in the letters that "We are depending on you to run the gin this season," and that "We would like to sell you an interest and have you run it," and finally urging Patten "to come on up as we will make deal with you, either to sell an interest or to run the plant for us." To these letters Patten replied, asking for a proposition from the oil company, and stating that the Brice Gin Company had offered him $150 per month to run the gin. As to purchasing an interest in the gin he said:

"As to buying an interest would not be able to make a decent payment. If you people could arrange to carry me we might make some kind of arrangements to pay you."

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On August 1 the Memphis Cotton Oil Company replied to Patten's letter, saying:

"We would like very much to sell you a one-third interest in the plant for $2,200, payable in notes on reasonable time and you could draw reasonable salary by the year, * * * and wish you would wire us on receipt of this letter whether or not you will come up at once and go over everything on basis about as stated."

Patten went to Memphis soon after receipt of this letter, and Foxhall testifies that he, acting for the Memphis Cotton Oil Company. and Patten thereupon made an oral agreement, by the terms of which Patten was to buy a one-third interest in the gin for $2,200, for which he was to give his notes, and the net profits of such one-third interest in the gin were to be applied in payment thereof, and that the notes were only to be paid out of the profits in this way; that it was also agreed that Patten was to run the gin and receive a salary of $100 per month, payable out of the business; that Patten took charge of the gin in pursuance to this agreement about August 16, 1919, moved his family into the residence on the property, employed labor, and ordered machinery for repair of the gin, and began operating it; that payment of the expenses thus incurred was made by drafts drawn in the name of the Brice Gin Company, which the Memphis Cotton Oil Company paid, and charged to an account carried on its books with the Brice Gin Company.

Foxhall further testified that he had no specific authority from the board of directors of the oil company to buy or sell the Brice gin, but that the directors "always accepted what he did"; that after his verbal agreement with Patten he had prepared a resolution of the board of directors authorizing a sale to Patten. The Board of Directors consisted of five members. Foxhall, the president, resided at Memphis, at which place was located the principal office of the company. Two of the directors, one being the secretary and the other the principal stockholder in the company, resided at Abilene, Tex. There was no regular meeting of the board of directors for the purpose of considering this matter. Foxhall sent the resolution to the secretary, and when it was approved by the secretary and the other director, who resided at Abilene, "that was considered a meeting of the board of directors," and the resolution was certified to by the president and secretary as having been passed at a regular meeting of the board of directors held in Memphis, Tex. A deed was then also prepared, dated September 29, 1919, by the terms of which the Oil Company conveyed to Patten, for the consideration of $2,200, a one-third interest in the Brice gin; this deed retained a vendor's lien to secure payment of the notes for $2,200; these notes were also prepared for execution by Patten, and were in the form of absolute obligations to pay. The deed was acknowledged by Foxhall, who testifies that he notified Patten over the phone that the papers were ready for execution and delivery, and that Patten answered that he would be in Memphis soon and close the matter up, and that the transaction was in this condition when Patten was killed on October 16, 1919. He further testified that after Patten's death he agreed with Mrs. Patten to cancel the trade and paid her $200 for her husband's services for the two months' work, and the papers were destroyed.

The only other evidence as to the agreement between the Memphis Cotton Oil Company and Patten was that of Mrs. Patten, who testified in part as follows:

"I know something about the particulars of Mr. Patten's employment by the Memphis Cotton Oil Company. At the time he was employed he was living in Stonewall county; that was done by letter and telegram. * * * I heard Mr. Foxhall talk to Mr. Patten with reference to the employment after we came out here. I heard Mr. Foxhall say that Mr. Patten was working for the company; he told me that before the accident. I didn't hear him state what salary my husband was

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to receive and I know his salary was $100 a month. The Memphis Cotton Oil Company did pay a salary after his death. They paid $200 for two months' work. He was employed by the year at $1,200 per year. The gin out there was supposed to run the season. During the remaining part of the year Mr. Patten was to be employed at the Cotton Oil Company at Memphis. His employment was for 12 months in the year. I don't know what his duties were in the oil mill but at Brice he was to manage and operate the gin. Running the gin stands constituted a part of his duty. He was running the stand at the time, I understand, he was hurt.

She further testified that her husband discussed all his business transactions with her, and she never heard him say he had a partnership interest in the gin, but he told her he was operating the gin for the Memphis Cotton Oil Company on a salary; that after her husband's death Foxhall asked her and her son and son-in-law whether they would want to take an interest in the gin "as he had offered it to Mr. Patten."

[1] We think it clear that, if deceased were a partner with the Memphis Cotton Oil Company at the time of his death, then he was not an employee of said company within the terms of the compensation law. Such law deals with "employers" and "employees," and defines the liability of the employer for personal injuries sustained by the employee in the course of his employment. A partnership has no legal entity in law. There would be no liability of a partnership to one of the partners who might be injured in the service of the partnership, even though he were being paid wages for his services, because he, as a member of the partnership, would be liable with the other members for the damage. He would be both employer and employee. The English courts have held that a similar law has no application to such a relationship, and at least one American case has followed these decisions. Cooper v. Industrial Commission, 171 Pac. 684. The Industrial Accident Boards of several of the states have come to the same conclusion. Honnold on Workmen's Compensation Laws. pp. 179, 180, and notes.

Notwithstanding the many decisions on the subject, it has been found to be a difficult matter to announce a satisfactory definition of partnership or to lay down tests that meet universal approval. See exhaustive notes on this subject, 18 L. R. A. (N. S.) p. 963 et seq. We shall not attempt an extended consideration of the authorities, but will refer to a few of the Texas cases on the subject. In the case of Buzard v. Bank. 67 Tex. 83, 2 S. W. 54, 60 Am. Rep. 7, it was held that an agreement to pay one employed to render certain services a per cent. of the profits of the undertaking, in lieu of a salary or wages. did not make him a partner. The recipient of such profits under the facts of that case had no interest in the business itself, his only interest being to secure a part of the profits as compensation for his services. We quote a few passages from the opinion of the court as indicating the trend of thought which led to the conclusion announced:

"Upon the question as to whether a participation in the net profits will necessarily constitute a partnership there is serious conflict, the great weight of the later decisions being in the negative; and it is generally conceded by the courts which hold the affirmative that, if the contract is expressly for a sum equal to a proportion of the profits, this does not of itself create the relation of partners.

"After a thorough discussion of the subject, Mr. Storey thus states the law: 'Admitting. however, that a participation in the profits will ordinarily establish the existence of a partnership between the parties in favor of third persons, in the absence of all other opposing circumstances it remains to consider whether the rule ought to be regarded as any more than mere presumptive proof thereof, and. therefore, liable to be repealed and overcome by other circumstances, and not of itself overcoming and controlling them. In other words, the question is whether

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the circumstances under which a participation in the profits exists may not qualify the presumption, and satisfactorily prove that the portion of the profits is taken, not in the character of a partner, but in the character of an agent as a mere compensation for labor and services. * * * If the participation in the profits can clearly be shown to be in the character of agent, then the presumption of partnership is repealed. In this way the law carries into effect the actual intention of the parties. and violates none of its own rules. It simply refuses to make a person a partner who is but an agent for a compensation payable out of the profits; and there is no hardship upon third persons; since the party does not hold himself out as more than an agent.' * * * In section 2, of chapter 6, of his work on Partnership. Mr. Parsons treats the question, * * * [and] near the conclusion in the text he says: 'It must be, however, considered as now settled that a person paid for services rendered to a firm by a share of the profits, if this be given him only as a compensation for service, and he has no interest in the principal, and no other interest in the profits. he is not liable as a partner.' * * * In the case before us Pennington was to receive one-half the profits of the business for his services. Buzard did not intend to make him a partner, but only an agent. Admitting that his understanding of the legal result of the contract would not change the law if the contract of itself had made Pennington a partner, still the circumstances attending the agreement show its purpose."

In the case of Kelley Island Line & Transport Co. v. Masterson, 100 Tex. 38, 93 S. W. 427, the following quotation from Goode v. McCartney, 10 Tex. 193, is approved as the law:

"If one person advances funds, and another furnishes his personal services and skill in carrying on the business and is to share in the profits, it amounts to a partnership. It would be a valid partnership, notwithstanding the whole capital was in the first instance advanced by one partner, if the other contributed his time and skill to the business. and although his proportion of gain and loss was to be very unequal. It is sufficient that his interest in the profits be not intended as a mere substitute for a commission, or in lieu of brokerage, and that he be received into the association as a merchant and not an agent."

The court in that case makes this further statement:

"Masterson was not to receive his share of the profits as compensation for the use of his money, nor were the Downey & Kelley to receive their share as payment for services but each received the profits as fruits of the joint enterprise, that is as profits, which made them partners."

In the case of Freeman v. Hutting Sash & Door Co., 105 Tex. 560, 571, 153 S. W. 122, 125 (Ann. Cas. 1916E. 446), Chief Justice Phillips, in commenting on a set of facts which were held to create a partnership as to the appellant, said:

"There existed by his tacit agreement a community of interests, the common enterprise, its operation for the joint account, and a right in the owner of each interest to share as a principal in its profits as such. which under the established rule in this state is a recognized test of the relation."

A number of decisions by the Courts of Civil Appeals and one by the Commission of Appeals may be referred to as approving and applying the rules stated in the above cases: Roberts v. Nunn (Tex. Civ. App.) 169 S. W. 1089; Avery v. Llano Cotton Seed Oil Mill Association (Tex. Civ. App.) 196 S. W. 353 (2); Kuykendall v. Schell (Tex. Civ. App.) 224 S. W. 303 (1); Fink v. Brown (Tex. Com. App.) 215 S. W. 843; Roberts v McKinney (Tex. Civ. App.) 187 S. W. 976; Steger v. Greer (Tex. Civ. App.) 228 S. W. 306 (1).

[2] Assuming of the present that the fact of the Cotton Oil Company being a corporation would have no effect on the question, a matter

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which we discuss later, if the agreement between the Cotton Oil Company and Patten was as testified to by Foxhall, and such agreement had been consummated by a delivery of the deed, which it was evidently contemplated should be delivered in consummation thereof, we think that a partnership would have resulted therefrom. The parties would thereupon have had a common interest in the capital itself, which adds greatly to the inference to be drawn from a community of interest in the profits. Bates on Partnership, § 31. Even if Patten's interest would not have thereby amounted to a legal title, he would have acquired some sort of an equitable interest therein, and would have been entitled to a voice in the management and control of the business, which would have been inconsistent with the holding that he was the mere agent of the Cotton Oil Company. The agreement that his share of the profits should be applied in payment of his interest in the business is not inconsistent with a conclusion that he was to receive these profits as a principal in the business, rather than as a mere agent or employee of the other party to the contract.

But the gin property was real estate, and title already vested in the Memphis Cotton Oil Company, and it would be a serious question as to whether Patten, by a mere oral partnership agreement, even though it be consummated by the parties actually engaging in the business together, could thereby acquire an interest in such real estate. Some authorities indicate that he might. Marsh v. Davis, 33 Kan. 326, 6 Pac. 612. We have not considered the question exhaustively, and express no opinion thereon. As stated, it was evidently contemplated that a deed would be delivered, and we assume, for the purpose of the disposition of the case, that this was necessary for a full consummation of the agreement, and it becomes necessary to determine what would be the relation of the parties in the interim—that is, if it be true that Patten took charge of the business in pursuance to the agreement for the formation of the partnership, acting as if the conveyance had been made and assuming that it would be shortly executed and delivered.

[3] An executory contract to form a partnership does not create the relation of partners between the parties until it is consummated or executed. If the agreement provides a condition precedent to the formation of the partnership, then it will not come into existence until the condition has been met. The enterprise in which the parties are to engage must be launched under the agreement before the parties become partners. Buzard v. McAnulty, 77 Tex. 438, 14 S. W. 139; Eagle Drug Co. v. White (Tex. Civ. App.) 182 S. W. 385; 20 R. C. L. p. 811; Bates on Partnership, § 78 et seq.

[4] But the precedent condition may be waived and. if the parties actually proceed with the business intending to operate it as partners under the agreement, they may be held to be partners though something may remain to be done to fully complete their agreement.

"Inasmuch as acting together as partners may constitute a partnership though no written articles of agreement be entered into, so actually beginning the joint business or launching it together, although something remains to be done or conditions to be performed by one or all, will constitute an immediate partnership inter se and as to third persons." Bates on Partnership, § 86.

In the case of Gullich v. Alford, 61 Miss. 224, an oral agreement was made, by the terms of which Gullich, the owner of a mill, "located, or intended soon to be located, on his own land," was to sell a one-half interest to Alford, a machinist, who was to repair it, and the parties were to conduct a milling business therewith in partnership. It was agreed that the contract should be reduced to writing. The parties entered into the business and conducted it for some time, but were unable to agree upon the terms of the writing which they attempted to draw to express their agreement. Whereupon Alford withdrew and sued for

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the value of the services performed by him while the mill was in operation. The case was decidd on the thoery that—

Alford "was entitled to the writing as a part of his contract, and that its execution was a condition precedent to a consummation of the contract unless it had been waived by him."

It was held by the court that—

"If * * * the parties made the writing of the essence of their contract, and the appellee [Alford] did not receive possession of the property as in execution of the contract, it would seem that he had the right to abandon it on the willful failure and refusal of the appellant to comply with its terms. * * * Electing to abandon the contract of purchase he was entitled to recover the debt due to him from the appellant [Gullich] as well as compensation for the labor performed in repairing the engine for if there was no sale of the engine this labor was done for the exclusive benefit of the appellant who is still the owner of the property repaired. But the court below, treated the agreement to form and carry on the partnership as a part of the contract of purchase, and inherent in and dependent on it, instructed the jury that unless the business conducted by the use of the machinery was carried in under a consummated contract of partnership the appellee might renounce his position as partner and recover a reasonable compensation for his labor contributed to the business. This was error. Though it may be true that the appellee would not have entered into the partnership but for his expectation of becoming a part owner of the machinery by which its business was prosecuted, it is nevertheless true that he did assume the attitude of partner. The services for which he sues were rendered by him, not to the appellant but to the firm."

This case is very closely in point under the case made by the appellant on Foxhall's testimony, and we think the evidence is sufficient to have warranted the finding that the parties entered into the business for which the partnership was formed, to wit, the operation of a cotton gin for profit, and that the partnership was actually launched notwithstanding the deed of conveyance had not been delivered. At this point we may say, however, that we do not think that the evidence conclusively shows this to be the fact. There is sufficient conflict in the evidence to have required the submission of the issue to the jury. The evidence is consistent with a finding that the deceased was working for the Memphis Cotton Oil Company under a tentative agreement to acquire an interest in the business, to be concluded and settled by the execution of the necessary writings at such time as Foxhall had the necessary authority to act for the corporation, and that there was no intention to "launch the partnership" until such time. Uder such a conclusion there would be no partnership. In addition to authorities already cited, see Martin v. Baird, 175 Pa. 540, 34 Atl. 812; Bates on Partnership, § 88; Gilmore on Partnership, § 16.

[5] It is necessary to consider in this connection one other matter; that is the effect which the fact that one of the proposed partners was a corporation would have on the agreement, and the acts that were done under it. It is the law that a corporation, unless its charter authorizes it to do so, may not enter into a partnership. Sabine Tram Railway Co. v. Bancroft. 16 Tex. Civ. App. 170, 40 S. W. 839; Markowitz v. Greenwall Theatrical Co. (Tex. Civ. App.) 75 S. W. 77–79; 7 R. C. L. p. 607; 3 Thompson on Corporations, §§ 2336–2340. But, when the parties have entered into such relations, and done business as partners, the law regards the acts already performed practically in the same way as if there had been a real partnership, though they are not perhaps strictly speaking partners. Some of the authorities refer to them as "joint adventurers," and the liability arising from such relationship as that of persons engaged in a joint enterprise. It is said in one case that—

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"While the partnership had no legal existence it had one in fact." Boyd v. American Carbon Black Co., 182 Pa. 206 37, Atl. 937.

The rights of the parties engaged in such an enterprise and those dealing with them, as to past transactions, are settled on practically the same basis as if they had been partners. Breining v. Sparrow, 39 Ind. App. 455, 80 N. E. 37; Wilson v. Carter Oil Co., 46 W. Va. 469, 33 S. E. 249; Cleveland Paper Co. v. Courier Co., 67 Mich. 152, 34 N. W. 559; Kelly v. Biddle. 180 Mass. 147, 61 N. E. 821; Wallerstein v. Ervin, 112 Fed. 124, 50 C. C. A. 129; Thompson on Corporations, supra. It was said in the opinion in the case of Sabine Tram Co. v. Bancroft, 16 Tex. Civ. App. 170, 40 S. W. 839:

"While those parts of the contract which have been executed should be enforced between the parties, no enforcement of the unexecuted part of it can be properly demanded. Parish v. Wheeler, 22 N. Y. 494; Thomas v. Railroad Company [101 U. S. 82]."

In the case of Fink v. Brown (Tex. Civ. App.) 183 S. W. 46. liability of a corporation as a partner with an individual for acts done by the partner was sustained without question, and, while the case was reversed on opinion of the Commission of Appeals (215 S. W. 846), no question was raised as to nonliability of the corporation because of its inability to enter into the agreement which was alleged to create the relationship of partners. Of course the real question in this case was whether Patten was an employee. And we think that. if the parties were engaged in the business in the manner stated by the witness Foxhall, and would have been partners but for the fact that the corporation could not enter into a partnership agreement, the same facts that would have constituted them partners would. but for such limitation on the power of the corporation, have made Patten so jointly interested in the enterprise that he would not have been an employee of the oil company. The case was tried on the theory that the resulting relationship would have been one of partnership. For practical purposes it would make no particular difference whether the relation would have been that of a partner, strictly speaking. or joint operators of the plant. And we think that, if there is any material error in the submission of the issue of partnership, of which appellant has properly complained, it would be entitled to a reversal of the case on such ground; and this brings us to the consideration of appellant's objection to the court's charge on partnership.

In connection with the submission of the issue of partnership the court charged the jury as follows:

"(b) A partnership is constituted where two or more persons enter into some lawful business or undertaking, with the understanding that they are to share the profits of such business or enterprise, in case there are profits growing out of the same, and to share the losses. if any there should be, growing out of their operation of said business or undertaking.

"(c) A partnership is to be distinguished from a mere joint ownership of property and from a contract of hiring, and, in this connection, should you find from the evidence that an agreement was made between the officers of the Memphis Cotton Oil Company and the deceased, W. H. Patten, that said Patten was to receive $100 per month for managing the Brice gin, and one-third of the profits of said gin, should there be profits, without any agreement to share the losses. should there be losses, such an agreement would be a contract of hiring and not of a partnership."

The objection urged by the appellant to this part of the charge was in this language:

"Plaintiff objects to the definition of partnership and what is contained in paragraph (c) of said charge in connection with said definition, because the same is not the law, is confusing and misleading, and

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calculated to influence the jury to make an incorrect and improper answer to the special issues submitted to them by the court in connection with said charge."

The appellant requested, and the court gave, at its request, the following issue:

"Did Foxhall and W. H. Patten agree that said Patten was to have a one-third interest in the net profits realized from the operation of the Brice gin, after all expenses, including Patten's salary, were paid, and that said Patten was to bear one-third of the losses resulting from the operation of the gin? "

The jury answered this "No." The appellant also requested the following charge, which was refused:

"To constitute a partnership there must be a community of profits or a specific interest in the profits."

[6] A reference to the authorities already discussed is convincing, we think, that the above definition and charge given by the court, as applied to the facts of this case, is not correct, and that part of the charge which made an agreement to share the losses a requisite to a partnership was particularly calculated to harm the appellant. It is true that many authorities might be cited to the effect that a partnership agreement must contemplate both the sharing of profits and losses in order to create the relation of partners between the parties thereto. 18 L. R. A. (N. S.) 992-998; Ann. Cas. 1913B, 1336. In many of the cases cited in support of this general statement holdings will be found to the effect that an agreement to share net profits necessarily includes a sharing of losses, as the losses are taken into account in arriving at the net profits. Such agreement, of course, provides for sharing of losses to a limited extent only. However this may be, the Texas authorities cited, we think, show that a charge, such as was given in this case, is not appropriate to the character of cases we are considering. It was expressly stated in the case of Cothran v. Marmaduke. 60 Tex. 372. that—

"It is not essential to constitute a partnership that the parties were by agreement to share in the losses, but it is sufficient if they are to have a community of interest in the profits as such."

To the same effect see Avery v. Llano Cotton Seed Oil Mill Association (Tex. Civ. App.) 196 S. W. 353 (2); Fink v. Brown (Tex. Com. App.) 215 S. W. 847; Bates on Partnership. § 56; Lindley on Partnership (Am. Ed.) p. 23.

[7] But we believe that the objection made to the charge at the time it was given, and the assignments presented here, do not entitle appellant to a reversal of the case on this point. The objection made to the charge was too general. The purpose of the law requiring all parties to make their objections to the charge in order to reserve them for consideration on appeal was to require that such objections be specific enough to inform the trial court of the particular error which the party claimed was made in the charge. Such general objections as were made in this instance convey no specific information whatever to the court, and to hold that such objections are sufficient would nullify the purpose of the law. P. & N. T. Ry. Co. v. Grundy (Tex. Civ. App.) 171 S. W. 318; Petty v. City of San Antonio (Tex. Civ. App.) 181 S. W. 224; T. & N. O. Ry. Co. v. Petersilka (Tex. Civ. App.) 176 S. W. 70; C., R. I. & G. Ry. Co. v. Comstock (Tex. Civ. App.) 189 S. W. 109; Keevil v. Ponsford (Tex. Civ. App.) 173 S. W. 518; Ochoa v. Edwards (Tex. Civ. App.) 189 S. W. 1022. But, if the general objection, taken in connection with the special charge requested, had been sufficient to call the court's attention to this error, we would be inclined to consider it. The special charge quoted above and refused is not strictly correct though it would have some tendency to direct the mind of the court to the correct test of partnership to be applied in the circumstances of this case. But, at the same time, the appellant requested, and the court gave an issue calling

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for, a finding as to whether the agreement was to share losses. This requested issue invited the error committed by the court. So that, on the whole, we do not think that the record shows that the appellant in any manner specifically directed the mind of the trial court to the real vice, which we think is in the charge. In fact, it is not even now clearly presented in appellant's brief. Its proposition is:

"The court erred in its charge defining partnership and in overruling appellant's objections thereto"

—and its subproposition thereunder is:

"There was no evidence in the case that Foxhall and Patten had not agreed to share the losses; on the contrary, the agreement between them being to share the net profits, it resulted that they had agreed to share the losses. The charge of the court was argumentative, assumed a fact which was not in evidence, and contained the vice of influencing the jury to answer the issue as to partnership erroneously."

We therefore do not think that we should reverse the case on account of the error which we conceive to be in the charge.

Appellant urges also that—

"The trial court should have directed a verdict for the appellant for the additional reasons: (1) There was no proof that the appellant had a license from the commissioner of insurance and banking to write compensation insurance; (2) the evidence was insufficient to establish that the Memphis Cotton Oil Company was a subscriber; (3) there was no proof that the claimants for compensation had made claim for compensation as provided by the Texas Employers Liability Act."

[8] If the appellant was doing business without procuring the necessary license, it cannot take advantage of its own violation of the law. K. C. Life Insurance Co. v. Elmore (Tex. Civ. App.) 226 S. W. 709 (17). The evidence sufficiently shows that the Memphis Cotton Oil Company was a subscriber, holding a policy written by the appellant, insuring payment of compensation to its employees within the meaning of the law. As to the third ground, it appears that the Memphis Cotton Oil Company received notice of the accident immediately; that it immediately notified the appellant; that Mrs. Patten also notified appellant within about two weeks; that within about a month a representative of the appellant visited Mrs. Patten, and attempted to settle with her; that "notice" of some sort was filed with the Accident Board within a month and one-half or two months after the accident. The judgment of the Accident Board itself was rendered on March 5, 1920, within less than six months after the accident, and recites that—

"After due notice to all parties at interest came on to be considered by the Industrial Accident Board the claim for compensation," etc.

[9, 10] While a copy of the claim as filed with the Board was not offered in evidence, all these circumstances are sufficient to show that such a claim was filed. American Indemnity Co. v. Zyloni (Tex. Civ. App.) 212 S. W. 183; Texas Employers' Ins. Ass'n v. Mummey (Tex. Civ. App.) 200 S. W. 251. It required the filing of such a claim to invoke the action of the board, and the board actually took action within the six-months period. Besides this, the board had the right to "waive the strict compliance with the foregoing limitations as to notice, and the filing the claim before the board." Article 5246—43, V. S. C. S. 1918 Supp.

This disposes of all propositions advanced by appellant for reversal, and we conclude that the judgment should be affirmed.

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TEXAS EMPLOYERS' INS. ASS'N v. BOUDREAUX ET AL.
(No. 467.)

(Court of Civil Appeals of Texas. Beaumont. Jan. 27, 1922., Rehearing Denied Feb. 15, 1922.)

238 Southwestern Reporter, 697.

MASTER AND SERVANT—DEATH COMPENSATION IN LUMP SUM JUSTIFIED.

Where the compensation for the death of an employee would amount to only $11.15 a week, from which one-third would bee allowed as attorney's fees, leaving only $3.72 a week for the mother, and $1.86 a week for each daughter and it appeared that the mother was taking boarders in an endeavor to educate her daughters, the facts show a case in which hardship would result from payment of weekly compensation, so that an order requiring payment of compensation in a lump sum as authorized by Workmen's Compensation Act, pt. 1, § 15 (Vernon's Ann. Civ. St. Supp. 1918, art. 5246—33), was proper.

(For other cases, see Master and Servant, Dec. Dig. § 386[4].)

Appeal from District Court, Harris County; Chas. E. Ashe, Judge.

Proceeding under the Workmen's Compensation Act by Mrs. Regina Boudreaux for the death of her husband, opposed by the Gulf Production Company, subscriber, and the Texas Employers' Insurance Association. An award of weekly compensation by the Industrial Board was made an award in gross by the district court on review, and the Insurance Association appeals. Affirmed.

See, also, 213 S. W. 674; 231 S. W. 756.

Harry P. Lawther, of Dallas, for appellant.

Gremillion & Smith, of Crowley, La., and Crook Lord, Lawhou & Ney, of Beaumont, for appellees.

WALKER, J. This case is before us again under mandate from the Supreme Court, remanding it to us under appellant's first assignment of error. Our former opinion is reported in 213 S. W. 674. Appellant's first assignment of error is set out in full in that opinion.

In remanding this case to us, the Supreme Court (231 S. W. 756), discussing our former opinion, said:

"The Court of Civil Appeals did not review the evidence touching the question of whether judgment should have been rendered in a lump sum, being of opinion that the trial court's findings upon this question were final, and not subject to be reviewed on appeal. This holding is the basis of the complaint made in the remaining assignment of error.

"Were the findings of the trial court with respect to whether the case was one calling for a lump sum settlement, subject to review by the Court of Civil Appeals?

"Section 18, part 1, of the act [Vernon's Ann. Civ. St. Supp. 1918, art. 5246—37] provides that the compensation shall be paid from week to week as it accrues, unless the liability of the association is redeemed as provided elsewhere in the act.

"Section 15, part 1, of the act is as follows:

"'In cases where death or total permanent incapacity results from an injury, the liability of the association may be redeemed by payment of a lump sum by agreement of the parties thereto, subject to the approval of the Industrial Accident Board hereinafter created. This section shall be construed as excluding any other character of lump sum settlement

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save and except as herein specified; provided, however, that in special cases where in the judgment of the board, manifest hardship and injustice would otherwise result, the Board may compel the association in the cases provided for in this section to redeem their liability by payment of a lump sum as may be determined by the Board.' [Article 5246—33.]

"The act provides further (article 5246—44, Vernon's Sayles' Statutes, 1918 Supp.) that—

"'If the final order of the Board is against the association, then the association and not the employer shall bring suit to set aside said final ruling and decision of the Board, if it so desires, and the court shall in either event determine the issues in such cause instead of the Board upon trial de novo and the burden of proof shall be upon the party claiming compensation. In case of recovery the same shall not exceed the maximum compensation allowed under the provisions of this act.'

"Under the provisions of the foregoing article the trial court had authority to determine the issues in the case, including the issue as to whether or not the compensation should be paid in a lump sum. This issue is necessarily one of fact. Facts only could make it appear whether the case is a special one.

"Evidence was introduced upon this issue by defendants in error. It is not necessary to set it out. The trial court heard the case de novo, and made its findings upon all the issues, including the issue with respect to a lump sum award. We see no reason why these findings are not subject to the same character of review on appeal to which findings upon other fact issues are subject. The Court of Civil Appeals, in our opinion, has power to review, and should review, the findings upon the issue of a lump sum settlement. Choate v. S. A. & A. P. Ry. Co., 91 Tex. 406, 44 S. W. 69.

"We recommend that the judgment of the Court of Civil Appeals be reversed, and that the cause be remanded to that court for a review of the findings and conclusion of the trial court with respect to whether the case was one calling for a lump sum award, and for further orders."

Referring now to our former opinion in this case (Texas Employers' Insurance Association v. Regina Boudreaux [Tex. Civ. App.] 213 S. W. 674), we find the following review of the facts under appellant's first assignment of error:

"There was no agreement of the parties for a lump sum settlement. The testimony of Mrs. Regina Boudreaux, the only witness on this point, testified: 'My little girls have not got any property. They have no means of living but the living I give them. I make a living for them by running a rooming house. I have just been doing that since Christmas. I am a dressmaker and used to sew. Since my husband's death I have sewed as a seamstress, and have supported my children that way. My children have no income from any other source, and I have no income from any other source. My husband was working in Texas for a year when he got killed; I do not know for whom he was working. During that year my husband did not send me any money. My husband was gone on his work; he was working for the last seven years. He had not quit me that I know of. I had not been making a living for myself and my children for seven years. Every time my husband come home he gave me all the money he had. During those seven years sometimes he stayed away three or fourth months before he came home. He never did stay as long as three years. The longest time he stayed was one year; that was not the year just before he got killed. When he got killed last July it was four months since he had been at home. He had been working in Texas a year, but he came home twice during that year. My husband did not leave me and go to New Orleans and stay nearly three years. He stayed at New Orleans, but I was staying there with him, too. My husband had not quit me, and I had not quit him, for

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as much as three years before he died. I know that. There had been no separation. I had not abandoned him, and he had not abandoned me, for the space of three years before his death; he was just going on working. When my husband was away from me over here in Texas I do not know what he did with his money. He did not send me money, but every time he came home he gave me all that he had. The last time he came home he gave me $75.'

"Section 15, pt. 1, of the Compensation Law makes provision for lump sum compensation in two ways: (a) Under agreement of the parties subject to the approval of the Industrial Accident Board; and (b) where, in the judgment of the Board, manifest hardship and injustice would result, in which case the Board may compel the association to redeem its liability by payment of a lump sum in an amount to be determined by the Board. The first depends upon the agreement of the parties; the second upon the discretion of the Industrial Accident Board upon any given case.

"The Compensation Act provides (article 5246—44, Vernon's Sayles' Texas Statutes, 1918 Supplement):

"'If the final order of the Board is against the association, then the association, and not the employer, shall bring suit to set aside said final ruling and decision of the Board, if it so desires, and the court shall in either event determine the issues in such cause instead of the Board, upon trial de novo, and the burden of proof shall be upon the party claiming compensation. In case of recovery the same shall not exceed the maximum compensation allowed under the provisions of this act.'

"The average weekly wage of Israel Boudreaux, deceased, was $18.57 per week, 60 per cent. of which sum is $11.15, which was found by the Industrial Accident Board and by the court to be the weekly compensation that would arise on account of the death of Israel Boudreaux, resulting while in the course of his employment. The Compensation Law provides for an attorney's fee, in case of suit, of one-third of the amount of compensation awarded. This one-third in this instance would be $3.71 out of each week's compensation, which would leave $7.44 to be shared by the surviving wife, Mrs. Regina Boudreaux, and her two minor daughters. The wife would be entitled to half of this amount, under our interpretation of the Compensation Law, which will be hereinafter discussed, and the two daughters would be entitled to the other half, or $3.72 per week, or $1.86 each per week. The proof showed these two daughters to be within the scholastic age and that they were attending school. It appeared that they had no earning ability whatever.

"The Legislature must have intended to leave the matter of lump sum settlement to the judgment of the Industrial Accident Board. The expression, 'Provided that in special cases where, in the judgment of the Board, manifest hardship and injustice would otherwise result, the Board may compel the association * * * to redeem their liability by payment of a lump sum,' seems to be intended to leave the matter as flexible as possible, so that the judgment of the Board can be exercised freely for the relief of those who might otherwise suffer an injustice. This provision, evidently, was intended to have application in cases where the needs are great and the compensation small. It seems to us that nothing else could have been intended.

"In the present case we have one in which two young girls have no means of support except what little their mother may be able to furnish by running a rooming house, and the revenue arising therefrom is not shown, but it may be naturally assumed that the profits from such an enterprise are meager. When we take into consideration the high cost of living of the present time and the ever-changing conditions and vicissitudes incident to the life of a widow with a family to support, it occurs to us that the lower court was correct in concluding that a lump sum ought to be awarded in this case, rather than a weekly compensa-

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tion, which would give each of these little girls $1.86 per week. This being a case in which hardship would result, justifying the award of a lump sum, we think that this provision of the law ought to be applied."

Having again reviewed the facts, as required by the mandate of the Supreme Court, we are still of our former opinion:

"That the lower court was correct in concluding that a lump sum ought to be awarded in this case, rather than a weekly compensation, which would give each of these little girls $1.86 per week. This being a case in which hardship would result, justifying the award of a lump sum, we think that this provision of the law ought to be applied."

It is therefore our order that appellant's first assignment of error be in all things overruled, and that the judgment of the trial court be in all things affirmed.

GALLOWAY, ET AL. v. LUMBERMEN'S INDEMNITY EXCHANGE ET AL. (No. 303-3615.)

(Commission of Appeals of Texas, Section A. March 22, 1922.)

238 Southwestern Reporter, 646.

1. MASTER AND SERVANT — MINOR UNLAWFULLY EMPLOYED NOT AN "EMPLOYEE" WITHIN COMPENSATION ACT.

Workmen's Compensation Act (Acts 35th Leg. [1917] c. 103, § 12i [Vernon's Ann. Civ. St. Supp. 1918, art. 5246—30]) does not repeal the Child Labor Law (Acts 35th Leg. [1917] c. 59), §5 [Vernon's Ann. Pen. Code Supp. 1918, art. 1050i]) making it unlawful to employ minors between the ages of 12 and 15 at certain dangerous occupations, nor are such minors included in the term "employee" (section 1, pt. 4, of the Compensation Act [art. 5246—82]), and a contract of insurance between an employer and an insurance company, being presumed to be in accord with the law, cannot be extended to persons employed in violation of the law.

(For other cases, see Master and Servant, Dec. Dig. § 366.)

(For other definitions, see Words and Phrases, First and Second Series, Employee.)

2. MASTER AND SERVANT — COMPENSATION CLAIMANT HAS BURDEN OF SHOWING EMPLOYMENT WITHIN STATUTE.

Under Workmen's Compensation Act (Acts 35th Leg. [1917] c. 103, pt. 2, § 5 [Vernon's Ann. Civ. St. Supp. 1918, art. 5246—44]), placing the burden of proof upon the party claiming compensation, an insurance company bringing suit to set aside an award for death of a minor need not allege that deceased was not an employee within the act.

(For other cases, see Master and Servant, Dec. Dig. § 417[5].)

Error to Court of Civil Appeals of Ninth Supreme Judicial District.

Suit by the Lumbermen's Indemnity Exchange and another, insurance carriers, against Susie Galloway and another, to set aside an award of the Industrial Accident Board awarding compensation for the death of the named defendant's minor son, Ernest Hadnot, the employee. From judgment of the Court of Civil Appeals (227 S. W. 536) affirming judgment for plaintiffs, defendants bring error. Affirmed.

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David E. O'Fiel, of Beaumont, for plaintiffs in error.
Crook & Lord, of Beaumont, for defendants in error.

SPENCER, P. J. Ernest Hadnot, a minor, under the age of 15 years and an employee of the Reese-Corriher Lumber Company, was killed on February 7, 1918, in the course of his employment. At the time of the accident resulting in his death, the lumber company was a subscriber to the Employers' Liability Act, carrying a policy with the Lumbermen's Indemnity Exchange to protect those who were employees within the purview of the act.

Susie Galloway, mother of the minor, filed a claim as a dependent of the minor with the Industrial Accident Board against the Lumbermen's Indemnity Exchange. She was represented before the Board by David E. O'Fiel, an attorney of Beaumont, Tex. An award was made in her favor by the Board, and a percentage of the award was adjudged to be paid to her attorney.

The Consolidated Underwriters, successors to the Lumbermen's Exchange, being unwilling to abide by the final decision of the Industrial Accident Board, filed this suit against Susie Galloway and David E. O'Fiel to set aside this final ruling of the Board.

The grounds alleged for setting aside the award were that Ernest Hadnot was not killed in the course of his employment, and that Susie Galloway was not a dependent. It also pleaded that upon the trial of the cause it claimed the privilege of urging other grounds for setting aside the findings of the Board. To this petition Susie Galloway filed an answer alleging that the minor was injured in the course of his employment, and that she was dependent upon him for support. By way of cross-action she prayed that she be entitled to recover in a lump sum the amount awarded by the Board instead of weekly payment, as decreed by the Board.

At the request of defendant in error the trial court instructed the jury to return a verdict in favor of defendant in error, and judgment was rendered upon the verdict so returned. It is conceded that the court gave the peremptory instruction, because the uncontradicted evidence showed that the minor was employed in violation of acts of the Thirty-Fifth Legislature, c. 59, § 1, p. 104 (Vernon's Ann. Pen. Codee 1916, art. 1050e), which prescribes a penalty for the employment of children under the age of 15 years by any person or any agent or employee of any person, firm, or corporation, to labor in or about any mill or factory.

Upon appeal the honorable Court of Civil Appeals entertained the same views of the law as did the trial court, and therefore affirmed the judgment. 227 S. W. 536.

[1] One of the very objects of the Child Labor Law, as declared by its caption and evidenced by its provisions, is to prohibit the employment of children under 15 years of age to labor in certain designated occupations. Section 5 of the act (article 1050i) provides for permits to be issued by the county judge, permitting children between the ages of 12 and 15 years to labor in the designated occupations, under certain conditions; one of the conditions being that the child is not to be employed in or around any mill, factory, workshop, or other place where dangerous machinery is used. Acts 35th Leg. c. 59, p. 104, § 5.

There is nothing in the Workmen's Compensation Law, passed by the same Legislature (Acts 35th Leg. c. 103, p. 269 [Vernon's Ann. Civ. St. Supp. 1918, arts. 5246—1 to 5246—91]) that expressly or impliedly repeals any of the provisions of the Child Labor Law. On the other hand, it expressly recognizes and provides against its repeal, as revealed by section 12i of the act (article 5246— 30), and therefore, impliedly at least, prohibits the employment of minors where such employment is prohibited by the statutes of the state. Section 12i reads:

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"If it be established that the injured employee was a minor when injured and that under normal condition his wages would be expected to increase, that fact may be considered in arriving at his average weekly wages and compensation may be fixed accordingly. This section shall not be considered as authorizing the employment of a minor in any hazardous employment which is prohibited by an statute of this state."

The broad definition given the term "employee" by the statute might be construed, if standing alone, as including the employment of a minor between the ages of 12 and 15 years of age in or around a mill where dangerous machinery is used if it were not for the qualification that precedes the definition and the restriction of the term as expressed in the concluding sentence of section 12i. The definition reads:

"The following words and phrases as used in this act shall, unless a different meaning is plainly required by the context, have the following meanings, respectively: * * * 'Employee' shall mean every person in the service of another under any contract of hire, expressed or implied, oral or written, except * * * " Section 1, pt. 4, Acts 35th Leg. c. 103, p. 269 (article 5246—82).

As the contract of insurance between the lumber company and the defendant in error was entered into in virtue of the Workmen's Compensation Law, it will be presumed, unless the contrary appears, that its stipulations are in accord with and not contrary to that law. As the law prohibits the employment of minors between the ages of 12 and 15 years, in and around mills where dangerous machinery is used, it will be presumed that the contract between the parties, written in pursuance of the law, embodies no provision in conflict with the law. The insurance company's liability is restricted to the terms of its contract, and cannot be extended to include the liability of the lumber company to persons employed by the latter in violation of the law.

This principle of law was announced by the Texarkana Court of Civil Appeals in Waterman Lumber Co. v. Beatty, 204 S. W. 448. In that case the injured employee sued the employer direct, and recovered judgment. The lumber company contended that he should look alone to the terms of the Workmen's Compensation Act for compensation, but the employee replied that the act did not apply because he was employed in violation of the Child Labor Law. The Court of Civil Appeals sustained the contention of the employee, and affirmed the judgment.

The Supreme Court granted a writ of error in that case, but affirmed the judgments of the trial court and the Court of Civil Appeals, holding that there was no error entitling the lumber company to a reversal of the judgment, thereby indicating its approval of the holding of the Court of Civil Appeals upon the question in issue. 110 Tex. 225, 218 S. W. 363.

[2] There is no merit in the contention that, as defendant in error did not allege that the deceased was not an employee within the meaning of the act, it could not take advantage of that fact. Section 5, pt. 2 (article 5246—44), provides:

"* * * Any interested party who is not willing and does not consent to abide by the final ruling and decision of said board shall within twenty days after the rendition of said final ruling and decision by said board give notice to the adverse party and to the board that he will not abide by said final ruling and decision. And he shall within twenty days after giving such notice bring suit in some court of competent jurisdiction in the county where the injury occurred to set aside said final ruling and decision and said board shall proceed no further toward the adjustment of such claim, other than as hereinafter provided; provided, however, that whenever such suit is brought, the rights and liability of the parties thereto shall be determined by the provisions of this act, and the suit of the injured employee or person suing on account of the death of such employee shall be against the association of the employer of such

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injured or deceased employee at the time of such injury or death was a subscriber as defined in this act. If the final order of the board is against the association then the association and not the employer shall bring suit to set aside said final ruling and decision of the board, if it so desires, *and the court shall in either event determine the issues in such cause instead of the board upon trial de novo and the burden of proof shall be upon the party claiming compensation.*" Acts 35th Leg. c. 103, p. 269. (Italics ours.)

This article clearly places the burden of proof upon the party claiming compensation. One of the essentials of the burden of proof, and without which there could be no recovery, is that the deceased was an employee within the meaning of the act. A failure to meet this burden entitled the defendant in error to a verdict regardless of whether he had pleaded it in his suit to set aside the award of the Board.

It is our view that the judgment of the district court and of the Court of Civil Appeals are correct, and should be affirmed, and we so recommend.

CURETON, C. J. The judgment recommended in the report of the Commission of Appeals is adopted, and will be entered as the judgment of the Supreme Court.

DELTHONY v. STANDARD FURNITURE CO.

(Supreme Court of Washington. March 24. 1922.)

205 Pacific Reporter 379.

MASTER AND SERVANT—EMPLOYER HELD NOT GUILTY OF "DELIBERATE INTENTION" TO INJURE EMPLOYEE WITHIN COMPENSATION ACT.

Under Pierce's Code 1919, § 3473, providing that if injury to a workman results from deliberate intention of his employer, the workman may take under the act and also have a cause of action against the employer, before an injured workman is entitled to recover he must allege and prove that his injury was the result of a deliberate intent on the part of the employer to injure him; and where an employee was injured by the explosion of a boiler, and compensation had been awarded him, that the boiler had been maintained in an unsafe condition to the employer's knowledge did not show "deliberate intention" to injure him, so as to entitle him to damages in addition to compensation.

(For other cases, see Master and Servant, Dec. Dig. § 352.)

Department 2.

Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Acton by Anthony Delthony against the Standard Furniture Company. From a judgment of dismissal, plaintiff appeals. Affirmed.

Walter G. Kienstra, of Seattle, for appellant.

J. Speed Smith and Henry Elliott, Jr., both of Seattle, for respondent.

MAIN, J. The plaintiffs brought this action to recover for personal injuries for which he claimed the defendant should respond in damages. At the conclusion of his case the defendant challenged the legal sufficiency of the evidence, and moved for a directed verdict. This motion was sustained, and a judgment entered, dismissing the action, from which the plaintiff appeals.

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The respondent conducts a general retail furniture business in the city of Seattle, occupying a seven-story building at the corner of Second avenue and Pike streets. The appellant was employed as an electrician and general maintenance man about the building. On April 5, 1909, while he was in the performance of his duties and near a boiler which was installed in the basement of the building, he was seriously injured by the explosion of the boiler. After the injury he filed a claim with the Industrial Insurance Commission, and as compensation for the injuries which he sustaained was awarded and received the sum of $777. Nothwithstanding this award the appellant claims the right to recover in this action against the respondents, and founds his claim upon section 3473 of Pierce's Code, which provides, among other things, that—

If injury to a workman results from "deliberate intention of his employer to produce such injury, or death, the workman, * * * shall have the privilege to take under this act, and also have cause of action against the employer."

It will be noticed that before the appellant would be entitled to recover it would be necessary for him to allege and prove that his injury was the result of a deliberate intention of the respondent to injure him. There is no evidence in the record showing, or tending to show, any such deliberate intention. It may be admitted that, if the question were one as to whether the respondent was negligent in the manner in which it maintained the boiler, the case would present a question for the jury. The appellant contends that, if the respondent knew of the dangerous and unsafe condition of the boiler, and knowing this fact, if it is a fact, maintained the boiler in a dangerous and unsafe condition, as a matter of law it would be held to have been deliberately intended to produce the injury. But this proposition cannot be sustained. The language of the act is "deliberate intention," and evidence of negligence fails to show such intention. In Jenkins v. Carman Manufacturing Co., 79 Or. 448. 155 Pac. 703, the Supreme Court of Oregon had this question before it. The act of that state provides that, if injury to a workman results from the "deliberate intention" of the workman himself to produce the injury, there would be no right to take compensation under the act. The language there used, "deliberate intention," is the same as the language of the section of the statute upon which the appellant predicates his right to recover. Construing this language, it was there said:

"We think by the words 'deliberate intention to produce the injury' that the lawmakers meant to imply that the employer must have determined to injure an employee and used some means appropriate to that end; that there must be a specific intent, and not merely carelessness or negligence. however gross."

The cases cited by the appellant do not support the proposition for which he contends. One of them (Wick v. Gunn [Okl. Sup.] 169 Pac. 1086, 4 A. L. R. 107). tends to support the position which we here take, which is the same as that of the Oregon court.

The judgment will be affirmed.

Parker, C. J., and Holcomb, Mackintosh, and Hovey, JJ., concur.

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MADDOX v. INDUSTRIAL INS. COMMISSION. (No. 16915.)

(Supreme Court of Washington. March 6, 1922.)

204 Pacific Reporter, 1057.

1. MASTER AND SERVANT — JURISDICTION OF SUPERIOR COURT OVER RECLASSIFICATION OF COMPENSABLE INJURY APPELLATE ONLY.

An injured employee awarded compensation under Workmen's Compensation Act by the Industrial Insurance Commission cannot bring an original action in the superior court to require the Commission to reclassify his injury, since the jurisdiction of the superior court as to such controversies is appellate only, and not original, under Rem. Code 1915, § 6604—20; the employee's remedy being an appeal to the court from the decision of the Commission.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

2. MASTER AND SERVANT—COMMISSION'S RECLASSIFICATION OF COMPENSABLE INJURY NOT BARRED BY COURT'S DISMISSAL WITH PREJUDICE.

Superior court's dismissal "with prejudice" of employee's original action to require Industrial Insurance Commission to reclassify injury did not preclude employee from prosecuting a claim for reclassification before the Commission and appeal from the Commission's decision to the superior court.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

Department 1.

Appeal from Superior Court, Pierce County; M. L. Clifford, Judge.

Action by John F. Maddox against the Industrial Insurance Commission. Judgment of dismissal, and plaintiff appeals. Affirmed.

P. L. Pendleton, of Tacoma, for appellant.

Lindsay L. Thompson and John H. Dunbar, both of Olympia, for respondent.

PARKER, C. J. The plaintiff, Maddox, commenced this action in the superior court for Pierce county by summons and complaint as an ordinary action, seeking a judgment directing the Industrial Insurance Commission to reclassify his injury, received in an extrahazardous occupation, as one of total disability, and to make him an award accordingly; his injury having theretofore been classified by the Commission as one of lesser degree and he having beeen awarded compensation accordingly. The Commission demurred to plaintiff's complaint upon the ground, among others, of want of jurisdiction in the superior court, which demurrer was by the superior court sustained. The plaintiff having elected to stand upon his complaint, and not plead further, judgment of dismissal was accordingly rendered against him, with prejudice.

The facts determinative of appellant's claimed rights in this action, as disclosed by his complaint, in so far as we need here notice them, are as follows: In January, 1918, appellant was injured while employed in an extrahazardous occupation, and his injury was thereafter classified by the Industrial Insurance Commission as one of lesser degree than total disability, upon which classification he was awarded compensation. On May 5, 1921, appellant, conceiving that the results of his injury had become so aggravated since the original award made to him as to entitle him to a reclassification as one totally disabled, filed with the Industrial

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Insurance Commission his claim asking an additional award accordingly. He concluded his claim with a request that the Commission make its decision in his favor thereon within 15 days. The Commission not having rendered a decision upon his claim within the 15 days, he immediately thereafter commenced this action. His alleged reason for not waiting for a formal final decision by the Commission and appealing therefrom to the superior court, as provided by the Workingmen's Compensation Act is, in substance, that the failure of the Commission to render its formal decision upon his claim within the 15 days, as requested, was in legal effect a final decision denying his claim.

[1] We think it is plainly apparent that this is nothing but an effort on the part of appellant to bring into the original jurisdiction of the superior court a controversy over which that court does not have any original jurisdiction. It is plain from the provisions of our Workingmen's Compensation Act (Rem. Code 1915, §§ 6604—1 to 6604—32) that the original jurisdiction to determine the classification of injuries received by workmen in extrahazardous occupations and the amount of awards to be made such injured workmen rests exclusively in the Commission, and that such questions must first be decided by the Commission before the courts can be resorted to looking to the further consideration of the merits of such controversies. The manner of bringing such controversies into the superior court is by review in the nature of an appeal from the final decision of the Commission, the procedure for which is very simple and clearly pointed out in section 6604—20, Rem. Code (Workingmen's Compensation Act). The jurisdiction of the superior court over such controversies is appellate only, and not original. This is true, though some of the questions arising in such controversies brought into the superior court for review are triable de novo; but that does not mean that even as to such questions they may in the first instance be tried in the superior court. Plainly we think the superior court has no jurisdiction in this action over the controversy which appellant seeks to have tried therein.

[2] Counsel for appellant complains particularly of that part of the superior court's judgment of dismissal reciting that such dismissal is "with prejudice." Counsel seems to fear that this will prevent further prosecution of appellant's claim for reclassification before the Commission and before the superior court upon appeal from a decision of the Commission. We think such is not the result. The judgment is final and with prejudice only in the sense that appellant cannot maintain any action invoking the superior court's original jurisdiction looking to the adjudication of his claim therein.

The judgment is affirmed.

Bridges, Fullerton, Mitchell, and Tolman, JJ., concur.

PLASTINO v. CITY OF SEATTLE. (No. 16720.)

(Supreme Court of Washington. March 17, 1922.)

205 Pacific Reporter, 404.

7. MASTER AND SERVANT—TELEGRAPH AND TELEPHONE COMPANY ENGAGED IN BOTH INTERSTATE AND INTRASTATE BUSINESS HELD NOT WITHIN COMPENSATION LAW.

A telegraph and telephone company engaged in both intrastate and interstate commerce to such an extent that it was not possible to render

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clearly separable and distinguishable its pay roll of workmen engaged in each of such classes of work is not within the Industrial Insurance Law under Laws 1919, p. 136, § 3.

(For other cases, see Master and Servant, Dec. Dig. § 365.)

Mackintosh, Bridges, and Hovey, JJ., dissenting.

En Banc.

Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by Mike R. Plastino against the City of Seattle to recover damages for personal injuries. Judgment for plaintiff, and defendant appeals. Affirmed.

Walter F. Meier and Frank S. Griffith, both of Seattle, for appellant.

Walter S. Fulton and Tucker & Hyland, both of Seattle, for respondent.

PARKER, C. J. The plaintiff, Plastino, commenced this action in the superior court for King county, seeking recovery from the defendant city of damages which he claims to have suffered as the result of the negligent operation of one of the city's street cars. A trial upon the merits resulted in a verdict awarding to Plastino recovery in the sum of $7,000. The city by appropriate motions timely made during and following the trial, challenged the sufficiency of the evidence to entitle Plastino to any recovery, and also moved in the alternative for a new trial. The trial court denied the city's motions challenging the sufficiency of the evidence to entitle Plastino to any recovery, and also denied the city's motion for a new trial, upon condition that Plastino consent to a reduction of the award to $6,400. He having elected to take an award so reduced, rather than suffer a new trial, judgment was rendered accordingly, from which the city has appealed to this court.

[1] The first and principal contention here made in behalf of the city is that the trial court erred in overruling its motions for an instructed verdict and for judgment notwithstanding the verdict; that is, that the trial court erred in its refusal to decide as a matter of law that Plastino was not entitled to any recovery. The argument of counsel for the city upon this branch of the case is addressed almost wholly to the question of contributory negligence on the part of Plastino. He was injured by one of the city's street cars coming into collision with an automobile he was driving, while crossing the intersection of Twenty-Fourth avenue northwest and West Sixty-First street, in the city of Seattle. These streets cross at right angles; Sixty-First street runs east and west; Twenty-Fourth avenue runs north and south, and has two street car tracks upon it. The north-bound cars run upon the east track and the south-bound cars upon the west track. Twenty-Fourth avenue is paved to the width of 60 feet between the curbs of the sidewalks.

At the hour of about 2 o'clock in the afternoon of the day of the accident, Plastino drove west along Sixty-First street approaching Twenty-Fourth avenue. When he arrived at about the east line of the pavement of Twenty-Fourth avenue, he stopped to await the passing of a north-bound street car upon the east track, which car was about to cross Sixty-First street. He waited there for a moment until he considered that the street car had proceeded a sufficient distance across the intersection so that he could proceed, when he started on west along Sixty-First street, passing immediately behind and within a few feet of the north-bound street car. When he arrived upon the west track his automobile was struck broadside by a rapidly moving south-bound street car upon the west track, causing his injury. The jury might well have

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believed that the speed of the south-bound street car was 30 miles, or more, per hour, the lawful speed being not to exceed 20 miles per hour. The impact was so violent, and the speed of the street car so great, that Plastino and his automobile were carried along upon the front end of the street car a distance estimated by different witnesses at from 125 to 160 feet.

Just as Plastino was starting his machine to cross the pavement and street car tracks behind the north-bound street car, he looked north, to see if there were any cars approaching from that direction upon the west track, and did not see any, according to his testimony. It is, it must be conceded, somewhat difficult to arrive at the conclusion that he did not see any car approaching from that direction; since his view was unobstructed for a long distance to the north past beyond the north-bound street car, and the fast-moving south-bound street car was then approaching from the north upon the west track about a block away; but we think the jury might well have believed from the evidence that Plastino did not become conscious of the approach of any street car from the north upon the west-bound track within any such distance as would lead a reasonably prudent person to believe that any car approaching from that direction would reach his line of travel in crossing the west track before he would arrive upon the west track; that is, we think there is room for honest difference of opinion as to whether or not Plastino was warranted in then assuming that no car would reach his line of travel upon the west track from the north and come into collision with his automobile, should he proceed on his way. It is not so much a mere question of Plastino's seeing the south-bound car at a more or less comparatively long distance to the north; but it is a question of his using reasonable caution to look and determine whether or not any street car was approaching from the north within such a distance as to make it dangerous for him to proceed across the west track. While the testimony of the witnesses is in conflict as to whether the motorman on the south-bound car timely rang his bell on approaching Sixty-First street, we think the jury were warranted in believing that no such signal was timely given.

Our recent decisions in Coons v. Olympia Light & Power Co., 111 Wash. 677, 191 Pac. 769; Johnson v. Seattle, 113 Wash. 487, 194 Pac. 417; Nabours v. Seattle, 113 Wash. 557, 194 Pac. 800; and Goldsby v. Seattle (Wash.) 197 Pac. 787—it seems to us are decisive in favor of Plastino upon the question of whether or not he was as a matter of law guilty of contributory negligence. Our decision in Stueding v. Seattle Elec. Co., 71 Wash. 476, 128 Pac. 1058, particularly relied upon by counsel for the city, does seem to furnish some argument in support of a contrary holding. That case involved the care to be exercised by a pedestrian crossing a street intersection over street car tracks. A pedestrian has at least some greater degree of opportunity to protect himself than one driving an automobile, by reason of the fact that he has a somewhat larger degree of control over his movements. We note that the pedestrian injured in that case was passing behind a standing street car in front of an on-coming car on another track; and, being only a pedestrian, he could have stopped, even after passing behind the first car, and no doubt would have then stopped, had he made proper observation of the on-coming car on the other track. This, it would seem, furnishes some ground for distinguishing that case from this. However that may be, we think the later decisions of this court, above cited, are controlling here.

We conclude that, in view of the speed of the south-bound car, the want of timely signal of its approach from the north, and what Plastino did under the circumstances, as the jury was warranted in viewing them, it should not be decided as a matter of law that the city was free from negligence, or that Plastino was guilty of contributory negligence.

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[2] It is contended in the city's behalf that the trial court gave to the jury two instructions which were so conflicting and confusing as to be prejudicial to the rights of the city. For the purpose of informing the jury as to the respective rights and duties of the operator of a street car and the operator of an automobile at a street crossing under an ordinance of the city, the court gave its fourteenth instruction as follows:

"I instruct you as a matter of law that it is the duty of the driver of a vehicle to be constantly on the lookout to avoid being hit by street cars; that is, it is the duty of the driver to keep out of the way of the street car; and, if you find from the evidence in this case that the plaintiff was not paying heed or was not giving the right of way, or that he was violating any of the provisions of the ordinance to which I called your attention, then he would be guilty of ngeligence."

This was followed by the court's fifteenth instruction, reading as follows:

"But the failure to look and listen at a street crossing before crossing the street does not constitute negligence as a matter of law."

[3, 4] At first thought is seems a little difficult to harmonize these two instructions; but we think they are not so inconsistent as to have misled or confused the jury to the prejudice of the city. Indeed, it is a little difficult to see other than that the fourteenth instruction was somewhat more favorable to the city than it was entitled to, since to give all of its language full force and effect would seem to leave no degree of care imposed upon the operator of a street car. The fifteenth instruction, we think, is the settled law in the light of our repeated holdings. We must remember that this was a collision between a street car and an automobile, and not between an ordinary railroad train and an automobile. More than that, it occurred within a street intersection, where, manifestly, the degree of care to be exercised by the respective operators of the street car and the automobile was substantially equally reciprocal, though the street car may have had the right of way. We think the law of the situation here in question is well stated by Judge Fullerton in the late case of Johnson v. Seattle, 113 Wash. 487, 194 Pac. 417, as follows:

"Contrary to the rule applicable to ordinary railroads, we have held that it is not negligence in itself to fail to stop, look and listen before crossing a street car track. This, of course, does not mean that a person so crossing may act blindly, without giving any heed to his own safety; it means simply that the rule is not one of uniform application to such a situation; that a person is not to be charged with negligence from the fact alone that he did not stop, look and listen. If the conditions are such that it would be the duty of an ordinarily prudent person to stop, look and listen before crossing the track, then the person crossing must do so, else be charged with negligence for not so doing. Stated in another way, the omission of the duty is but a fact to be weighed with all other facts and circumstances surrounding the case in determining the question of negligence or contributory negligence."

We think the giving of these two instructions was not error prejudicial to the city's rights in the trial of the case.

[5] Some contention is made that the trial court erred in refusing to give certain instructions requested by counsel for the city to be given. We think it sufficient to say that the instructions so requested to be given were covered in substance by others given by the court, which were fully as favorable to the city's contentions as the ones refused to be given, and that therefore no prejudicial error was committed in the refusal complained of.

[6] The city pleaded as an affirmative defense, in substance, that Plastino, when he was injured, was then acting in the course of his employment as a lineman of the Pacific Telephone & Telegraph Company, that he had, previous to the commencement of this action, filed a claim

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with the Industrial Insurance Commission, claiming compensation against the Industrial Insurance Fund for such injury. This was admitted in Plastino's answer, in so far as his being so employed and the mere filing of his claim with the Industrial Insurance Commission are concerned. There is nothing else in the record touching this question, other than his testimony showing that he was at the time on his way to disconnect a a telephone, and, of course, the fact that he was injured by the city, a third party, while away from the plant of his employer. It is contended and briefly argued, in behalf of the city, that this action on the part of Plastino was an election by him to take under the Industrial Insurance Act (Laws 1911, p. 345) such as to preclude him from recovering in this common-law action. The trouble with our dealing with this question is that the record before us is not such as to enable us to determine whether or not Plastino had any right of election such as it is claimed he made by the filing of his claim with the Industrial Insurance Commission. There is nothing in the record to show that he ever followed up his claim against the insurance fund, or that his claim was ever considered or allowed by the Industrial Insurance Commission; nor is there anything in the record lending support to the city's contention, upon this affirmative defense, that Plastino's employer was under the Industrial Insurance Law of this state as to compensation to its injured employees.

[7] It may be said that Plastino's employer was engaged in both intrastate and interstate commerce to such an extent that it was not possible to render "clearly separable and distinguishable" its pay roll of workmen engaged in each of such classes of work. This would exempt his employer from the operation of our Industrial Insurance Law, and make his only available remedy a common-law action against the city, such as we have here. Laws 1919, p. 136, § 3; State v. Postal Telegraph-Cable Co., 101 Wash. 630, 172 Pac. 902. This record does not enable us to decide that there was any remedy available to Plastino, other than by this action; hence he made no binding election when he filed his claim with the commission.

[8] It is contended in behalf of the city that Mr. Tucker, of counsel for Plastino, while making his argument before the jury, was guilty of misconduct in the use of certain language to the prejudice of the city. All that we have in the record touching this contention is the following;

"Mr. Tucker: * * * Counsel knows that any judgment that is rendered will not be paid out of the city treasury, but will be paid out of the Stone & Webster bonds.

"Mr. Griffith: If the court please, I think counsel is just a little out of propriety when he talks about that. That is improper conduct and improper argument.

"The Court: What was his remark?

"Mr. Griffith: His remarks were something about the bonds of Stone & Webster. It is rather stretching the argument a little.

"The Court: Well, I guess Stone & Webster are not interested in this matter now, Mr. Tucker.

"Mr. Tucker: Well, the only thing I wanted to say—I don't think I was in error about it, but anyway whatever judgment we get is payable out of the public utilities. Counsel will not contend that if we get a judgment it is payable out of the general fund."

It must be conceded that some impropriety on the part of Mr. Tucker is suggested by this quoted portion of the record. We are convinced, however, that his conduct was not of such a prejudicial nature against the city as to call for a new trial of this case. In the first place, the record does not disclose to us what was or could have been meant by Mr. Tucker by the use of the term "Stone & Webster bonds," except possibly that any judgment which might be recovered by Plastino would not be payable out of the general funds of the city—that is, by the taxpayers of the city—but would be payable out of some special fund, ap-

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parently the proceeds of the operation of the city's street car system as an independent business. As to whether this was or was not prejudicial to the city was apparent to the trial court more clearly than it is made to us by this cold record. We note that counsel for the city did not ask any instruction from the court to the jury to disregard the observations of Mr. Tucker. Nevertheless, the court's remark, "Well, I guess Stone & Webster are not interested in this matter," seems to us to have been sufficient under the circumstances. We conclude that the trial court did not abuse its discretion in holding that this was not cause for a new trial.

Two other contentions are made and very briefly argued: (1) That the wife of Plastino, present at the trial, was guilty of such misconduct as to prejudice the rights of the city in the trial; and (2) that the verdict was excessive, as being prompted by passion and prejudice on the part of the jury. We think it sufficient to say that we have carefully examined both of these contentions, and are quite satisfied that there was no abuse of discretion on the part of the trial court in refusing to grant a new trial for either of such reasons.

The judgment is affirmed.

Fullerton, Main, Holcomb, and Mitchell, JJ., concur.

MACKINTOSH, J. (dissenting). The opinion of the majority says:

"Just as Plastino was starting his machine to cross the pavement and street car tracks behind the north-bound street car, he looked north, to see if there were any cars approaching from that direction upon the west track, and did not see any, according to his testimony. It is, it must be conceded, somewhat difficult to arrive at the conclusion that he did not see any car approaching from that direction, since his view was unobstructed for a long distance to the north beyond the north-bound street car, and the fast-moving south-bound street car was then approaching from the north upon the west track about a block away."

The only objection I have to this statement is that, under the evidence, it is not "somewhat difficult to arrive at the conclusion that he did not see any car approaching from that direction," but that it is impossible to reach such a conclusion. He had stopped before attempting to cross a street 100 feet in width, upon which he had an unobstructed view for several hundred feet, and the testimony is that there was no other traffic on the street except the street car north-bound, and yet he says that, although he looked, he did not see the south-bound car. I cannot understand how his conduct can be other than negligent, as a matter of law. The only conclusion I can arrive at from this testimony is that he did not look, and under such circumstances as here surrounded him he must look. I therefore dissent from this opinion, and believe that judgment should have been entered for the appellant.

Bridges and Hovey, JJ. We concur in the foregoing dissenting opinion.

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418(6)—The Supreme Court cannot review facts as found by the common pleas when there is any evidence to support the lower court's findings Kauffeld v. G. F. Pfund & Sons (N. J.) 739
418(6)—Finding of fact conclusive under act before amendment. Old Ben Coal Corp. v. Industrial Commission (Ill.) 531
418(6)—District court's finding in cases held conclusive. Troxell v. Morris & Co. (Neb.) 611
418(6)—Credibility and weight of testimony in case not reviewable as matter of law. Fernald's Case (Mass.) 587

(7). Determination and disposition.

§ 419. PROCEEDINGS TO INCREASE, DIMINISH, OR TERMINATE COMPENSATION.

419—Drafts held not "moneys paid" precluding retroactive modification of award. Crisco v. Edgewater Sawmills Co. (N. Y.) 231
419—Commission is without power to reopen proceedings and make award after claimant's death. Terry v. General Electric Co. (N. Y.) 224
419—Petition for review of commissioner's order approvng agreement held barred by time limit. Lemelin's Case (Me.) 182
419—Commissioner's findings in conflict with findings on prior hearing are held erroneous.—May reopen award and hear case de novo on proof of fraud. Grabowski v. Miskell (Conn.) 277
419—Award of weekly payments authorized on reconsideration of claim. Dolen v. Muncie Sand Co. (Kan.) 169
419—Agreement, approved by board, reviewable—award commuted to lump sum reviewable. Norbut v. I. Stephenson Co. (Mich.) 416
419—Award subject to modification or termination. Sun Coal Co. v. State Indust. Comm. (Okla.) 443
419—Act authorizing review of agreement or award within 18 months on ground that disability has increased, held not to entitle employee, who had signed settlement for injury to eye, which became blind, to maintain an original application for compensation filed after the expiration of the time allowed. Jackson v. Indus. Comm. et al. (Ill.) 662
419—A total disability agreement contemplates a total payment of compensation to the claimant for the period of 500 weeks, and when board relieves the employer of such payment, although it uses the word "terminate," it merely suspends that payment or obligation awaiting further development of injuries. Gairt v. Curry Coal Mining Co. et al. (Pa.) 774
419—An employee awarded compensation by Commission cannot bring original action in the superior court to require the Commission to reclassify his injury, since the jurisdiction of the superior court is appellate only and not original—the employee's remedy is to appeal to the court from the decision of the Commission—superior court's dismissal "with prejudice" of employee's original action did not preclude employee from prosecuting a claim for reclassification before the Commission and appeal from the Commission's decision to the superior court. Maddox v. Indus. Ins. Comm. (Wash.) 809
419—Upon its own motion or upon application of any party in interest, on the ground of a change in conditions, the Commission may at any time review any award and, on such review, may make an award ending, diminishing or increasing the compensation previously awarded, subject to the maximum or minimum provided in the act, and shall state its conclusions and shall immediately send to the parties a copy of the award. No such review shall effect such award as regards any money already paid. Markham et al. v. State Indus. Comm. et al. (Okla.) 754
419—Original injury shown to be cause of recurrence of claimant's disability. Gaglione's Case (Mass.) 590
419—Evidence held to show increased disability after first award of compensation. Benton Coal Co. v. Indust. Comm. (Ill.) 520
419—Termination of disability must appear on motion to discontinue compensation—refusal to discontinue compensation sustained. Whitehead Coal Mng. Co. v. State Indust. Comm. (Okla.) 641

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§ 420. COSTS, FEES, AND EXPENSES.

420—Attorney's fee allowed claimant held reasonable. Ulaski v. Morris & Co. (Neb.) 61

420—Attorney's fees limited by Act—attorney's fees payable in solido not allowable on compensation payable in installments—allowance of attorney's fee to guardian ad litem for minor claimant authorized. Woodward Iron Co. v. Bradford (Ala.) 496

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